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## SECTION VI.

## THE JUDICIAL AND LEGAL SYSTEM

## INDUCED REVOLUTION

The transitional phase of Japan at present has been fittingly characterized as "induced revolution." Under the Potsdam Declaration, the Japanese Government was 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."

It is obvious that such an authoritative mandate would necessitate reforms extending over a wide field. After enforcing military disarmament, the Occupation of Japan was concerned mainly with what might be called psychological disarmament to an extent unheard of in the history of occupations. Tremendous efforts were required to establish democratic institutions and promote civil liberties.

The Occupation was conscious of the truth that the customs and traditions of a society cannot be changed by compulsion and that it takes a long time before new ideas can be assimilated in the minds and hearts of a people. Apart from continuous education and enlightenment, all that could be done from the outset was to lay the legal foundations for the sweeping changes necessitated by the broad objectives of the Potsdam Declaration. The application and interpretation of the law is as essential as its making. Since a democratic pattern of government was to be achieved, with sovereignty vested in the people, the necessary complement to the creation of a truly representative legislature was the establishment of an independent judiciary.

Obviously the Occupation could not tolerate the continuation of a system of laws contrary to its objectives but was committed to bring about

thoroughgoing reforms.*/ With the enactment of the new Constitution of Japan and the materialization of its comprehensive Bill of Rights, it became mandatory to reform the basic codes and laws in order to eliminate from them provisions contrary to the new constitutional principles and to implement the Constitution by additional provisions whenever necessary and expedient.

All reform work under the Occupation has been carried out through the medium of the Japanese Government and its agencies. While in other fields, such as the Purge, legislation had to be frequently directed, with few exceptions the Japanese Government acted on its own volition in carrying out the necessary revisions of the basic codes. This activity was supervised and guided by Government Section as the staff section of the Supreme Commander's General Headquarters responsible for the organization and functional operation of Japanese governmental institutions. Within Government Section the Courts and Law Division was in charge of the judicial aspect of government and the reform of the legal system. The nature of the relationship of the members of this Division with the Japanese drafters of legislation was advisory rather than obligatory. In their almost daily contacts with the representatives of the Occupation, the Japanese on the whole demonstrated themselves as gratifyingly cooperative and open to progressive ideas. That may be explained by the fact that for the last two decades before the war a strong reform movement had existed which advocated the modernization of backward elements of the law. Thus, a development which might have eventually taken place was hastened by the Occupation. Except where

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*/ In broad outline such reforms were required by the U. S. Initial Post Surrender Policy for Japan which stated in part: "...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."

insistence on the abrogation of laws or the enactment of new provisions was strictly required by the principles of the Potsdam Declaration or the Constitution, the Japanese were given a free hand in shaping their new legal system. Consequently no attempt was made by the Occupation to impose the introduction of legal concepts and institutions patterned on Anglo-Saxon law upon basically different Japanese law.

At the beginning, the Occupation was faced with a legal system, the modern product of the Meiji Constitution, rooted in several basic codes - Civil, Commercial and Criminal, and procedural While heavily drawn from Continental principles, it was conspicuous in the exclusion of any foreign influence which might undermine deep-seated customs and traditions, particularly the all-powerful family system.

While essential Continental features of the Japanese legal system remained untouched, a mild tendency away from German-French and toward Anglo-Saxon ideas has undeniably developed, particularly with regard to the protection of the individual from arbitrary action of officials in the exercise of judicial and law enforcement process. The legal experts who prepared the legislation endeavored to arrive at a synthesis of both systems. It was fortunate that the legal advisors on the Allied side had experience in both Continental and Japanese legal systems as well as American law and practice. Hence they were in a position to weigh whether and to what extent new legal devices were adaptable to the Japanese system. Only if true integration into that system appeared reasonably probable were such new devices suggested and actually adopted. Provided they could be convinced of the value of an institution hitherto unknown to them, the Japanese proved eager to learn from the experience of others. That the two

legal systems do not in reality constitute irreconcilable contrasts is more and more recognized as time goes on. The idea of making possible a unified whole out of separate conceptions has been fittingly emphasized by the Editorial Committee of the Association of American Law Schools:

> "As the nations are drawn closer together by forces not wholly in human control, it is inevitable that they should come to know each other more fully. The legal institutions of any country are no less significant that its language, political ideas, and social organization. The two great legal systems of the world, the civil and common law, have for some years been moving toward what may become, in various fields of law, a common ground." (See The Jurisprudence of Interests, Vol. II of the 20th Century Legal Philosophy Series, Translated and Edited by M. Magdalene Schoch, Cambridge, Massachusetts, 1948, Introduction, p. ix.)

The problem then, was to rationalize these legal concepts and institutions to conform to the new Constitution of Japan. The obvious shortcomings of the Japanese legal system called for radical changes and revisions in its organizational structure and in its substantive and procedural laws. In addition, much of the new Diet legislation required constant scrutiny for Occupational as well as constitutional considerations. Not without importance, was concern for the status and social position of the judges, procurators and legal profession in general - an indispensable part of any legal system.

How that problem was unfolded, how the transition from pre-occupation legal and judicial institutions into the administration of justice during the Occupation developed - was the interesting and engaging task of the Courts and Law Division of Government Section.

## I. PRE-SURRENDER JUDICIAL AND LEGAL SYSTEM

The axiom that the institutions and attitudes of a nation can be understood only on the basis of its history applies above all to the legal system of a country. Without at least a brief outline of the historical developments which the law and the administration of justice underwent in Japan of the past, this report would be incomplete.

1. Historical Sketch.*/ Scholars divide the course of Japanese law into three periods: the first extending from pre-historic times to the early seventh century A. D.; the second until the Meiji Restoration in 1868; and the third being the modern era. History will reveal whether a fourth period will eventually be recognized as dating from the Allied Occupation.

Japanese law before the seventh century was unwritten and primitive. It appears to have dealt chiefly with the rituals of ancestor worship and to have concerned clans and families rather than individuals. This emphasis on the collective unit may be traced to the early immigration of invaders from Manchuria and from the Malayan regions. From the fourth century on, Chinese culture with Confucian morality and Buddhist religion began to penetrate the country, thus preparing the way to a Chinese pattern of governmental administration.

The first strictly legal code, which initiated the second period, was a group of short enactments of 645-6 under the Emperor Kotokuku, called the Taikwa reform. Among later enactments, the most notable code was the Taiko Code of 701. This legislation projected into a country, far too backward to appreciate and effectively apply such institutions, a centralized government, a civil service based on merit rather than birth, conscription, national ownership of land, and taxation. The old Chinese custom of providing

*/ This Chapter is based on John H. Wigmore: A Panorama of the World's Legal Systems, Chapter VIII, and on a study by Thomas L. Blakemore: Postwar Developments of Japanese Law, Wisconsin Law Review, July 1947.

a bell and a box outside the ruler's palace for petitioners was adopted, so that the common people might seek justice from the ruler and incidentally keep the ruler in touch with public opinion.

Yet powerful families dominated the new government as effectively as the old. From the seventh until the twelfth century the ruler (Tenno or Son of Heaven) was merely the symbol of ancestral worship and patriotism and the civil officers of the court exercised the royal power. But their rule was displaced by that of powerful feudal lords (daimyo) who had gradually acquired a semi-independence. By the twelfth century, although the national sovereignty remained nominally with the Emperor at Kyoto, the complete political power was vested in a regency (Shogunate) in Kamakura based on military feudal tenure. Political equilibrium was upset when the powerful daimyo could no longer be controlled by the central government and the weak regents lost their power over the emperors. Intermittent civil wars lasted until 1600, when a single clan, the Tokugawa, rose to power and reigned for the next two and a half centuries until 1868. During this period feudal conditions continued, but were modified to accommodate a quasi-centralized government. Japan was closed to foreign intercourse and the nation enjoyed internal peace in its seclusion. Seperate laws and traditions governed the activities of nobles of the Imperial Court, warriors, commoners, and outcasts. The ownership of land was restricted to the warrior classes, but merchants gradually overcame this handicap and gained a substantial economic position. Customary law varied greatly by locality. After 1600, law assumed both a local and national character.

A rudimentary national judicial system was developed which provided for both civil and criminal actions and appeals. The daimyo were allowed to

retain local jurisdiction in legal matters in their own provinces. They had their own courts yet they were virtually under central control. The Tokugawa Supreme Court in the new capital of Yedo (Tokyo) was given national original jurisdiction for suits between parties from different provinces and otherwise served as an appellate court. A certain jurisdiction was reserved for confirming death sentences imposed by the daimyo's court on a vassal for political offenses. In all matters the daimyo's judges often consulted the Tokugawa Court with a view to uniformity of law. The legal-minded Tokugawa dynasty built up the nation's legal system. Yet law, for the most part, consisted in internal instructions and regulations given to officials and rarely or only partially publicized. The laws of land tenure and family succession were founded on custom and each village had its own written code of rules for local affairs. No distinct profession of legal advocates appeared, for each party was supposed to conduct his own case. To accept a fee was unlawful. The trial method was identical with that already developed in China and continental Europe, the inquisitorial method, which gives all responsibility to the trial magistrate.

Another fundamental feature of the system was the principle of conciliation, also prominent in Chinese justice and a result of the Confucian philosophy. The tendency to settle disputes by compromise has been deep-rooted in the Japanese people up to the present time. It is one explanation for the surprisingly small number of judges in Japan and for the small figures in civil litigation statistics. Even in political matters the Japanese prefer compromise to voting. Every town and village was divided into <u>kumi</u> or associations of five neighbors who were mutually responsible for each other's conduct. In case of a disagreement between members of

an association, the five heads of families met and endeavored to settle the matter. If a settlement failed, the case was submitted to the next higher authority, the chief of associations. An appeal to the higher authorities was the practice in the larger towns and cities only, where the family unity was somewhat weakened.

In the village there was a great dislike toward seeking outside settlement and few private disagreements went beyond the family or association. If the association chief could not settle the matter, it was laid before the higher village officers, the elders and the headman. They formed a board of arbitration for the settlement of disputes. If the headman was unable to settle a case it was placed before the local magistrate who usually sent it back with the injunction to settle it by arbitration. When the case formally came before the magistrate for decision, it became a lawsuit and might pass to the higher courts at Yedo. The case was not treated in the strictly legalistic style of the West, but the judge aimed at general equity on the basis of customary law.

Finally, the third period began with the Meiji Restoration in 1868. The background and historical facts regarding the elimination of the Shogunate and the transfer of governmental control to the Emperor are generally known. The restoration was followed by the establishment of a strong central government, the abolition of the feudal regime, and the abandonment of the policy of isolation. In order to unify the domestic law and adjust it to the needs of an incipient capitalism, as well as to reassure the Western powers who were reluctant to relinquish extraterritorial rights so long as unfamiliar patterns of law continued to exist, a comprehensive system of codes was enacted. In its initial contacts with the West, the

Japanese legal world appears to have taken an equal interest in the common law and civil law, but it was finally decided to adopt the Continental law, and particularly the German pattern. There were many reasons for this choice. Prince Ito, the outstanding statesman of the Meiji period, had studied German institutions in Germany and consulted with Bismarck, and was greatly impressed with the achievements of the newly established German Empire. The Meiji Constitution shows clearly the Prussian and Bavarian mark. Furthermore, a codified system appeared preferable because of its simplicity, and this preference was greatly supported by the presence of several outstanding French and German jurists in Japan. Thus, judicial institutions, as well as laws, were patterned on those of continental Europe.

It would be erroneous to attribute this development to an innate Japanese trait of imitating other nations. The adoption of foreign legal systems is a frequent phenomenon in the history of law. The best known example is the reception of Roman law in Northern Europe during the Middle Ages. The analogy goes beyondthat. Just as the Roman Law was merged with the unwritten customary Germanic law, so were certain deep-rooted customs and traditions retained in the Japanese adaptation of the Continental system. The Civil Code, which was enacted after almost thiry years of study and debate in 1898, is a good illustration. Its first three books, dealing with natural and juristic persons, real property, obligations and other general matters, lean heavily on the German Civil Code. But the last two books, dealing with domestic relations, or family law, and the inheritance law, are a codification of old Japanese tribal customs.

The Commercial Code, in a sense, is an exception to the Civil Code since it removes from the effect of the Civil Code all commercial trans-

actions, as well as other acts performed by traders or merchants. While German codes supplied the greater portion of the articles, many provisions were taken from French law, a few from the common law, and certain indigenous Japanese commercial practices were re-enacted in statutory form.

The Japanese Criminal Code, dating from 1882 is also of Continental European origin. The distinctive feature was the lese majesty provisions under which persons endangering the lives of members of the Imperial family were punished by death, while acts disrespectful to them could be punished by penal servitude up to five years.

Finally, elaborate codes concerning Court Organization, Civil and Criminal Procedures were enacted.

2. Relation to Continental Law. The legal system, as it developed in Japan subsequent to the Meiji codifications should not be identified with its European models. The textbooks of the codes are to a large extent similar, but their actual application and interpretation is not. In this respect the survival of old attitudes and concepts in the administration of justice in Japan has frequently led to unforeseen results in the application of the imported law, because the nation did not go through political and social developments similar to those of the western countries. Japan, in spite of its industrialization, did not experience the strong liberalism of Imperial Germany, not to speak of the democratizing forces of the Weimar Republic and of French parliamentarianism.*/

The Japanese judges did not enjoy the independence of their French counterparts but were career government bureaucrats. Moreover, while in France judges were elected from among the members of the respected legal profession who were fully conversant with economic and social as well as

*/ This liberalism found its expression in the emphasis on the idea of Rechtsstaat (government by law) which led to the establishment of administrative courts in most states.

legal problems, the Japanese judges, by virtue of their education and sociological background, were primarily legal technicians. They were trained for the higher civic service in law schools where they learned only a formal and positive conception of the law. In the past, legal education in Japan has been monopolized by the Imperial Universities, Tokyo Imperial being the foremost, and a few private schools. Most law graduates never practice law but entered the bureaucracy, of which the judicial branch was the least popular. Conspicuous in the curriculum of the law student was the emphasis on legal-analytical studies, with very little practical training, and the stepmotherly treatment of political, sociological and economic aspects. In this respect, similar to his German counterpart, the Japanese judge considered himself a servant of the state rather than a guardian of justice in a higher ethical sense. The ensuing attitude fostered a narrow application of the letter of the law enacted in the proper form by the state authority. No effort was ever made to question the legality of a provision because of its substance. This purely legalistic approach still exists.

While in France a splendid system of administrative courts developed, climaxing in the Conseil d'Etat, the Japanese people did not have the right to challenge the legality of the acts of their officials, to whom they were deliberately kept in subservience. To be sure, there existed one Court of Administrative Litigation.[1] The jurisdiction of this court, however, was strictly limited to such matters as taxation, business licenses and public works. The Court was never popular, its judges who were selected because of their administrative background being blamed for their tendency simply to uphold the administrative action. In addition, the procedure was

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1. Law No. 48 of 1890.

extremely slow due in part to the fact that no system of inferior administrative courts had been established. In contrast to the Third French Republic, the executive always overshadowed the other branches of the government in Japan.

This was also true of the legislative branch. Authoritarian cabinets had little difficulty in causing Diets to enact whatever statutes were demanded. The Diet lacked independence, courage, and initiative. Since most legislation originated in the Cabinet and member bills were a rare exception, the Diet served in many instances as a mere rubber stamp. During the ten years preceding the Occupation, especially vicious legislation accompanied mobilization and the war. "National Peace Preservation Law," "Thought Offenses," "Special Police Activities," and "Protective Detentions" were products of that period.

The National Peace Preservation Law provided penalties up to death for those acting as organizers, officers, members, or supporters of organizations having as their object "changing the national polity." Generally, no appeal was allowed from a judgment of the first instance which found any person guilty. The Supreme Court could, however, nullify the original decision and transfer the case to an appellate court.

Protection and Surveillance Commissions, under the direct supervision of the Minister of Justice, administered the provisions of the Protection and Surveillance Law against persons who had been convicted under the Peace Preservation Law but who had either been granted reprieve or pardon from execution, or who had served their term. The avowed purpose of the law was to guide the thoughts of persons in this category in order to change their attitude and "protect" them from committing further crimes. It gave the

state authorities virtual power to keep under protection and surveillance anybody who, as an opponent of governmental policy, had been punished under the flexible provisions of the Peace Preservation Law which allowed almost any interpretation at the pleasure of the Procurator. The maximum protection and surveillance period was two years although the period could be prolonged by decision of the commission. The individual concerned could be placed under the personal surveillance of the protecting official or of some duly authorized guardian, or entrusted to a protective organization, temple, church, hospital or any other appropriate organization.

3. Status of Civil Rights. The worst abuses of civil liberties were not based on statutory authority, but arose through the use of loopholes deliberately left in laws and through the development of legal fictions. The provisions of the codes of Criminal Procedure proved adequate in the countries of their origin to protect the individual from limitless powers of the police and prosecution with regard to arrest, detention, search and seizure. Under the Japanese practice, however, through the use of a minor administrative law not challengeable before any court, the individual was powerless and at the mercy of the police. In spite of provisions in the Criminal Code which forbade abuse of authority and torture, the Japanese police extorted confessions by constant use of third degree methods and long detentions.

In other countries the cause of civil liberties has been championed by lawyers who, by virtue of their vocation were called upon to defend the right of the individual against arbitrary exercise of the authority of the state. The political role which the lawyers played in the French Republic and their powerful influence on legislation are well known. In Japan the

lawyers, supervised and disciplined by the Ministerial bureaucracy of the executive branch of government, did not, and could not, fulfill a similar mission as defenders of civil liberties. Their social status as non-officials was below that of the judges and public procurators, a factor which weighed heavily in a country where class distinctions were so meticulously observed. The legal profession was more or less regarded as just another business. It was not efficiently organized and the bar associations then existing lacked prestige and influence.

## II. LEGISLATIVE CHANGES AFFECTING LEGAL AND JUDICIAL INSTITUTIONS

1. Form of Enactment. It has been pointed out that all legislation under the Allied Occupation was enacted through the Japanese Government. On the basis of the Constitution, the normal medium is the Diet as the Legislative branch of the Government. The policy was to give the Diet a free hand to perform its legislative function, subject only to a veto by SCAP in case an intended bill or provisions thereof were prejudicial to the objectives of the Occupation. The occupying authority, of course, has the power to legislate by prerogative act. Where the mode of occupation is direct military government, as in Germany or Korea, that authority sets the standard of law and proclaims it to the people directly. The Allied Occupation in Japan, however, did not abolish the Government and its agencies as organizations, and did not adopt direct military government but utilized the existing machinery of government. However, so far as the officially-stated will and command of the occupying authority goes, the free determination by the Government of the occupied country is, as a matter of course, completely excluded. Moreover, the directives of the Supreme Commander (SCAPINS) had to be implemented and transformed by the Government into domestic law. While doubtless all organs of the occupied state are subject to the power of the occupying authority, it appeared inadvisable to charge the Diet with the task of automatic implementation of SCAP directives. Nevertheless, such implementation had to be carried out instantaneously regardless of whether the Diet was in session or not. Consequently, SCAP directives were transformed into Japanese law not by statutes enacted by the Diet but by Ordinances. The legal basis for this device is Imperial Ordinance No. 542 of September 20, 1946 which reads in part:

> "In accordance with the acceptance of the Potsdam Declaration, in order to carry out items based on

the demands made by SCAP, the Government may, when especially necessary, take the necessary steps through ordinances, and may establish necessary penal regulations."

Consequently, SCAP directives were implemented by Imperial Ordinances and, after the new Constitution abolished this form of legislation, by Cabinet Orders.1/ Otherwise the Supreme Commander was deeply convinced that if the construction of a new system was to last, it had to be built by the people through their elected representatives in the Diet.

However, since frequently no penal provisions for violations were contained in the implementing Ordinances, Imperial Ordinance No. 311 was subsequently issued under the Potsdam Declaration. This Ordinance described acts prejudicial to the Occupation Objectives as; violation of directives to the Japanese Government by the Supreme Commander of the Allied Powers; orders issued by Occupation Force Commanders of Army, Corps or Divisions to implement SCAP directives; and all ordinances or laws promulgated by the Japanese Government in implementation of these directives. It contained a general clause stipulating, as penalties for violation of such directives, imprisonment not exceeding ten years with hard labor, or a fine not exceeding 75,000 yen, or detention or minor fine.

2. Abrogation of Existing Law by SCAP Directives. At the beginning of the occupation SCAP was primarily concerned with the main problem of disarmament rather than with Japan's judicial organization and law. In such

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1. See Law 72 of 1947, C.O. No. 311 of 18 April 1947

1/ Appendix H; 17, Law Concerning the Validity of the Provisions of the Orders in Force at the Time of Coming into Force of the Constitution of Japan, etc., Law No. 72, April 18, 1947.

stages, where prerogative action is superior, legal problems retreat to the background. But certain existing laws and legal practices were so oppressive and tyrannical that the need for their abrogation was urgent and could not be delayed.

In conformance with the provision of the Potsdam Declaration, which states that "Freedom of speech, of religion, and of thought, as well as respect for the fundamental human rights shall be established," and with other basic objectives of the Occupation, the most conspicuous enactments which abridged the civil rights of the people were abrogated by SCAP directives early in the Occupation.

a. SCAPIN 93, entitled "Removal of Restrictions on Political, Civil and Religious Liberties," issued on October 4,1945, may be characterized as the basic directive restoring civil rights to the people. It directed the Japanese Government to abrogate and immediately suspend all laws, decrees, orders, ordinances and regulations restricting political, civil and religious liberties; to allow unrestricted discussion of the Emperor, the Imperial institution, and the Imperial Japanese Government; to remove restrictions on the collection and dissemination of information; and to abolish all legal discriminations against any person on account of race, nationality, creed or political opinion. Specific legislation such as the following was listed:

(1) The Peace Preservation Law (Law 54 of 1941)

(2) The Protection and Surveillance Law for Thought Offense (Law 29 of 1936)

(3) Regulations Relative to Application of Protection and Surveillance Law for Thought Offense (Imperial Ordinance 401 of 1936)

(4) Ordinance Establishing Protection and Surveillance Stations (Imperial Ordinance 403 of 1936)

(5) The Precautionary Detention Procedure Order (Ministry of Justice Order 49 of 1941)

(6) Regulations for Treatment of Persons under Precautionary Detention (Ministry of Justice Order 50 of 1941)

(7) The National Defense and Peace Preservation Law (Law 49 of 1941)

(8) National Defense and Peace Preservation Law Enforcement Order (Imperial Ordinance 542 of 1941)

(9) Regulations for Appointment of Lawyers under Peace Preservation Laws (Ministry of Justice Order 47 of 1941)

(10) Law for Safeguarding Secrets of Military Material Resources (Law 25 of 1939)

(11) Ordinance for the Enforcement of the Law for Safeguarding Secrets of Military Material Resources (Imperial Ordinance 413 of 1939)

(12) Regulations for the Enforcement of the Law of Safeguarding Secrets of Military Material Resources (Ministries of War and Navy Ordinance 3 of 1939)

(13) Law for the Protection of Military Secrets (Law 72 of 1937, revised by Law 58 of 1941)

(14) Regulations for the Enforcement of the Law for the Protection of Military Secrets (Ministry of War Ordinance 59 of 1939, revised by Ministry of War Ordinances 6, 20 and 58 of 1941)

(15) The Religious Body Law (Law 77 of 1939)

(16) All laws, decrees, orders, ordinances and regulations amending, supplementing or implementing the foregoing enactments.

Persons detained or imprisoned under provisions of such legislation were ordered to be released immediately.*/ Organizations and agencies, such as the secret police, which had been given authority to supervise publications, public meetings and to exercise surveillance

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*/ Actually several thousand political prisoners were released from jail.

and control of thought, speech, religion or assembly were ordered abolished. Certain personnel of such organizations were ordered to be removed from office and any further activity based on enactments which restricted political, civil and religious liberties was prohibited.

b. As a result of SCAPIN 93, the Japanese Government issued the following Imperial and Ministerial Ordinances specifically abrogating the above named enactments:

Imperial Ordinance No. 568, October 12, 1945 - abolished the National Defense and Peace Preservation Law; Law for Safeguarding Secrets of Military Material Resources; Law for the Protection of Military Secrets; Temporary Law Controlling Seditious Documents; Temporary Law Controlling Speech, Publication, Assembly and Associations; National Defense and Peace Preservation Law Enforcement Order; Ordinance for the Enforcement of the Law for Safeguarding Secrets of Military Material Resources.

Imperial Ordinance No. 575, October 15, 1945 - Abolished the law concerning the Preservation of Public Peace; Law Concerning Protection and Surveillance for Thought Offense; Ordinance concerning the Enforcement of the Law for Protection and Surveillance for Thought Offense; Ordinances Concerning Maintenance of Public Peace in Kwantung and Korea.

Justice Ministry Ordinance 52 of October 15, 1945 - abolished those regulations pertaining to (1) the disposition of temporarily discharged "thought offenders;" (2) expenditures for Protection and Surveillance; (3) appointment of lawyers;

(4) procedure for protective detention; (5) treatment under protective detention; (6) expenditures for protective detention.

Imperial Ordinance No. 638, November 20, 1945 - abolished the Police Law for the Preservation of Public Peace and the Peace Preservation Law.

Previous to the all-inclusive SCAPIN 93, SCAP had decreed that there was to be an absolute minimum of restrictions upon freedom of speech. However, the Japanese Government was directed to prevent dissemination of news which failed to adhere to the truth or which disturbed public tranquility. (SCAPIN 16, September 10, 1945).

The press was disassociated from the government, and barriers to dissemination of news were ordered to be removed (SCAPIN 51, September 24, 1945) in an effort to encourage liberal tendencies in Japan and to establish free access to the news sources of the world.

Further steps toward freedom of speech and of the press were taken by the issuance of SCAPIN 66 on September 27, 1945, which directed the removal of peace-time and war-time restrictions on freedom of communications and the abrogation of specific laws which had given the government complete control of all channels of expression of public opinion.

In order to separate religion from the state, to prevent misuse of religion for political ends, and to put all religions, creeds and faiths upon the same legal basis, SCAPIN 448, issued on December 15, 1945, directs that governmental sponsorship,

support, perpetuation, control, and dissemination of State Shinto be discontinued. Affiliation with the government and propagation and dissemination of militaristic and ultra-nationalistic ideology was forbidden to Shinto as well as to other religions, faiths, creeds, sects, or philosophies.

The Japanese Government implemented this directive by issuing Imperial Ordinance No. 718 December 27, 1945, which abrogated the Religious Bodies Law; Ordinance relating to the enforcement of the Religious Bodies Law ; Ordinance relating to the Registration of Religious Bodies; Ordinance relating to the Registration of Buildings for Public Worship and their Sites.

In order to eliminate certain preferential employment practices of the Japanese Government, SCAPIN 380, issued on November 28, 1945, directed the Japanese Government to insure that no discrimination be exercised or permitted for or against any worker either in private or government work, with regard to wages, hours or working conditions by reason of nationality, creed or social status. The Japanese Government was further directed to revoke, rescind and abrogate all enactments of any kind which provided preferential employment and educational opportunities for demobilized military personnel solely on the basis of military service.

Pursuant to this directive the Welfare Ministry issued Welfare Ministry Ordinance No. 2, January 10, 1946, which interpreted these principles into Japanese law, and placed upon the local governor or the chief of the labor office the responsibility for insuring that employment practices were conducted in

accordance with the principle of equal treatment.

By the terms of SCAPIN 93 the Japanese Government was also directed to restore the right to vote and the right to hold public office to those persons who were released from detention, imprisonment, or protection and surveillance under SCAPIN 93. All persons affected by this directive were to be notified that their electoral rights had been restored and of the procedure which they were to observe with regard to registration or filing of candidacy for public office. Accordingly, late registration and waiver of established residence requirements were to be provided for.

The Japanese Government Implemented this directive by issuing Imperial Ordinances No. 730 and 731, December 29 1945.

Since the Japanese Government had used education to inculcate militaristic and ultra-nationalistic ideology, it was directed by SCAPIN 519, December 31, 1945, to suspend all courses in morals, Japanese History, and Geography in all educational institutions; to suspend all ordinances, regulations or instructions directing the manner in which the specific subjects should be taught; to collect all textbooks and teachers' manuals used in the instruction of these subjects..

Because licensed prostitution in Japan, the use of involving contracts whereby women were bound by contracts to serve for a stated period under condition amounting to bondage, was deemed to contravene the principle of equality of the sexes and inconsistent with the development of individual freedom, the Japanese Government was directed by SCAPIN 642, January 21, 1946, to abro-

gate and annul all enactments which directly or indirectly authorized or permitted the existence of licensed prostitution in Japan, and to nullify all contracts and agreements which had for their object the binding or committing, directly or indirectly, of any woman to the practice of prostitution.

3. Diet Legislation

a. Preparation and Phases of Enactment. In considering the sweeping reforms of the basic codes and the administration of justice, the time element involved should be clearly understood. Extensive changes in codes pose tremendous and vastly complicated problems, even greater than legislation in common law countries where there is more variety in legal source material. It may be recalled that preparation of the Japanese Civil Code during the Meiji period required a full 10 years of study and discussion even though it drew heavily on the existing European models and experiences. However, extraordinary times of an almost revolutionary character require extraordinary means. The new Constitution would have remained a mere textbook of pious principles if it had not been implemented in the body of basic codes and statutes. Moreover, the Occupation, in order to carry out its clearly defined objectives, had to insist on such implementation. The Japanese Government, however, was faced with a physical problem of meeting a time limit resulting from enactment of Article 98 of the new Constitution which provides that:

> "This Constitution shall be the supreme law of the nation and no law, ordinance, imperial rescript or other act of government, or part thereof, contrary to the provisions hereof, shall have legal force or validity..."

In the summer of 1946 it was realized that the Constitution would be promulgated by November 1946 and therefore come into effect by

May, 1947 six months later. It was obvious that the important and time-consuming revisions of the Civil Court Organization System, Criminal, and procedural law could not possibly be achieved within the six months from the date of promulgation of the Constitution before which no definite legislation could be drafted, and the date of enforcement.

Hasty legislation under such drastic time limitations would have been almost useless. On the other hand, if no implementing legislation at all were enacted, a chaotic legal vacuum and uncertainty would have ensued. Whole chapters of the basic laws would have been inapplicable because they conflicted with the new constitutional principles, and the courts would have found themselves groping for ethereal interpretations. In this dilemma the Japanese Government, with the approval of SCAP, resorted to the expedient of submitting to the Diet provisional bills, or bills for temporary adjustment pursuant to the enforcement of the Constitution. The legislative technique used in these interim revisions was highly irregular and justified only by the inescapable need for immediate enactment of vital revisions, even if only provisional. It was mainly used in the case of the Civil Code and the Codes of Civil and Criminal Procedure. The provisional laws contain only the most elementary revisions in the form of broad principles. Their temporary character was made clear by the provision that they would become automatically invalid at the end of the year 1947. This deadline later had to be extended so far as the procedural codes were concerned. The Diet enacted them in its 92nd Session* but they have been replaced in the meantime by the enactment of the full and definitive revision of these laws.*/

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*/ The last session of the Imperial Diet, December 27, 1946 to March 31, 1947.

The preparatory work on the revision of the codes was started while the Constitution was still in the stage of deliberation by the Diet. The Cabinet established a Provisional Legislative Investigating Committee and a similar group acted under the Ministry of Justice to work out the essential principles on which the revisions should be based, without doing any actual drafting. The Cabinet Committee consisted of members of both houses of the Diet, members of the Supreme Court, representatives of several ministries, outstanding professors of law, lawyers, representatives of local entities, journalists, business men, and women. When the Committee terminated its activity at the end of September 1946, it recommended preliminary and tentative outlines of nineteen bills to the Cabinet. These bills covered, among other matters, the revision of the basic codes.

The 91st session of the Diet, November 26, 1946 to December 26, 1946, adopted four major bills whose provisions implemented the Constitution and dealt with matters concerning the Imperial House, the Cabinet, and the House of Councillors. No law, however, was enacted in the field of judicial administration or basic codes.

The 92nd Diet passed the following eleven laws related to the reform of the judicial and legal system:

(1) Court Organization Law

(2) Law for the Enforcement of the Court Organization Law

(3) Law for the Establishment of Inferior Courts and their Territorial Jurisdiction.

(4) Law Concerning the Total Number of Court Officials.

(5) Law for the Emergency Measures for Compensation of Judges.

(6) Public Procurators Office Law.

(7) Law for Temporary Measures concerning the Compensation of Public Procurators.

(8) Law for the Temporary Adjustment of the Law of Civil Procedure pursuant to the Enforcement of the Constitution of Japan.

(9) Law for the Temporary Adjustment of the Code of Criminal Procedure.

(10) Law for the Temporary Adjustment of the Civil Code pursuant to the enforcement of the Constitution of Japan.

(11) Amnesty Law.

A great many bills covering the judicial system were enacted by the 1st session of the National Diet, which lasted from the 20th of May 1947 to the 9th of December 1947. The following are among the more important ones:

(1) Law Concerning the Final Revision of the Criminal Code.

(2) Law Concerning the Domestic Relations Court.

(3) Judges Impeachment Law.

(4) Law Concerning the Status of Judges and other Court Officials.

(5) Law Concerning the People's Examination of the Supreme Court Judges.

(6) Law Concerning the Reserve Funds of Courts.

Finally, the 2nd Session of the National Diet, which lasted from December 10, 1947 to July 5, 1948, passed the following important laws:

(1) Inquest of Prosecution Law.

(2) Amendment of the Procurators Office Law.

(3) Amendment of the Judges Impeachment Law.

(4) Final Revision of the Code of Civil Procedure.

(5) Final Revision of the Code of Criminal Procedure.

(6) Final Revision of the Civil Code.

(7) Administrative Litigation Law.

(8) Administrative Enforcement by Proxy Law.

(9) Habeas Corpus Law.

(10) Attorney-General's Office Law.

(11) Family Registration Law.

b. Method of Collaboration Between Government Section and Drafters of Legislation. Between members of Courts and Law Division of Government Section and the Ministry of Justice, as well as the Provisional Legislative Investigating Committee of the Cabinet, continuous conferences took place in which all aspects of the eleven bills submitted to the 92nd Session of the Diet were discussed. There was a mutual exchange of ideas which went on throughout the period of preparation and drafting as well as after the final drafts of the Cabinet bills had been finished. In March 1947, an overall Conference for the purpose of improving and completing the bills was set up consisting of representatives of the Government Section, and of representatives of the Japanese official and legal world, including the Ministry of Justice, the Legislative Bureau of the Cabinet, and a great number of legal advisors.

A similar conference was organized in February 1948 to consider the Code of Civil Procedure. The groundwork for such conferences was thoroughly prepared beforehand in the course of preliminary meetings with officials of the Justice Ministry, and agreement on many items of the bills was reached in these preparatory discussions. There remained, however a considerable number of problems that could not be informally settled on the working-level. These the Courts and Law Division formulated in writing and presented for the deliberation of the main conference together with a short discussion of possible solutions and suggestions for amendment or specific provision in the bill.

The Code of Criminal Procedure, consisting of more than four hundred articles required the greatest length of time and the most arduous

labor. Since the administration of criminal justice affects the civil liberties of the people more than anything else, and since the psychology and methods of the police state had been so thoroughly integrated in the Japanese system and official attitude, strenuous efforts on the part of SCAP's legal experts were necessary to bring about a thorough-going change in this all-important law. Informative conversations with the Japanese ministerial officials went on for several months before ideas could be exchanged, conversations in which the language barrier complicated the difficulties of mutual understanding of alien ideas and concepts. While direction would certainly have been an easier method than persuasion, the members of Government Section stuck to the principle that legislation, if it were to last, should not be imposed by fiat. After three different teams, each consisting of one member of the Courts and Law Division and several representatives of the Attorney General's Office (successor to the Ministry of Justice) had terminated the preliminary discussion, sixty odd problems of major importance were left unsolved.

Another overall Committee was then established for the purpose of discussing these problems and of arriving to final determination on how they should be solved. The Committee consisted of four members of Courts and Law Division and again of high representatives of the Attorney General's Office, of the procurators' offices, of judges of the Supreme Court, and legal scholars. In addition, this time representatives of the leading Japanese bar associations and of the newly established Japanese Civil Liberties Union participated in the conference. The atmosphere was, to begin with, cool and even critical. A passive resistance to any suggestions for the amendment of the proposed bill became evident. The public procurators, who were frequently supported by the head of the Japanese

group, the Assistant Attorney-General, a former procurator, were naturally opposed to any curtailment of their powers and those of the police.

However, as the discussion proceeded, the Japanese representatives, and particularly the judges, lawyers and Civil Liberties men were impressed by the democratic way in which the conference was conducted. There was a complete freedom of speech and argument on the basis of absolute equality of the conferees. The proceedings of the group resembled that of a parliamentary law-drafting committee of a democratic system of government. Thus, this experiment developed simultaneously into a practical demonstration of the democratic process in action. While the Occupation had the undeniable power to declare certain revisions mandatory, it never used this authority. As soon as the Japanese realized that the SCAP representatives did not intend to resort to a high-handed or prerogative attitude but were willing to benefit from Japanese legal experience and ideas, they changed their attitude and became amazingly cooperative. No longer on the defensive, the judges and the lawyers welcomed many of the GHQ suggestions as valuable for the modernization and expediting of the criminal processes. With each group free to speak its mind, the lawyers on a number of issues took a position diametrically opposed to that of the procurators. The conference started on the 14th day of April and lasted until the 6th of May, 1948. Meetings were held almost every day and frequently in the morning as well as in the afternoon. The result was that basic agreement was reached on all of the problems submitted.

Many of the revisions developed from SCAP suggestions, but many suggestions for revisions were made by the Japanese representatives. Interestingly enough, in one case the Supreme Court, motivated by a desire to be relieved from part of its burdensome duties, proposed a complete re-

form of the system of appeals in criminal procedure, - a reform which had been independently considered by members of Courts and Law Division but abandoned as too difficult to carry out within the short time available. The suggestion of the Supreme Court was accepted by an overwhelming majority of those present. At the end of the conference, when the various representatives of the Japanese groups expressed their gratitude for the way in which the discussions were conducted, the leading member of the bar association emphasized his satisfaction over the fact that for the first time in Japanese history, lawyers, serving as representatives of the legal profession, had been allowed to participate in the drafting and deliberation of a cabinet bill.

Even in the case of other less important legislation the contacts of Courts and Law Division were not restricted to discussions with the ministerial bureaucrats who had drafted the bill. Advice on the subject matter was also requested from legal scholars and lawyers, either officially or privately.

When the bill did not originate in the Cabinet, but was a member bill, conferences were held between Courts and Law Division and the chairman or other members of the Judicial Committees of the two houses who approached GHQ for advice and guidance. As an illustration of an important member bill, the Habeas Corpus Act may be mentioned, one of the few enactments which drew heavily on Anglo-Saxon principles. In this case the sponsors of the bill, as well as the committee members, on their own initiative requested all information they could obtain on the American relevant legal theory and practice to help them in formulating a corresponding legal procedure suitable for Japan.

## III. THE SUBSTANCE OF REFORMS

### 1. Organizational Reforms

#### a. Judiciary

(1) Court Organization Law.[2/] The Court Organization Law implements Chapter VI of the Constitution which deals with the judicial branch of the government. The basic principles of this law are the independence of the judiciary from the executive, specifically the Ministry of Justice, and the strengthening of the prestige and powers of the Supreme Court.

In the past, the Japanese judges enjoyed life tenure and were theoretically independent in the performance of their judicial functions. They held the status of civil servants and were classified and remunerated in the same manner as administrative officials but they were relatively less important and invited little respect - the step-children of bureaucracy. Instead of exercising judicial independence and responsibility, the judges, especially the ambitious ones, tended to answer to their jurisdictional superior, the Ministry of Justice, both for decision and discipline. Appointments, promotions and "corrective" transfers of judges were determined by the Ministry of Justice, which also decided the budget for the courts. This arrangement did not foster an independent judiciary. Furthermore, 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 of the Ministry of Justice.

The new Constitution has rectified these weaknesses, incorporating the principle of separation of powers in government. The courts are removed from the jurisdiction of the Ministry of Justice and form a separate organization headed

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1 Law No. 59 of 1947, effective May 3, 1947. G.O. No. 311, 4/21/47

2/ Appendix H: 10, Court Organization Law; Law No. 59, April 16, 1947.

by the Supreme Court. Public procurators and judges are no longer under the same master, a factor which in the past prevented an independent judiciary.

Under Article 76 of the new Constitution the whole judicial power is vested in a Supreme Court and such inferior courts as are established by law. The Court Organization Law, adhering to the concept of the exclusiveness of the judicial function, provides that courts shall decide all legal disputes. This brought about the abolition, among others, of the Court of Administrative Litigation. In order not to prejudice the creation and operation of quasi-judicial administrative agencies, a provision was added which leaves the way open for preliminary determination by executive agencies. Another exception is made with respect to the future establishment of a jury system for criminal cases.*/

The court system itself, apart from retaining the character of a national organization, has undergone considerable changes. The new Supreme Court, Saiko Saibansho, has no identity with the former highest tribunal, Daishinin, but differs from it with regard to structural composition and functions. The most important new constitutional powers entrusted to the Supreme Court are the judicial review with regard to the constitutionality of legislation and administrative acts, and the rule-making power.

The Inferior Courts below the Supreme Court consist of High Courts, District Courts, and Summary Courts. The High Courts have, roughly speaking, taken the place of the former Appellate Courts. The new District Courts have assumed the functions of the old District Courts and have taken over as well much of the jurisdiction of the former Local Courts, which have been abolished. On the lowest level is the Summary Court which may be compared with the institution of Justice of the Peace in Anglo-Saxon countries. Its jurisdiction is limited,

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*/ Japan adopted the jury system in criminal cases when the Jury Law was enacted in 1923. The application of the Law was, however, suspended during the war. The law was inadequate and left so many loopholes that it never enjoyed popularity.

in civil suits to less significant claims, and in criminal affairs to petty offenses. Thus it has also assumed the functions of the former police courts which have gone out of existence. At present there are eight High Courts, whose districts correspond to the eight geographical regions of Japan, forty-nine District Courts, whose districts generally coincide with the prefectures, 328 branches of District Courts, and 557 Summary Courts.*/

The Supreme Court is composed of one Chief Justice and 14 associate judges.**/ The method of their appointment is specified by a provision of the Constitution, repeated in the law, which states that the Emperor shall appoint the Chief Justice of the Supreme Court as designated by the cabinet, while the other justices of the Supreme Court shall be appointed by the Cabinet. The Chief Justice has no constitutional power to influence the selection of the other members of the Supreme Court. Conscious of thetremendous importance of the choice of suitable personalities to the high position of justice of the Supreme Court, the drafters of the Court Organization Law provided that a Consultative Committee for the Appointment of Judges be established to give advisory suggestions to the Cabinet on the selection of candidates to the Supreme Court. While the Cabinet was not bound constitutionally to accept the advice of this committee, the device was intended as a psychological check on the Cabinet because it was anticipated that the Committee would consist of outstanding figures of public life rather than political appointees.

The expectation that this would facilitate the choice of prominent candidates and discourage the selection of incompetent judges for reasons of

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*/ The cities of the eight High Courts are Tokyo, Osaka, Nagoya, Hiroshima, Fukuoka, Sendai, Sapporo and Takamatsu.

**/ The former Supreme Court was composed of thirty-two judges.

favoritism was justified but the effect of the Committee's activity actually went far beyond that. The Japanese emphasis upon "face" had the strange result that when the Consultative Appointment Committee made its recommendations the Cabinet actually felt bound to accept them lest the Committee lose face if its proposals were not accepted automatically and without any change. The Cabinet, therefore, appointed all of the candidates designated by the Committee. Thus, the power to appoint the Supreme Court which constitutionally rests with the Cabinet actually shifted to the Committee and for this reason subsequent amendment to the Court Organization Law abolished the Committee as an institution.

There remains now only the popular recall by referendum as the constitutional check on the appointment of the members of the Supreme Court. The Court Organization Law refers this matter to a specific statute.3/

The Constitution has by this means expressly recognized the political character of the highest tribunal and the interest of the people in the judges composing it. It remains, however, to be seen to what extent this check will be effective in practice. It presupposes an interest on the part of the people in the character and performance of their judges which must be developed in the future by information and education.

The judges of the Inferior Courts are also appointed by the Cabinet, but from a list of persons nominated by the Supreme Court. This rule practically entrusts the personnel policy with regard to these judges to the Supreme Court. Life tenure is replaced in their case by a 10-year term of office with right of reappointment for a similar term in order to permit the replacement of incompetent or otherwise objectionable judges after one term.

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3/ Appendix H: 24, People's Examination of Supreme Court Judges, Law No. 136 of 1947, November 20, 1947.

Different qualifications have been established for judges of the Supreme Court, on one hand, and for presidents and judges of the High Courts on the other. The term judges in this restricted sense comprises the associate judges of the High Courts and all judges of the District Courts, while judges of the Summary Courts occupy a somewhat lower position and are recruited under less rigid requirements. The law provides that the judges of the Supreme Court shall be appointed from among persons of broad vision and extensive knowledge of law and that they must be at least forty years old. Between the two extremes of rigid professional requirements, as customary in continental law countries, and complete freedom of choice, the law resorts to a compromise solution in providing that of the fifteen judges of the Supreme Court, only ten must have specifically defined experience in law, while the remaining five are not subject to such limitations. This opens the way for the appointment of personalities whose background differs from that of the usual expert in jurisprudence. The status of a judge is guaranteed by the provision that he shall not, against his will, be dismissed, or be removed to any other official position, or be transferred from one court to another, or be suspended from exercising his judicial function or have his salary reduced, except in accordance with the provisions of the statutes relating to public impeachment[4] or national review, or unless, in accordance with provisions made elsewhere by statute, he is declared mentally and physically incompetent to perform official duties.[1] Disciplinary punishment other than removal, suspension or reduction of salary might be imposed by judicial decisions as provided elsewhere by statute.[2]

The retirement age has been fixed at 70 years for judges of the Supreme Court and at 65 years for judges of the Inferior Courts. The maximum

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1 See Impeachment of Judges Law, pages 52-53

2 Law Concerning the Status of Judges [illegible] 1947, O.G. No. 175, 29/09/47.

4/ Appendix H: 23, Impeachment of Judges Law; Law No. 157, November 19, 1947.

age for judges of the Summary Courts has been extended to 70 years because of the lack of and urgent need for competent persons available for this low-paid position. Membership in the Diet and in assemblies of local public entities is forbidden to judges. They are not allowed to engage actively in political movements, or to hold another salaried position without obtaining permission of the Supreme Court, or to carry on any commercial business which aims at pecuniary gain.

While the law provides for supervision of judicial administration by the Supreme Court and the other courts, it emphasizes explicitly that this power of supervision shall not influence or restrict the judicial independence of judges, so far as their decisions are concerned.

The drafters of the legislation were faced with the serious problem of relieving the Supreme Court from too heavy a burden of business. Account had to be taken of the reduction of the judges in the Supreme Court from 32 to 15 and of their new additional duties, such as constitutional review and rule-making. The Court Organization Law therefore limits the jurisdiction of the Supreme Court to judgments on Jokoku appeals, a term characterising an appeal from a judgment usually restricted to a review of issues of law. It was furthermore recognized as highly impractical to compel all 15 judges of the Supreme Court to participate in the decisions of every case, whether major or trifling. Therefore, the Supreme Court may conduct hearings and render decisions either through a grand or a petty bench. The details were left to the rule-making power of the Supreme Court except that the petty bench must be comprised of at

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[redacted]

least three members and that the grand bench, consisting of all justices, must sit when questions of constitutionality are involved or when the Supreme Court wants to deviate from a precedent.

An important innovation is the requirement that in the Supreme Court "the opinion of every judge must be expressed in written decision." This provision introduces into Japanese law the institution of dissenting opinion which has proved invaluable in Anglo-Saxon Countries as source material for legal science and for the progress of judicial interpretation. In continental practice a judge in a collegiate court, though overruled, must write the decision on the basis of the majority opinion without bringing to light his own disagreement. The new device will simultaneously have the effect of letting the people know the views of the individuals sitting on their highest court so they may be in better position to make reasonable use of their right of recall.

Administrative affairs of the Supreme Court are managed by the so-called Judicial Assembly consisting of all the judges under the general supervision of the President of the Supreme Court. The law contains similar organizational provisions with respect to inferior courts.

The High Court decides primarily on Kosa appeals. When the Court Organization Law was enacted, this type of appeal resulted in a trial de novo from judgments rendered in the first instance by District Courts. In the meantime, the character of this appeal has been changed with regard to criminal cases by an amendment in connection with the revision of the Code of Criminal Procedure. Furthermore, the Law provided to begin with that the courts could decide on Jokoku appeals from judgments in the second instance rendered by District Courts in cases starting in the Summary Court. This jurisdiction has been abolished in the meantime

for the criminal procedure, which now makes the District Court the normal court of the first instance, the High Court the only court to decide on kogo appeals and the Supreme Court the only court to decide on Jokoku appeals.

The High Court is a collegiate court sitting in a composition of three judges.* The District Court, as a rule, handles cases through a single judge, but there are certain exceptions, particularly trial of serious criminal offenses. The Summary Court, which always acts through a single judge, has jurisdiction in the first instance in civil matters over claims where the value of the subject matter of the action does not exceed 5,000 yen. In criminal matters its jurisdiction has been reduced a great deal in connection with the revision of the Code of Criminal Procedure.

The law finally contains elaborate provisions about court officials other than judges. There are secretaries in the Supreme Court, High Courts, and District Courts headed by the Secretary-General of the Supreme Court and chiefs of the Secretariat, respectively, of the other courts. In addition court clerks function in all courts. A Judicial Research and Training Institute is attached to the Supreme Court with a chief and teachers as its staff. This Institute manages affairs related to the research and training of judges and other court officials and to the education of judicial apprentices.

An innovation is the establishment of positions of judicial research officials in the Supreme Court and in the High Courts. Their task is to conduct, under the direction of the judges, the necessary research in connection with the hearing and decision of cases. The power of appointment, dismissal and promotion of all second-class administrative officials, formerly

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*/ Only when the High Court decides in the first instance (cases of Civil War according to Articles 77 to 79 inclusive of the Criminal Code) is it composed of five judges.

2 See Below Page 113

exercised by the executive through the Ministry of Justice, has shifted to the Supreme Court. The Cabinet has, however, retained such power with regard to court officials other than judges of first-class rank, but even here it acts upon the request of the Supreme Court. It may be noted that the only administrative officials in the Supreme Court who have first-class Civil Service rank are the Secretary-General and ten out of twenty research officials.

An important change has been made with rggard to matters relating to the study and examination of judicial apprentices. Heretofore determined by the Ministry of Justice, those matters will now be subject to the rule-making powers of the Supreme Court.

Finally, it should be noted that the courts have been given a definite budgetary independence. The Law requires that expenditures of courts shall be independently appropriated in the national budget and that a reserve fund must be provided among these expenditures.

In summary, the law is designed to create an independent judiciary and to strengthen basically the prerogatives and prestige of the Supreme Court, but the success of this fundamental reform will depend completely upon whether the Supreme Court can measure up to the immensity of the task imposed upon it. The highest tribunal needs individuals of outstanding personal independence, integrity and professional ability, as well as broad knowledge of the people's life and needs. Only if these qualifications are met will the Supreme Court build up a genuine third branch of government, determined to be a strong guardian of the Constitution yet not aspiring to achieve a type of "judicial supremacy" at

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~~Detailed provisions about the procedure to be followed with regard to the budget of the courts are made in the Finance Law of March 31, 1947 (Law No. 34 Official Gazette Extra (3), 3/31/47). See also Law concerning the Reserve Funds of the Courts (Law No. 117 of 1947, O.G. No. 44, 10/15/47) The new arrangement minimises the power of the Ministry of Finance or the Cabinet to influence the Supreme Court by arbitrary decision on its budget.~~

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the expense of the other branches of government.

(2) Law for the Enforcement of the Court Organization Law.[5] The Law for the Enforcement of the Court Organization Law provides only for the essentials of enforcement, leaving details to determination by Cabinet Order. Necessary provisions had to be made for the period of transition from the old to the new judicial system on the basis of Article 103 of the Constitution. The Cabinet considered itself free to remove judges who held office when the Constitution came into force and to appoint new ones. In fact, far-reaching continuity of tenure of Inferior Court judges was maintained and provision was made for them to be temporarily assigned to the type of newly-established court most nearly corresponding to the old. Thus judges of former Local Courts were assigned to the District Court which had jurisdiction over the former Local Court district. As to the judges of the former Supreme Court, the law provided that, insofar as they were not appointed as judges to the new Supreme Court, they should be deemed to be assigned to the Tokyo High Court. To reduce the period of uncertainty for the judges to a minimum, the new Supreme Court was required to designate those persons who were to be appointed as successors to the former judges, within a period of six months after the enforcement of the Court Organization Law (May 3, 1947). This period was subsequently extended to December 31, 1947.

A serious problem arose with regard to appointment of judges to the Supreme Court. Since the Highest Tribunal under the new Constitution was not identical with the former Supreme Court and since the mode and procedure of

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5/ Appendix H: 11, Court Organization Enforcement Law; Law No. 60, April 16, 1947,

appointment were defined by the new Constitution, the members of the Supreme Court were to be appointed after the Constitution had come into force and by a Cabinet formed under the provisions of the new Constitution. On the other hand, it was essential that the new Supreme Court come into existence as soon as possible after the enforcement of the Constitution. To facilitate the preparation of appointment, therefore, the Law provided that the Consultative Committee for the Appointment of the Supreme Court Judges could take up its duties prior to the 3rd of May 1947.

(3) Law for the Adjudgment of Domestic Relations.[6] In the Law for the Adjudgment of Domestic Relations the term "Court of Domestic Relations" may be misleading because it conveys the impression of an extra-ordinary tribunal apart from the regular hierarchy of courts. The establishment of such a court would be unconstitutional. Actually, the Court of Domestic Relations is a branch of the District Court in the regular court system,[*] and exercises jurisdiction over all family matters. The Law defines its object as the maintenance of domestic peace on the basis of individual dignity and essential equality of the sexes. After the semi-feudal house system had been abolished a need arose for bringing about a reasonable solution to domestic troubles before they reach the stage where legal action is taken. This function of conciliation and mediation had, in the past, been carried out to a large extent by the head of the House and the family council, which he dominated. With the disappearance of these institutions, an appropriate method of judicial determination and conciliation had to be introduced.

In large cities the Courts of Domestic Relations are staffed by judges who specialize in family problems while in other areas, district judges

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Law No. 152 of 1947, O.G. No. 377, 12/4/47

*/ Subsequent amendment to the Court Organization Law creates a "Family Court" with the Court of Domestic Relations as one branch and the Juvenile Court as another.

6/ Appendix H: 25, Adjudgement of Domestic Relations Law; Law No. 152, December 4, 1947.

will serve concurrently as judges of the Courts of Domestic Relations. The jurisdiction of the courts will include such matters as parental power, (determination and change of person having parental power), incompetence and quasi-incompetence; disappearance of persons, permission to change names; adoption or termination of adoptive relationship; legacy; wills; guardianship, including appointments, resignation, dismissal of guardian, curator or supervisor of guardianship and grant of remuneration to guardian; matrimonial relations relative to cohabitation of husband and wife, support, share of expenses arising from marriage and distribution of property.

The Court of Domestic Relations acts through a single judge who, before rendering a decree or effecting conciliation, may cause councillors to attend the proceedings and to give their advisory opinions. Councillors are appointed every year by the District Court. The number of persons to be appointed councillors and the requirements for appointment are determined by the rules of the Supreme Court.

Compulsory conciliation may be rendered in certain categories or cases in which the court believes that a solution by mediation and conciliation is possible. Conciliation is effected by a conciliation committee which consists of a judge of the Court and two or more conciliation commissioners. The commissioners are nominated in each case by the judge of the Courts of Domestic Relations from a list of persons appointed each year by the District Court, persons determined by the agreement of both parties, or any other person considered by the judge to be necessary in the disposition of the case.

The Court of Domestic Relations may on its own motion submit a case on matters relating to cohabitation of husband and wife, their support and cooperation between them, to conciliation. In the course of rendering a decree the court may cause interested persons to take part in the proceedings.

The decree becomes effective when the person receiving the decree is given notification. An immediate complaint may be raised against a decree within two weeks. In this case the decree is not effective unless it becomes final and conclusive upon the determination of a hearing.

Any person who wishes to bring an action in a case "in which conciliation may be effected" may apply for conciliation in a Court of Domestic Relations at any time. The court effects conciliation in cases of personal affairs and in other cases relating to the family except adjudication and revocation of incompetency.

If an agreement is arrived at in conciliation between both parties and if it is stated in protocol, the conciliation is concluded. The statement has the same effect as a final and conclusive decision.

If the conciliation is unsuccessful, the Court of Domestic Relations may hear the opinions of the conciliation commissioners and considering equity for both parties may render a decree of divorce*/, abolition of adoptive relations, etc., as long as it is not contrary to the applications of both parties. In these cases, the payment of money or other property may be ordered.

The sociological significance of this Law, which puts the judge in the role of protector of domestic peace and advisor to the people in family problems, is obvious. So far as the short time of its application permits judgment, the Japanese people are already making voluntary use of this type of judicial help. As time passes, they will become accustomed to it and overcome their traditional reluctance to approach public authorities with their private troubles. Particularly in the case of women, timidity in this respect has been observed. If sympathetic personalities are selected as judges of such courts,

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*/ This refers only to divorce by agreement and not to judicial divorce proper which is decided on by the regular branch of the District Court.

the people will finally prefer the new system to the paternalist form of settlement by the head of the house and the family council.

(4) Sea Casualties Inquiry Law. The Sea Casualties Inquiry Law and the Cabinet Order enforcing it established a Marine Court system or, more properly, marine boards of investigation under the jurisdiction of the Ministry of Transportation to inquire into the causes of sea casualties and to contribute to the prevention of the occurrence of such casualties.

This law established four local marine courts located at Yokohama, Osaka, Moji and Otaru, and defined their areas of jurisdiction. Each court functions with a personnel of four judges and one commissioner, and four secretaries. The High Marine Court, situated in Tokyo, is presided over by a senior judge.* The law also provides that each Marine court shall have the services of 12 Commissioned Judges, selected by reason of their expert opinion and experiences in shipbuilding, engine construction, lighthouse and hydrography, ports and harbors, weather and other related marine activities.

Provision is made for a hearing in the first instance in the local marine court, after the commissioner has completed the preliminary proceedings, with a mutual right of either the aggrieved party or the commissioner to make application for second instance to the High Marine Court. Court review of, or relief against, decisions of the High Marine Court is provided by filing suit against the decision in the Tokyo High Court which has exclusive original jurisdiction. Final judicial relief is provided by law in the second instance by Jokoku** appeal to the Supreme Court. This entire procedure established a pattern to be followed

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*/ The four judges and the commissioner are second class officials. The senior judge of the High Marine Court is a first-class official.

**/ Appeal on question of law.

by other boards or commissions charged with administrative regulations of the government and thus provides a system of relief against the findings of administrative tribunals, as visualized in the Court Organization Law.

In the exercise of their investigatory and inquisitorial powers, the summary power of the marine courts is limited to disciplinary punishment, either by suspension or cancellation of marine certificates or licenses, or by censure or admonition as to other persons. No constitutional right of property or due process is contravened as the power to grant, withhold, or revoke licenses is not a judicial, but administrative or quasi-judicial, function. An innovation in the law is the contempt power for violation of any order or requirement of the law. This extraordinary power, however, was carefully limited and can only be exercised by the marine courts in accordance with the provisions of the Law of Procedure in Non-Contentious Matters.[1] None of the penalties or fines enumerated in the law are self-executing, however, and action thereon must be taken before a competent court of justice.

The law came into effect on March 1, 1948 and the formal installation of the Marine Court was held in Tokyo on April 1, 1948.

(5) Law of the People's Examinations of the Supreme Court Judges.

Article 79 of the Constitution provides in part that

> "The appointment of the Judges of the Supreme Court shall be reviewed by the people at the first general election of members of the House of Representatives following their appointment, and shall be reviewed again at the first general election of members of the House of Representatives after a lapse of ten (10) years, and in the same manner thereafter.
>
> "In cases mentioned in the foregoing paragraph, when the majority of the voters favor the dismissal of a Judge, he shall be dismissed.
>
> "Matters pertaining to review shall be prescribed by law."

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[1] ~~Law No. 14, 21 June 1896, as amended by Law 22, 1941~~

During March 1947 the Ministry of Justice presented a draft of a bill to implement these provisions of the Constitution. This draft had a number of undesirable features. One in particular which required the voters to write upon the ballot the name of judges he wished to dismiss would have placed an impossible burden upon that large number of Japanese voters who are only semiliterate and would almost have assured the continued retention in office of judges once they had been appointed.

Shortly after the First Session of the National Diet convened, the task of drafting the law was taken over by the Judicial Committee of the House of Representatives which submitted a draft during August 1947. This action of the Diet was a gratifying illustration of the initiative being taken by the representatives of the people in the enactment of legislation. A draft of the Law of the People's Examination of the Supreme Court Judges was submitted to the Diet for passage and enacted into law on November 20, 1947.1/

The more important features of the law are as follows:

(a) Notification of the examination is to be made by publication in the Official Gazette at least twenty five (25) days prior to the date of examination;

(b) A fairly simple form of printed ballot is provided for use in the examination. Simple detailed instructions are printed on the ballot in order to avoid any possible misunderstanding by the voter. Inasmuch as this is the first printed ballot provided for use by the Japanese people it will be widely publicized prior to its actual use.

(c) The law provides that a judge shall be dismissed where the majority of the votes favor such action, except where the number of votes

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1/ Appendix H: 24, Law No. 154 of 1947, O.G. No. 493, 11/20/47

does not reach a one-hundredth of the persons listed on the poll-books. This exception was insisted upon by the Committee to guard against the possibility of the dismissal of a judge by unfavorable vote of a very small percentage of the qualified voters. Since the possibility of such a small vote being cast is very slight in any case, no serious objection was raised to this provision which might be considered incompatible with a literal interpretation of the Constitution.

(d) The basic rules for voting in braille points are contained in the law, with details to be provided for by Cabinet Order.

(e) Provision is made for contesting the validity of the examinations by action commenced within 30 days of notification of results in the Tokyo High Court. It is also provided that even though certain votes are declared invalid in such action, no new election will be necessary if the result is not effected thereby. Dismissal of the judge is to be effective upon expiration of the time within which an action may be brought, or if commenced, on the day that the action ceases to be pending in Court or judgment overruling objections becomes final.

(f) The provisions of the Law for the Election of Members of the House of Representatives which are applicable and not in conflict with the present law, are incorporated by reference in order to provide the pattern for election procedure.

(g) Penal provisions for election frauds, buying of votes, bribery, obstructing voting, intimidation of voters, neglect of duty on the part of election officials and for other violations, are provided. In general, these penalties are similar to those contained in the Law for the Election of Members of the House of Representatives.

(6) Law of Impeachment of Judges. Article 78 of the Constitution provides that:

"Judges shall not be removed except by public impeachment..."

According to Article 64:

"The Diet shall set up an impeachment court from among the members of both Houses for the purpose of trying those judges against whom removal proceedings have been instituted.

"Matters relating to impeachment shall be provided by law."

The Judge Impeachment Law,[8] which was submitted to the Diet as a member bill, implements this provision.

There are two grounds for removal of a judge: (a) grave violation or neglect of official duties, and (b) conduct, inside or outside the office, absolutely inconsistent with the dignity and integrity which the office requires. This broad formulation resulted from a change of the original draft which was unsatisfactory in that it provided for grounds for removal allowing impeachment even for trivial reasons and restricting the impeachment authorities too much in their discretion. The language of the law in its final form insures against removal when disciplinary punishment would serve as a sufficient sanction and avoids the mistake of restricting the Impeachment discretion of authorities by too narrowly defined standards.

An Impeachment Committee consisting of twenty Members of the House of Representatives is created to perform functions similar to those of the United States House of Representatives in Impeachment proceedings. Ten reserve members are to act in case any of the regular members are unable to do so. A quorum of fifteen members is necessary, to open any deliberations or pass any deliberations or resolutions. Decisions require a simple majority vote of

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1 Law No. 137 of 1947, O.O. No. 493, 11/20/47

8/ See Appendix H: 23.

members present, except that a resolution to proceed with an impeachment requires a two-thirds majority.

Any person may lodge a motion of impeachment with the Committee by presenting a clear statement of the grounds upon which he considers impeachment to be warranted. The Committee itself may investigate or may request any government or public office to inquire into the facts. Authority to demand the presence and testimony of witnesses and production of records is conferred. After inquiry into the facts the Committee may either dismiss the charges or file a written impeachment with the Court of Impeachment.

The Court of Impeachment consists of fourteen members, seven from each house of the Diet. Four reserve members from each house are also elected to serve in case of inability of regular members to act. The Court sits as a collegiate body and cannot conduct hearings or render judgment unless at least five judges from each house are present.

Trials in the Impeachment Court and announcement of judgment must be public. The original draft provided that the public could be excluded if the Court determined publicity to be dangerous to public order or morals. Article 82 of the Constitution allows an ordinary trial to be conducted privately upon such conditions. Since Article 78 provides for public impeachment without any modification, however, it was finally held that the Court of Impeachment was an unusual type of court to which the constitutional exceptions made with regard to the proceedings of regular courts were not applicable. Accordingly it was decided that all impeachment trials must be public. Procedural matters, insofar as not in conflict with the present law, are to be governed by the Code of Criminal Procedure.

The rules for voting by the court correspond to those made for the Committee.

Once removed from office, a judge cannot again hold judicial office unless he applies for and obtains judgment for recovery of qualification from the Impeachment Court on one of two grounds:

(a) If after the lapse of five (5) years from the date of removal good reason exists for recovery of judicial qualification.

(b) If any new evidence is found to prove the absence of the cause of removal, or other justification exists for recovery of judicial qualification.

In judging the law, it must be kept in mind that the decision to have a judge removed only by impeachment in the case of conduct unbecoming or prejudicial to his position was made by the Constitution. The same is true of the device that the Impeachment Court must be composed of members of the Diet. Thus, the law merely carries out the constitutional provisions. Since the Diet is the highest organ of state power, it appears logical and consistent with the position of the judiciary to entrust decisions on the removal of a judge to the representatives of the people. The method used in the past of having judges decide on the conduct of their brethren, has certainly definite weaknesses, inasmuch as professional loyalty and esprit de corps among colleagues usually results in an attitude of indulgence. On the other hand, it is a well known fact that impeachment procedure, as a heavy instrument of last resort, is used very sparingly. During the occupation a certain reluctance of the new Supreme Court to request impeachment against one of its judges was experienced in a case in which information alleging misconduct of this judge had reached the Supreme Court. Since conclusive evidence was not available, the President of the Supreme Court took the position that he would be neither justified nor well advised to take action or to move for the opening of an impeachment procedure. For this reason

it was considered necessary to revise the Judge Impeachment Law by imposing on the Supreme Court the legal duty to request impeachment procedure in all cases in which misconduct justifying removal of a judge comes to its official knowledge.*/

(7) Law Concerning the Status of Judges and other Court Officials. Article 78 of the Constitution provides in part that "Judges shall not be removed . . . . . unless judicially declared mentally or physically incompetent to perform official duties. No disciplinary action against judges shall be administered by any executive organ or agency."

The Court Organization Law in Articles 48 and 49 states that removal for mental or physical incompetency or disciplinary punishment of judges shall be provided for elsewhere by statute. Articles 64 and 80 of the same law provide the general basis for dismissal and supervision of court officials other than judges.

In order to implement the above provisions the then Ministry of Justice prepared a draft entitled "Bill of the Status of Judges and other Court Officials, which was submitted to the Diet and enacted into law on October 29, 1947.

The following is a resume of the more important features of the law with comments on controversial provisions:

> A judge may be dismissed by the appointing authority when adjudged to be mentally or physically incompetent to perform his official duties where such incompetency is not of a temporary nature or when he petitions for dismissal. The phrase "is not of a

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*/ On July 5, 1948, the Judges Impeachment Law was amended accordingly.

temporary nature" was inserted in order to guard against a possible exercise of personal dislike of one or more judges by dismissal for a temporary incompetency, although under past custom public officials were continued in office in spite of absence from duty for extended periods of time. The provision concerning the dismissal upon petition of the judge covers all cases where a judge may desire to resign for any reason whatsoever, including mental or physical reasons. In this connection it should be noted that Article 41 of the Law of Impeachment of Judges places a limitation upon the right to resign by providing that pending the final judgment of the Court of Impeachment, a judge impeached for removal shall not, despite his own request, be removed;

Disciplinary punishment, where the offense is not serious enough to warrant impeachment proceedings, shall be a reprimand or non-penal fine not exceeding ten thousand yen. The apparently high limit was agreed upon as necessary to enable imposition of a more severe penalty in case of aggravated or repeated offenses;

Jurisdiction is vested in each High Court over cases involving judges of District or Summary Courts within the district under the High Court's jurisdiction, and in the Supreme Court over cases involving judges of the Supreme and High Courts. Appeals from the High Court decisions may be taken to the Supreme Court;

Cases in the High Court shall be heard by a collegiate body of five judges, and cases in the Supreme

Court will be heard by the grand bench. This provision was considered necessary to insure hearings before a proper number of judges in view of the special category of the proceedings and the importance of such cases with respect to the judge concerned and the judicial system;

In order to avoid duplication, the law provides that disciplinary proceedings may be suspended pending the outcome of a criminal or impeachment case with regard to the judge concerned;

The procedure in status cases is, except as otherwise provided in the law, governed by rules determined by the Supreme Court in accordance with Article 77 of the Constitution. This article states that, "The Supreme Court is vested with rule-making power under which it determines the rules of procedure and of practice, and of matters relating to attorneys, the internal discipline of the courts .. ...." This is another example of the rule-making power of the court and of a statute which recognizes the independence of the judicial system.

Finally the law provides for dismissal by way of disciplinary punishment of other officials of the courts who are not judges, and for reduction in salary, or reprimand by way of punishment in lesser cases. Decision to administer punishment is in all cases left to the discretion of the courts. Dismissal of such officials for physical or mental incompetency is also provided for on the same basis as dismissal of judges for similar reasons.

b. Public Procurators

(1) Public Procurators Office Law.[9] This law is essentially a re-enactment of those provisions of the former Court Organization Law which related to public procurators. The need for a separate treatment of these subjects follows logically from the complete separation of courts and administrative agencies, required by the new Constitution.

The procurators' organization, as before, is nation-wide and made up of separate offices which correspond to the new type of courts: The Supreme Procurators Office to the Supreme Court, High Procurators Offices to the High Courts, District Procurators Offices to the District Courts, and Local Public Procurators Offices to the Summary Courts. Procurators are national officials and responsible to the national government along through the Attorney-General.

The procurators offices are completely separated from the courts, although procurators are subject to the rule-making power of the Supreme Court in respect to litigation. For other purposes, they are, as administrative officials, part of the executive branch of government. However, they have, within the jurisdiction of the Attorney-General, a semi-independent status under the Procurator General who heads the Supreme Procurators' Office. Thus, while vesting the general control and supervision in the Attorney-General, the law provides that with regard to the examination and disposition of particular cases he may control only the Procurator General. Within this limitation, the Attorney-General, if he wants to give directives to a public procurator at an inferior court, must do so through the Procurator General, to whom also other powers may be delegated by the Attorney-General. Procurators are subject to different classifications in respect to pay and rank on the basis of the existing civil

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1 Law No. 61 of 1947, O.G. No. 311, 4/16/47

9/ Appendix H: 12, Public Procurators Office Law; Law No. 61, April 16, 1947.

service system.

Qualifications for admission to the procurators' service have been reduced to permit an infusion of new talent. In the future, lawyers, law professors and former judges may enter the procurators' service. It will also be possible for persons having long practical administrative experience to enter the service at the low level. This provision was necessary as a practical matter, inasmuch as it had become increasingly difficult to satisfy the need for additional personnel in the procurators offices.

The fact that procurators' offices are badly understaffed has contributed to the unfortunate and widely criticized delay in the operation of criminal justice. The need for help through additional personnel was, therefore, obvious. The law creates the office of Administrative Secretary who shall, upon orders of the procurator, conduct business matters with which the public procurators office is concerned, assist the procurator, and engage in criminal investigation under his direction.

While not stated in express terms, procurators are the sole agents of the government who possess powers of indictment. Criminal actions in Japan can be initiated only by the procurator. The law provides that in criminal cases the functions of the procurator shall be to bring public action, request the proper application of law by courts, and supervise the execution of judgments. He may also investigate any criminal offense. In other cases under his jurisdiction, he shall perform such functions as are authorized by other laws. For instance, he represents the public interest in divorce cases and suits concerning the status of children.

Thus the law basically follows the traditional lines with regard to the status and function of public procurators. Criticism has been raised in

two directions and the opinion advanced that, first, the procurator should not be appointed, but elected by the people and, second, that the procurators' offices should no longer be under the national government. Decentralization of the procuratorial system is suggested along the lines of the local autonomous entities. The Japanese Government is vigorously opposed to such fundamental changes on the ground that popular election of procurators would make them political officials completely dependent upon the whims and changes of party politics. Their election would be determined by factors different from their necessary professional qualifications. As to the question of decentralization, the Japanese Government points out that, according to the Constitution, the Cabinet has the duty to administer the law faithfully and that the enforcement of criminal law, in particular, must be regarded as a national task. To deprive the national government of its power to control and direct the public procurators, and to subordinate the latter to the prefectural governors or city mayors, would be all the more dangerous in view of the fact that the police have been decentralized in accordance with the new National Police Act.[10] These arguments, while not completely convincing, appear to have merit.

Accordingly, the Occupation did not want to go so far as to impose popular election and decentralization upon the procuratorial system. However, it was felt, and the Japanese government recognized, that some popular check on the public procurators should be introduced. Therefore, an amendment to the Procurator's Office Law provided for the establishment of a Committee for the Examination of Qualifications of Public Procurators. The task of this Committee is to determine whether and when a public procurator should be dismissed from office as "unsuitable

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1 Law No. 196 of 1947, O.G. No. 516, 12/17/47

10/ Appendix H; 30, Police Law; Law No. 196, December 17, 1947. Enacted into law 4/13/48 by the Second Session of the National Diet.

to discharge his duties because of mental or physical disability, inefficiency or other reasons." A periodic examination of all procurators is to be conducted every three years. 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. The Committee is composed of eleven members, four members of the House of Representatives, two members of the House of Councillors, the Procurator General, the Prosecution Assistant to the Attorney-General, and one judge of the Supreme Court, one representative of the Federation of Bar Associations and one member of the Japanese Academy. With the exception of the Procurator General and the Prosecution Assistant to the Attorney-General, all other members are elected by mutual vote of the organization to which they belong. The Committee may order a procurator who is under examination and the chief of the Procurator's Office to which such procurator belongs, to be present at a hearing and may have them state their opinions.

The procurator whose qualifications are under discussion must be given notice by the Committee a considerable time in advance of such meeting. The Committee informs the Attorney-General of its decisions in case it has found that a procurator is not suitable to discharge his duties. However, the opinion of the Committee is advisory only and it is up to the Attorney-General to determine whether or not the procurator in question should be removed. Since the Japanese do not sharply distinguish between advisory and determining functions and since the nature of its membership will impart great prestige to the Committee, it may be assumed that the Attorney-General will follow the Committee's advice.

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~~Cabinet Order No. 85 of 1947, Regulations Governing the Organization of the Committee for the Examination of Qualifications of Public Procurators, O.O. No. 362, 6/17/47~~

While this check was of an organizational and personal nature, the Law Concerning the Inquest of Prosecution introduces a new functional control of the public procurators.

(2) Law Concerning the Inquest of Prosecution.[11] In connection with discussion of the status of the public procurators emphasis was put on the necessity of a functional check on their prosecuting in addition to the administrative check provided for by the operation of the Committee for the Examination of Qualifications. Such functional check was less needed on the prosecuting activity of the procurator because unjustified and unreasonable indictments can and will be dismissed by the court. It was, however, necessary with regard to the frequent case that he omits prosecution. 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. However, there was almost unanimous agreement that the introduction of this system in Japan would be premature and unwise.

The Law for the Inquest of Prosecution therefore does not establish a Grand Jury: the inquest does not render a true bill of indictment but 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. In addition, the inquest may make proposals and give advice to the procurators regarding improvement of prosecutions. If a person had originally made a formal complaint to the procurator or if he has been injured by a criminal and the procurator has not

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11/ Appendix H: 41, Law for Inquest of Prosecution, Law No. 147, July 5, 1948.

taken any action, the inquest must conduct an examination upon application. It may also, ex-officio, upon a majority vote, investigate a case in which no public action has been taken but should have been taken.

The inquest may require the procurator to present material necessary for examination and to be present at its meeting; it may make inquiries of public or private experts or organizations and request reports; it may call witnesses and examine them. If deemed necessary the inquest may ask for expert opinion as well as for legal advice.

When a finding has been made as a result of the 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 Examination of Qualifications of procurators, which reviews the record of the procurator for efficiency and which advises on his removal. 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 or had been injured by a criminal.

The Chief Procurator of the District Procurator's Office, upon receiving such findings, shall take into consideration the findings and require indictment to be made, if he agrees with the findings of the Inquest. In other words, the decision of the Inquest is a recommendation, and is not a mandatory

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~~See above, Pages (Procurators' Office Law)~~.

requirement that action be taken. However, since the gist of the decision will be published and since the findings will be sent to the Chief Procurator of the District Procurator's Office, and from there forwarded to the Committee for Examination of Qualifications of Public Procurators, the decision of the Inquest will carry tremendous pressure behind it.

Each Inquest is composed of eleven members selected by lot from among the voters for the members of the House of Representatives within the territorial jurisdiction of each Inquest, there being not less than 200 Inquests, at least one in each District Court area. The Inquests will be established in the area where each District Court and major branch of a District Court are located. Detailed technical provisions deal with the selection of the members of the Inquest. Since it was deemed desirable to have some continuity of membership in the Inquest, provision is made for rotation, whereby only part of the Inquest goes out of office every three months, the term of membership being six months.

The Chief Judge of the District Court or a judge of the branch of the District Court instructs the members of the Inquest in their duties and powers and administers an oath requiring them to discharge their duties fairly and faithfully according to their conscience. The meetings of the Inquest are closed to the public; the matters taken up by the Inquest are decided by a majority of its members; however, agreement of not less than eight members is necessary in order to decide that a case should be prosecuted.

c. The Attorney-General

(1) The Law for the Establishment of the Attorney-General's Office, which came into effect sixty days after promulgation, implements a letter of the Supreme Commander to the Prime Minister, dated September 16, 1947.[12] This letter pointed out in connection with the reorganization of the police that, due to the complete separation of the judiciary from the executive branch of the government according to the new Constitution, the Ministry of Justice was no longer responsible for the administration of justice so far as the Courts were concerned, and the public procurators had become subject to the rule-making power of the Supreme Court. On the other hand, the letter noted that the Cabinet was responsible for executing the Constitution and the laws enacted by the National Diet. In order to reflect this constitutional separation of powers adequately, SCAP suggested that the Ministry of Justice be replaced by an Attorney-General, sitting in the Cabinet as Minister of State and serving as the chief legal advisor of the executive branch of the Government.

Simultaneously, the Supreme Commander's letter suggested that the new office absorb the functions of the present Legislative Bureau of the Cabinet which could be dispensed with "in the interest of governmental efficiency and economy". In the past the Legislative Bureau of the Cabinet had in accordance with the order of the Premier drafted all bills to be submitted to the legislature by the government and all ordinances to be promulgated. Proposals of amendment or repeal were also submitted to this Bureau. In the discharge of his duties, the Chief of the Legislative Bureau was at liberty to present his opinion to the Cabinet (Japan Year Book 1937,p. 104). The Bureau was staffed with top legal technicians, trained almost without exception in the law school of the Tokyo Imperial University. They exercised a tremendous

12. Appendix H: 29, Law Establishing the Attorney General's Office; Law No. 193, December 17, 1947 and Appendix D: 7, General MacArthur's letter to the Prime Minister concerning police reform and reorganization of the Justice Ministry.

and, on the whole, unhealthy influence on Japanese legislation. Far from restricting themselves to a formal drafting or editorial activity, they extended their functions to policy making with regard to the bills which they had to prepare or to review. In no other place of the government did the attitude of bureaucratic legalism thrive more intensely than in this Bureau which, even during the Occupation, on several occasions raised objections of a formalistic nature to revisions of law agreed upon between other Japanese government agencies and the staff sections of General Headquarters concerned with the subject matter. The organizational change in connection with the establishment of the Attorney-General's Office offered a welcome opportunity to abolish this agency and integrate its functions in the new office.

In the law, the Attorney-General is characterized as the "supreme advisor of the Government on legal questions." He is a member of the Cabinet and his position is that of a Minister of State. In his office are concentrated all matters relating to criminal prosecution and civil litigation, the drafting and examining of all cabinet bills, ordinances, research and expressing of legal opinions, and a number of purely executive functions, remnants of the Ministry of Justice jurisdiction. Under the Attorney-General are five Assistant Attorneys-General, respectively in charge of prosecution, legislation, research and opinion, litigation and executive operation. In addition, a Secretary-General supervises and directs the business of the Secretariat and handles personnel, budget and accounting matters. Through a subsequent amendment to the Law the Attorney-General is authorized to appoint an Assistant to the Attorney-General, not under classified government service and answerable only to him, to act in his stead and absence.

The business of each Assistant Attorney-General's Office is conducted through five bureaus charged with enumerated responsibilities:

(a) The Prosecution Assistant: Besides actual conduct of the

prosecution, the Prosecution Assistant supervises the public procurators, and has charge of criminal investigation, extradition, amnesty, training of judicial police, the dissolution and control of ultra-nationalist and other prohibited organizations, investigating undesirable personnel and enforcing rules against such personnel. The latter functions, closely related to Occupation policies, were taken over from the dissolved Ministry of Home Affairs.

(b) The Legislation Assistant: The Legislation Assistant has charge of all the functions of the old Cabinet Bureau of Legislation, and is responsible for matters relating to foreign treaties and affairs, finance, industry, economy, traffic and communication, legal affairs, culture, welfare and labor.

(c) The Research and Opinion Assistant: The work of the Research and Opinion Assistant is indicated by his title. He has charge of research and expressing opinions on domestic and foreign statutes, other laws and legal matters, and collects legal statistics.

(d) The Litigation Assistant: The Litigation Assistant is charged with the handling of all civil, tax and administrative litigation.

(e) The Executive Assistant: In addition to many administrative functions, the Executive Assistant has charge of nationality, aliens, deposits, notarial acts, registration and non-contentious matters, disposition of property of dissolved organizations, general planning and administration of penal institutions, and the correction, training and rehabilitation problems of adults and juveniles. A new and extremely important task of the Executive Assistant is the promotion and protection of the fundamental civil rights and liberties of the people, as guaranteed in the Constitution of Japan, along with matters concerning habeas corpus and legal aid for the poor or indigent.

Far-reaching jurisdictional changes in the field of juvenile delinquency

have resulted from the new law. It provided that for a transitional period, ~~until the 1st of July 1948~~, the Attorney-General should continue to exercise the same functions over matters concerning rehabilitation of juveniles as had been exercised hetherto by the Minister of Justice, who in the past was in charge of all types of juveniles, whether delinquent or only neglected or morally endangered.*/ ~~Since the 1st of July 1948~~ After this period a clear distinction will be made between those juveniles who have been placed under correction by a Juvenile Court and all other juveniles who only need care and protection. The first category is under the jurisdiction of the Attorney-General, while the second category is exclusively within the jurisdiction of the Minister of Welfare. Beyond this, the law establishes the long-range policy that from the 1st of April 1949, correction and rehabilitation will no longer be administered in private institutions, used in the past as reformatories, but only in public reformatories under the Attorney-General's jurisdiction. Private reformatories will continue under the jurisdiction of the Minister of Welfare for the purpose of training, education, and rehabilitation of neglected or morally endangered children.

The new law constitutes a significant step forward in conformity with those provisions of the Constitution which required a clear-cut separation of executive and judicial functions in the administration of Justice. It also reflects a definite modernization of criminological concepts. It establishes a new type of top-level office in which the powers of law enforcement are concentrated insofar as the Constitution leaves such powers to the national government. Last but not least, emphasis upon Civil Liberties in the law gives evidence that the enforcement of law is no longer looked upon merely from the point of view of the prerogatives of the State over its citizens but also in the light of the protection

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*/ This transitional period, originally scheduled to end March 31, was extended to March 31, 1949.

of the people's rights from illegal and unwarranted interference by their government. It is symbolic that a Civil Liberties Bureau is established in the same central authority which controls prosecution of crimes.

2. Substantive Law

a. Civil Law and Related Laws

(1) Civil Code. The Civil Code was revised twice in the course of the Occupation. The first revision was the Law for the Temporary Adjustments of the Civil Code Pursuant to the Enforcement of the Constitution of Japan, which took effect on May 3, 1947. As in the case of other temporary revisions, the amendment was virtually limited to a statement of the new principles which would replace those of the old Civil Code pending a full revision. The expanded revision which implemented these principles in detail was made in the form of a Law for the Revision of the Civil Code which went into effect on January 1, 1948. In the final form, it involved the revision of almost three hundred articles of the existing code.[13] These fell almost completely within Books IV and V dealing with family relationships and succession.* The revisions of the Japanese Civil Code produced probably the most far-reaching effects upon the everyday lives and activities of the Japanese people of any legislation enacted in the course of the Occupation. These uprooted the centuries-old semi-feudal "house system," founded upon Confucian principles, and replaced them by a code premised upon a respect for the dignity of the individual and equality of the sexes.

These results were accomplished by the implementation of three articles in the new Constitution which state:

Art. 13: "All of the people shall be respected as individuals."

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* Few changes were enacted with regard to Books I-III (General Provisions, Property, and Obligations.)

13/ Appendix H: 38, Law Amending the Code of Civil Procedure; Law No. 120, July 5, 1948.

Art. 14: "All of the people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status, or family origin."

Art. 24: "Marriage shall be based only on the mutual consent of both sexes and it shall be maintained through mutual cooperation with the equal rights of husband and wife as a basis.

"With regard to choice of spouse, property rights, inheritance, choice of domicile, divorce, and other matters pertaining to marriage and the family, laws shall be enacted from the standpoint of individual dignity and the essential equality of the sexes."

The final paragraph of Art. 24 struck the keynote for reforms of the Civil Code, for it required the abolition of obsolete family relationships. A novel and unprecedented procedure was the formulation of the new articles in Books IV and V in a colloquial style more readily intelligible to the general public than the usual language in which laws are written.

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, exercised considerable legal and economic powers over the other members of the house regardless of whether he lived with them or not. Thus his consent was required in case a member of the house wanted to change his residence or be a party to marriage, divorce or adoption. He owned most of the family property, and succession into property was, therefore, 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 group.

It is noteworthy that the wholesale abolition of the house system went beyond the requirements for the implementation of the Constitution and was

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~~1 See also the discussion of the Family Registration Law, pages~~

not directed by SCAP whose policy was that, apart from the principles of equality of sexes and individual freedom, how to modernize and reform their family law should be left to the Japanese people themselves. This policy was based on the consideration that it would be unwise to impose on an Oriental country the Western ideas and standards in the field of domestic relations. Therefore, when the Provisional Legislative Investigating Committee in its majority voted in favor of the abolition, SCAP was surprised and welcomed the resolution as the expression of a progressive attitude. Significantly enough, the outcome had been considerably influenced by the vigorous arguments of two outstanding women members.

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

Moreover, all restrictions on the legal capacity of women as wives and mothers are abolished. While formerly subject to control and management by the husband, a wife will, in the future, be free to dispose of her property. The husband and wife are to share jointly all family expenses and, in the event of divorce, either party may obtain a share of property acquired by the other in the course of marriage. Furthermore, judicial divorce is provided on grounds which are applicable equally to husband and wife.**/ Under the old Civil Code adultery was always a ground for divorce if committed by the wife. The wife, however, could demand divorce only if the husband was sentenced to a penalty for a sexual crime.

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*/ Apprehension has been expressed that this new law of succession might result in further parcelization of the small farm holdings in Japan, inasmuch as the land reform has already reduced the size of rural property. Hence legislation was prepared with the objective to provide for exceptions from the rule of intestate succession established by the revised Civil Code so that agricultural assets may be succeeded to by one heir only, while the co-successors might be compensated in some form. No agreement has been reached on the subject up to now.

**/ The traditional institution of divorce by agreement has been retained.

While hitherto parental power was primarily in the hands of the father, it is now exercised jointly by the father and mother. The custody of the children is to be determined by an agreement of the parties in case of divorce, but subject always to the approval of the newly created Court of Domestic Relations, to which the Civil Code entrusts broad powers. It has already been pointed out that this court supervises all phases of parental responsibility. Among the reforms which are designed to bring about a democratization of the family, the new provision that parental consent to marriage is no longer necessary for adults may be mentioned. Matrimonial relationship is terminated by divorce, or by death if the surviving spouse applies for dissolution of the relationship after the death of the other. It is anticipated that this revision will free widows from in-law relationships which under the old system continued even after the death of the husband or after divorce. While formerly the obligation for mutual support extended to all members of a legal house, the reciprocal duties of support of lineal blood relatives now are limited by the law to the third degree of relationship and subject to the approval of the Court of Domestic Relations. An illegitimate child has been given the right to a share in the inheritance of his ancestors' property.

Apart from these major reforms, many other changes along the lines of independence of the individual from the family have been enacted in the field of marriage, divorce, child-parent relationship, adoption, guardianship and inheritance.

The effect of these fundamental reforms upon Japanese society cannot yet be fully evaluated. Continuous observation has, however, shown that the members of the younger generation, particularly the women, are growing increasingly conscious of their new rights. Women who in the past did not dare to sue their

husbands for divorce or for property claims have discovered, in a relatively short period, that their legal status has completely changed. As a matter of course, the psychological and economic features of the house system cannot possibly disappear overnight as a consequence of a change in the law. Among the working classes in the cities, the old family system was of little interest one way or the other. However, it was of paramount concern to the urban aristocracy and the rich. The reason is obvious. Since the head of the house was legally obligated to support the needy members of the family, the sanction against violating the rules of the head of the house, namely expulsion from the house, had unpleasant economic implications chiefly in the wealthy families. The situation is similar, however, in the rural districts where the more static way of life and more traditional attitudes have a dampening effect on social progress. A leading Tokyo newspaper, the Mainichi Shimbun, conducted a so-called national public opinion investigation on the reforms of the Civil Code. About 3,000 people, representative of various classes throughout the country, were asked their opinion on the abolition of the House System and of the inequality of sexes. When asked whether or not they favored the reforms, 57.9 percent answered "yes;" 37.4 percent answered "no;" and 4.7 percent were undecided. Among the males 55.7 percent voted "yes" and 41.9 percent voted "no," while among the females, 60.1 percent voted "yes" and 33.1 percent "no." The reforms found more favor among the unmarried males as well as females than among the married people. The breakdown in occupations gave the following figures:

| | Yes | No | Undecided |
|---|---|---|---|
| Salaried Employees | 62.0 percent | 36.3 percent | 1.7 percent |
| Industrial Workers | 58.7 percent | 33.8 percent | 7.5 percent |
| Farmers and Fishermen | 43.3 percent | 54.6 percent | 2.1 percent |

| | Yes | No | Undecided |
|---|---|---|---|
| Merchants | 53.3 percent | 44.8 percent | 1.9 percent |
| Students | 78.2 percent | 21.8 percent | 0 |
| Housewives | 53.4 percent | 38.7 percent | 7.9 percent |

The poll, which shows the farmers and fishermen as the only group opposed in its majority to the reforms, confirms the observation made above with regard to the rural population.

This bill received more publicity before its passage into law than any other single piece of legislation. A considerable number of private committees consisting of legal scholars and representatives of women's groups engaged in studies of the provisions of the bill and in public discussions. Members of these committees traveled throughout the country to hear the opinion of the people. For the second time in Japanese parliamentary history public hearings were conducted by the Diet, which listened to the views of people from all walks of life.*/

(2) Family Registration Law. Implementation of the new Constitution and Civil Code of Japan necessitated removal of all the objectionable power, influence, obligations and feudalistic ramifications of the long-established House Registration (Koseki) System.

The modern period of Japanese vital statistics began in 1872 when registration of births and deaths by the Koseki system was introduced. Before that, registration was purely a religious function, a record of deaths only being entered in the Buddhist books. The recording of marriages and divorces in the Koseki was started in 1886 and, while not included in the Koseki, stillbirths were registered beginning the same year. The Koseki-Ho (House Registration Act)

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*/ The first public hearing was conducted on the revision of the Criminal Code on the abolition of adultery as a crime.

was passed in 1898 and in the same year the responsibility for registration statistics was transferred to the Cabinet Bureau of Statistics. With the adoption of the Koseki-Ho under the exclusive jurisdiction of the Home Ministry, it became apparent that the purpose of the Koseki was primarily to record family events for "official" purposes and only secondarily to assist in the collection of vital statistics. The power of the Home Ministry to have access to the minutest detail of any individual's personal life was of inestimable value to a police state, to say nothing of examination by prospective employers, go-betweens arranging marriage, etc.

The Koseki system was an official record of a family or house, a term used in a broad sense to include persons connected by consanguinity, affinity, kinship, adoption or other relationship, who were legally and summarily under the jurisdiction and complete control of a designated Koshu or "head of the house." The recording in the Koseki included the head of the house, his lineal ascendancy, spouse, direct lineal descendants together with spouses, collateral family, and such persons who were not relatives but who assumed the name of the head of the house. The members of one family or house did not necessarily belong to the same household or live all together. Branches of a single family may have lived permanently separated in different parts of the country or they may have lived together as a single unit. The official registration document was filed permanently in local governmental ward offices where the head of the house maintained his legal domicile, which automatically became the legal domicile of every member of the house.

In view of a reasonable apprehension of a return to the old system, considerable attention and thought was given the question as to the necessity of any registration of the family, as opposed to a separate registration for each

individual. The place of the family in Japanese society and the convenience of registration through such a unit warranted the conclusion that a family register was not only desirable but necessary for the sake of practical operation, and not in conflict with the dignity of the individual as guaranteed by the Constitution.

Legally, 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, resumption of surname by surviving spouse and dissolution of matrimonial relations, disinheritance of presumptive successor, entry into a family register, separation from a family register, acquisition or loss of nationality, alteration of name or surname, and transfer of registered locality and settlement.

Under the new Family Registration Law,[1] which went into effect on January 1, 1948, registration is managed by city mayors, town or village headmen, all under the jurisdiction of a Judicial Bureau.[14/] Formerly, supervision of the system was reposed in the district courts, an unnecessary and objectionable administrative burden on the judicial function. Under the new law, Minseki (civil person system) registration will be set up under Hitto (name of person who appears first written) and will include, at the most, only the small family unit consisting of the husband and wife and such immediate children as are unmarried and not otherwise emancipated. Briefly, the law specifies what matters are subject to registration, what information is required and who is under duty to give it, and how and where and when it must be given.

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1 Law No. [illegible] of 1947, GO Extra. 12/22/47.

14/ Appendix H: 32, Census (Family) Registration Law; Law No. 224, December 22, 1947.

The operation of the system has been considerably simplified. The law provides certain registration rules which are mandatory in establishing and maintaining registration books, the entries in which are effected by means of a notification, report, application or demand, or copy of a document, logbook or judicial decision. A new register is required to be made up for any person in case of: marriage; having a child or adopting another person; attaining majority and separating from the register; establishing a register for the first time, such as may be done by a naturalized person, an orphan, or divorced party. Whenever a person establishes a new register, his name must be struck off his former register.

In general, every notification, whether written or oral, must be given in the proper district concerned. However, in the case of a birth or death, the notification must be given in the district of occurrence, the recorder of which then transmits the notification to the recorder of the person's registered locality. The forms for notification are designated by the Attorney-General, and when signed and sealed by the responsible notifier, must contain the following information:

1. Matter concerned and date of notification;
2. Notifier's date of birth, place of residence and district;
3. Information as to transfer, former register, new register and reason, and whether another person is accompanying the registered person;
4. Any additional facts necessary clearly to establish the matter;
5. Reasons for any omissions or facts not known.

Certain additional information is required by the specific subject matters enumerated in the law as subject to registration.

Time limits within which notifications must be given shall be computed from the day on which the matter occurred. Notifications concerning agreements or matters determined by judgments or court action shall be made within ten days after same becomes final or conclusive, and a copy thereof must be annexed. Birth notifications must be made within 14 days after the occurrence, and notifications of death must be made within 7 days after the notifier becomes aware of the fact.

The law provides for penalties, or administrative fines, under the exclusive jurisdiction of the summary courts, for certain unlawful omissions or commissions on the part of the responsible party or administrative official.

An important concluding provision of the law is that any family register made up, or district established, under the former law shall be deemed similarly made up under the new law. In view of the physical impossibility of changing millions of registers by the mere promulgation of a new law, it was provided that at the expiration of ten years (i.e., January 1, 1958) from the effective date, all family registers made up under the former laws shall be revised to conform to the new Family Registration Law.

~~Reform of the family system pursuant to the revision of the civil code has been treated in considerable detail for~~ While registration may seem to be a technical and formal matter, it is intimately associated with all important events in the lives of the Japanese people and has considerable political as well as psychological implications. Without the modernization and democratization of this law the reform of the family system would be incomplete and defeated.

(3) State Redress Law. Article 17 of the Constitution guarantees that "every person may sue for redress...from the State or a public entity, in case he has suffered damage through illegal acts of any public official."

An analysis of Japanese law reveals that few categories of officials were made expressly and specifically liable personally for civil damages when their unlawful dispositions caused a loss to private persons. Article 715 of the old Civil Code makes the employer generally responsible for the acts of his agent. However, Court decisions, in construing this article, were inconsistent in that some held the provisions applied only to cases involving suits between private individuals, and others held the article did create a liability on the part of the State and public officials. In order to implement Article 17 of the Constitution and to resolve the existing confusion in court decisions, the State Redress Law was enacted and came into force on October 27, 1947.[15]

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 reinburse the State or public entity which has paid damages.

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1 Law No. 124 of 1947; GS No. 413, 10/28/47

15/ Appendix H: 22, State Redress Law; Law No. 124, October 27, 1947.

Liability is also placed upon the State or public entity concerned for any damage to persons caused through the existence of any defect in the construction or management of highways, rivers or other public installations. Here again the State or public entity concerned has the right to obtain reimbursement from any other person who is responsible for causing the damages.

The individual damaged may proceed against the State or public entity charged with the appointment or supervision of the official in question or responsible for the establishment or management of the public installation in question. He may also sue the State or public entity which defrays the salary of such public official or the expenses necessary for the establishment or management of such public installation.

Lastly, the law provides that where an alien is the injured party, he may recover damages provided compensation is reciprocally guaranteed by the country to which he owes allegiance.

Discussion has already arisen as to the constitutionality of this limitation on the right of aliens to relief, in view of the use of the words, "any person" in Article 17 of the Constitution. If the term "person" is used in a general sense, the aliens may not be denied redress because of lack of reciprocity. No case has arisen, but arguments have been advanced pro and con by Japanese jurists. The question must be left to the decision of the Supreme Court.

b. Criminal Law and Connected Laws

(1) Criminal Code. The Japanese Criminal Code, patterned on Continental Law, was an extremely modern and progressive instrument when it was enacted as a part of the codification of the Meiji period. One of its main

merits was that it left much discretion to the courts and thus enabled them to do justice to the specific circumstances of the individual case. The great emphasis upon subjective guilt was another commendable feature of the Code. Subsequently, since criminological concepts underwent rapid changes, more advanced theories regarding penalties were gaining ground and so many defects were noticed in the Code, in 1926 the Extraordinary Legislative Committee passed a resolution for the revision of the Penal Code. A Special Investigation Committee set to work in 1931 and an outline of the revised Penal Code was drawn up. However, no essential reform was actually enacted.

On October 14, 1947, the Diet passed into law the Bill for the Partial Amendment to the Criminal Code. While this reform was primarily necessary to have the provisions of the Code comply with the new Constitution of Japan, the occasion was used to bring about other revisions favored by public opinion for a long time. While no such fundamental and sweeping changes are involved as in the case of the Civil Code and its Family Law, the Japanese Criminal Code was bound to be essentially affected by the political and sociological revolution in which the nation finds itself at present.

The abolition of the whole Chapter called "Crimes Against the Imperial House" should be mentioned in the first place because of its eminent political significance. 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 act was subject to death penalty if directed against the Emperor, his close relatives, or the heir apparent, while an attempted

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~~2 Law No. 124 of 1947, GG extra, 10/26/47~~

assult 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 Emperor has become the mere symbol of the state and of the unity of the people, without governmental power, while the sovereignty is vested in the people. The Emperor, who himself discarded the mythical divinity which in the past surrounded the origin and person of the ruler, is now supposed to be one of the people. Therefore, the legal protection granted him in his symbolic and ceremonial role ought to be no more and no less than the protection accorded any citizen. As the Supreme Commander expressed it in a press release of October 9, 1946, in commending the action of public procurators who had withdrawn the prosecution of news editors for lese majesty, "to hold the contrary would constitute a direct negation of one of the basic principles of democratic government. It would serve to perpetuate the pattern of feudalism and authority and do violence to those basic freedoms acknowledged by Japan and to which the Emperor himself has given most hearty accord."

The concept of equality before the law necessitated another important revision of the Criminal Code. Articles 90 and 91 provided for special protection of heads of state and envoys of a foreign power staying in Japan with

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*/ Offenders against the honor and life of the Emperor and his family will now be punishable under the general provisions for defamation or insult and murder, manslaughter, and injury respectively. Only one concession with regard to the Emperor and his next of kin has been made in providing that the application for prosecution required in case of defamation and insult may be made by the Prime Minister instead of the Emperor or his specifically listed relatives personally.

regard to acts of violence or threats and insults. In deleting these special crimes, the Diet emphasized that the principle of equality before the law shall exclude not only special privileges of Japanese citizens but also of foreign nationals, however high their position may be.

The Minister of Justice expressed the views of the government on the international aspects of this revision in the House of Councillors. He referred to the inviolability under international law of the head or envoy of a foreign country and raised the question of whether the deletion of these special protective clauses might infringe upon the provision of the Constitution which reads: "Established law of nations shall be faithfully observed." In pointing out that the statutory punishment for assault, threat, and defamation against any person has been increased, he arrived at the conclusion that the general provisions of the Code offer adequate protection of these representatives of a foreign power in compliance with the principles of international law. It might be added that the principle of inviolability concerns the exemption of these representatives from the jurisdication of the state where they stay or where they are sent to and does not necessarily include their privileged protection against criminal offenses, provided ~~that the~~ general law of that state protects them sufficiently.

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. Therefore, a husband who committed adultery with an unmarried woman was not subject to punishment. Obviously, this was incompatible with the new Constitution. Japan's legislators were, therefore, faced with the alternative, either to make adultery 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 di-

vided, as could be expected, in such a delicate matter of mores when plausible arguments can be advanced for either solution. The Diet finally decided in favor of complete abolition so that in the future criminal courts will no longer be concerned with adultery. It will, of course, be a ground for divorce and, according to the new Civil Code, regardless of whether it has been committed by husband or wife.

The renunciation of war, as proclaimed in the Constitution of Japan, made necessary essential changes in the provisions concerning treason in time of war. Hitherto, acts of destroying, damaging or delivering war potentials to the enemy were punishable with death, penal servitude for life or for a long period. The same was true of spying for the enemy and betraying military secrets to him. All these provisions have been deleted, and only conspiracy with a foreign power which has forced war upon Japan by aggression remains a grave crime. As the revised Code now reads, every person who conspired with any foreign state and thereby caused this state to use force of arms against the state of Japan shall be condemned to death, and every person who, when a foreign state used force of arms against Japan, has entered into the military service of that state, aiding it or benefitting it militarily, shall be condemned to death or punished with penal servitude for life or not less than two years. These provisions are not in conflict with the constitutional renunciation of war, but serve merely to exercise the right of self-preservation against treasonable acts~~, wholly consistent with the repudiatory right of belligerency of the state.~~

The idea of international cooperation and respect of other nations has motivated the abolition of the strange provision according to which the Criminal Code applied to every foreigner who has committed certain specified crimes against a Japanese citizen outside of the Japanese Empire. It is obvious that such extension of domestic law to acts committed in a foreign country was tied

up with the mythical concept that the Japanese, by virtue of their race and nationality, were in a superior category and that major crimes against them must be punished according to more stringent Japanese standards regardless of where in the world and by whom they had been committed. The deletion of this rule will have the effect that from now on foreigners who perpetrate crimes outside Japan will be tried only by the courts and under the jurisdictional law of the country where they have been committed.

Related to this revision is the amendment of another Article which provided that even though a final judgment had been rendered in a foreign country, the same act might be punished in Japan, and that if the sentence had been executed, either in part or entirely in foreign jurisdication, execution of the punishment might be mitigated. This provision made it possible for an offender, who had served his penalty in the foreign country, to be tried and punished again after his arrival in Japan. Since such device implied a disregard for the administration of justice in other states, this article has been amended by making mitigation or remission of the punishment mandatory on the Japanese courts instead of leaving the matter to their discretion in case the verdict of the foreign court has been in part or entirely executed.

The constitutional safeguards concerning freedom of speech and expression necessitated an important revision of the Code with respect to libel or defamation. Under the old law every person who had injured the reputation of another person by publicly alleging facts was liable to penal servitude or imprisonment not exceeding one year or to fine of not more than 500 yen, regardless of whether such facts were true or false. This complete exclusion of truth as defense 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. A basic revision of this archaic statute was sought which would promote free speech and expression on the one hand, and outlaw calumny and blackmail in public and private life on the other hand. To achieve this, the penalty for libel has been increased to penal servitude or imprisonment up to three years or fine of not more than 1,000 yen. However, 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 public benefits and if the alleged facts are established as true. This general exception is based on the principle that the public interest and benefit shall prevail over the consideration of private honor and reputation. Furthermore, two types of true allegations are explicitly listed as illustrations of this principle. First, facts concerning a criminal act committed by a person who has not yet been prosecuted in relation to such act shall be deemed as having been alleged in the public interest. In other words, since the punishment of crime is of vital concern to the people as a whole, nobody should be punished for helping the law in detecting offenders, provided that his allegations are true. Second, the amendment provides that a true allegation of facts is not punishable if it refers to a public official or a candidate for elective public office. Here 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.

The many remaining revisions are of a more technical nature. Some of them are connected with the fundamental reform of the family law. They eliminate or reduce the special protection or consideration hitherto given in the Criminal Code because of the relationship of the family to the person who committed the crime. Thus, punishment was to be remitted for the crime of theft when it was committed by a lineal blood relative, spouse, relative or member of the house living together with the victim. Now this protection has been limited only to spouses, lineal blood relatives and relatives, omitting members of the house as a consequence of the abolition of this institution.

Another revision aims at facilitating the extinction of punishment in criminal records, in order that the released convict might not be discriminated against because of his former status as a criminal.

Finally, the penalties for a number of offenses have been increased in order to adjust them to changed concepts of the gravity of certain crimes. Among them are ~~arrest or imprisonment of officials abusing~~ the abuse by public officials of their powers of judicial prosecution or as police, as well as the commission of acts of violence or cruelty in the performance of such functions against a convicted person whom the official was guarding. In the first case, the maximum penalty has been increased from 7 to 10 years of penal servitude or imprisonment, and in the last case from 3 years to 7 years. It should be noted that these provisions, punishing abuse of official powers and third degree methods, while on the statute books for a long time, have seldom been applied. As long as Japan was a police state, it required courage for an individual to demand punishment against law enforcement officials. The new constitutional guarantee of freedom of speech,

the responsibility of the executive branch of the government to the Diet, pressure from civil liberties groups, and the popular control of the procurator's actions and omissions will make it increasingly difficult to refrain from indicting such official offenders.

(2) Minor Offenses Law.[1] The Minor Offenses Law 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.

The Minor Offenses Law replaces the old Ordinance since penal provisions under the new Constitution can be enacted only by the Diet unless explicit authorization is delegated to the Cabinet. Care has been taken not to reenact those former provisions which were or could probably be politically abused for interfering with freedom of speech or assembly.

The following illustrations of such minor offenses punishable by minor fines (up to 20 yen) or detention (up to one month) may be listed: illegal possession of dangerous weapons; loitering without fixed residence and without intention to work even though physically fit for work; extinguishing without reason lights on the streets or other lights placed for public convenience; throwing objects in places where they are likely to cause injury or danger to others; failure to keep dangerous dogs and other animals in confinement; beating or ill-treating cattle, horses or other animals and failing to give them proper food and water; peeping into bathrooms, washrooms or other places where people are undressed; spitting or urinating on streets or other public places.

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1 Enacted into law 4/30/48.

3. Procedural Laws:

a. Civil Procedure. The reform of the Code of Civil Procedure was carried out, as in the case of the Civil Code, first by a provisional law--Law for the Temporary Adjustment of the Code of Civil Procedure pursuant to the Enforcement of the Constitution of Japan, - and subsequently by a comprehensive revision--Amendment of the Code of Civil Procedure.16/

Although not directly required by the changes in the new Constitution, the reform of many phases of Civil Procedure was an important legal objective of the occupation. This was true for a variety of reasons, the principal one being the practical and physical limitations of Japanese judicial machinery. The need for reform lay particularly in the field of appellate practices, where, because of the prevalence of frivolous appeals, a tremendous burden was imposed on appellate courts. In the course of the occupation only approximately ten percent of the civil appeals taken in Japan resulted in a modification or reversal of judgments. Furthermore, appellate procedures were extremely sluggish. It was not uncommon for cases to remain in appeal for five, ten or even fifteen years. With the reduction of the Supreme Court from a bench of originally thirty-two to fifteen judges, some drastic reduction in the volume of appeals, as well as in the techniques for handling appeals, was an inescapable necessity. How this could be achieved without interfering excessively with the rights of litigants was perhaps the major problem of civil procedure reform. A partial solution had already been achieved in the provisional code by restricting jokoku appeal, which is mainly concerned with the interpretation

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16/ Appendix H: 38. Law Amending the Code of Civil Procedure; Law No. 149, July 1, 1948.

of law. The general principle is that jōkoku appeals may be taken to the Supreme Court from final judgments in the second instance, or in the first instance if rendered by a High Court. Normally, a civil suit starts in the District Court, goes to the High Court by way of kōso appeal (trial de novo) and then to the Supreme Court by way of jōkoku appeal. In order to relieve the Supreme Court, the previous procedure which permitted four instances in the petty cases starting in the Local Court has been abolished. Now decisions of the Summary Court may be appealed from by kōso appeal to the District Court and against the decision of the District Court, the parties may lodge a jōkoku appeal with the High Court. Thus, the Supreme Court is no longer the only court to hear jōkoku appeals. However, exceptions to the rule that in these cases the High Court is the court of final resort are made when questions of constitutionality are involved. Then a further jōkoku appeal to the Supreme Court is allowed. Moreover, it was necessary to secure the uniformity of legal interpretations and to avoid divergent decisions of the several High Courts and decisions contrary to precedents established by the Supreme Court. Therefore, the Law authorizes the Supreme Court to determine by rules when a High Court deciding on jōkoku appeal must transfer the case to the Supreme Court.*/

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*/ Rule No. 5 of the Supreme Court, Official Gazette No. 459, October 9, 1947, implementing this provision, requires transfer of the case to the Supreme Court in the following instances: in cases in which an opinion concerning the interpretation of the Constitution or any other laws and ordinances would be contrary to that of a decision previously rendered by the Supreme Court; in cases in which an opinion concerning the interpretation of the Constitution or of any other laws or ordinances would be contrary either to that of a judgment previously rendered by another High Court as the court of jōkoku instance or to that of a judgment previously rendered by the former Supreme Court or an old Court of Appeal as the court of jōkoku instance.

A secondary need existed for the improvement of trial procedures in the first instance, and a number of changes were made in this connection. For example, the right of oral argument was expanded; the use of depositions was limited to only those instances in which a witness whose testimony had previously been taken was unable to appear at trial; appeals were permitted from adverse decisions regarding jurisdiction; the possibility of shifts of judges in the course of trial were curtailed; ex officio calling of witnesses on the part of the court was prohibited; public inspection of records was recognized.

On the other hand, certain needs for a strengthening of judicial prestige and the effectiveness of court controls were also apparent. One of the factors resulting in delay in many civil trials was the tendency of witnesses to ignore summons. Although SCAP representatives suggested the adoption of a mild form of contempt of court, this was not followed by the Japanese drafting committee, which felt that a successful introduction of this Anglo-American concept would require a greater preliminary study than was possible at that time. Therefore, the draft revision merely provided an increase in the ordinary variety of penalty which could be imposed on reluctant witnesses. The right to waive appeals in advance of judgment was eliminated as being conducive to a denial of access to courts.

A final reform achieved by revision of the Code of Civil Procedure was the provision for certain added protections of the rights of 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.

b. Administrative Procedure and Related Laws.

(1) Petition Law.[17] It has already been pointed out that with the enactment of the Court Organization Law the Court of Administrative Litigation ceased to exist. Apart from the few cases to which this court had been restricted, official acts of administrative agencies could not be challenged by the individual citizen. Even according to the old Meiji Petition Law[1] applications of a purely administrative character were restricted to the same matters as the jurisdiction of the court. They were also subject to rigid formal requirements. The new Petition Law is based on Article 16 of the new Constitution which allows every person to petition for the "redress of damage, for the removal of public officials, for the enactment, repeal or amendment of laws, ordinances or regulations or other matters". While demanding the written form, the new law removed all limitations on the subject matter of the petition. Moreover, it required the official or entity receiving the petition to give it "sincere consideration". Actually this law does not express much more than the principle already established by the Constitution. The question whether a legal duty should be imposed upon the public authority receiving the application to give an answer to the petitioner had been considered by the drafters. However, due to the apprehension lest the government agency might be flooded with petitions and hence such an obligation would put an unbearable burden on public officials, this idea was rejected. With the new right to challenge any official

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1. Law No. 105 of 1890.

17/ Appendix H: 16, Petition Laws: Law No. 53, March 15, 1947.

act in the courts, the problem of petitions has lost much of its significance.

(2) Law of Special Regulations Concerning the Procedure of Administrative Litigation.[18] The Provisional Revision of the Code of Civil Procedure had already established the principle that all actions for the annulment or alteration of any illegal disposition made by an administrative office may be brought to the regular courts. The scope of such action was meant to be unlimited. The law for the Special Regulations Concerning the Procedure of Administrative Litigation adopts this revolutionary reform and makes the provisions of the Code of Civil Procedure applicable to such actions. The old rule that the citizen must exhaust the administrative channels before he can institute an action was retained, with the important limitation, however, that if no decision were made by the administrative office within three months, court action could, nevertheless, be instituted. The court could also dispense with the petition if "heavy damages" were anticipated.

The other important provisions of the law relate to injunctions against an illegal disposition. Provisions are made to prevent the court from stopping or paralyzing the proper functions of the executive branch of the government. Therefore, the bill admits injunctions only when the court considers them as urgently necessary to prevent 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

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1. Law 71 of 1947, G. G. No. 334, 4/19/47.

2. Enacted into law 4/15/48 by the Second Session of the National Diet.

18/ Appendix H: 37, Procedure for Administrative Litigation Law; Law No. 81, June 25, 1948.

case the suspension of execution is against the public interest. Furthermore, if the Prime Minister declared that the national interest was affected, an injunction must be rescinded. The case as to the remedy of the plaintiff would, nevertheless, continue to final adjudication.

While this provision may be viewed as an encroachment upon the judiciary, the Prime Minister can be expected to use it very sparingly in a country where his Cabinet might fall on a vote of non-confidence as a result of a wrong political judgment. He could 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.

In conclusion, it may be said that the unlimited safeguards which this law guarantees against interference by the state are not only a unique innovation in Japan where rule by official ukase was the law of the past but go even far beyond the remedies granted the citizens of the United States against administrative acts.

It might be argued that the Law confers too much power upon the courts. However the courts can annul administrative dispositions only on the grounds of illegality and cannot pass on questions of administrative expediency and discretion. Whether the device will work in practice depends upon the future attitude of judges. They must find the right balance between safeguarding the rights of the individual on the one hand and a wise self-restraint and consideration for the practical needs of the executive on the other hand.

(3) Law for Administrative Execution by Proxy. The law for Administrative Execution by Proxy was passed by the Diet on May 6, 1948, and came into effect 30 days after promulgation. It abrogated and replaced the old Administrative Enforcement Law, originally promulgated in 1900 as Law

No. 84. The old law provided among other things that administrative authorities could take into provisional custody for 24 hours persons engaged in fighting or in other breaches of peace and if dangerous weapons were found upon such persons the weapons could be held in provisional custody for longer periods of time. These powers concerning provisional custody had been used by the Japanese police as a means of making various types of arrests, detentions, searches and seizures without complying with any of the procedural safeguards of the Code of Criminal Procedure. The old law thus served as an instrument for the suppression of civil liberties.

After the enforcement of the new Constitution, the provisions concerned with provisional custody became inapplicable and were superseded in part by the Provisional Amendments to the Code of Criminal Procedure. Subsequently it was decided that the old law should be formally abrogated but that certain of its provisions dealing with fulfillment of administrative obligations should be embodied, with modifications, in the new Law for Administrative Execution by Proxy.

The essence of the new law is that where a person is required by law to carry out a certain act, but fails to fulfill his obligation to the great prejudice of the public interest, the competent administrative office may proceed to execute such act on its own account, or cause a third party to perform such act and may then collect the expenses of such execution by proxy from the person under obligation to perform such act. Provisions are made for notice in advance of execution by proxy except in cases of emergency or imminent danger where there is urgent necessity for immediate performance of the act and no time to give the normal notice. The expenses are to be collected in accordance with procedure for collection of national taxes. Provision is made for filing of objections and administrative

and court appeals.

c. Criminal Procedure and Related Laws.

(1) Constitutional Guarantees. ~~Code of Criminal Procedure.~~ Nothing affects more the very lives of men and women than the methods by which criminal justice is administered. Life, personal liberty and honor, property and employment are at stake when a person is prosecuted and tried. Therefore, the new Constitution has established elaborate safeguards for the protection of the individual in the field of criminal justice.19/

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 accused has the right to speedy trial, a very important safeguard against the old custom of protracted trials. He may have the assistance of competent counsel and examine witnesses. In the past, even persons suspected of only minor offenses were frequently long held in police custody without being tried, and confessions were often extorted by third degree methods. The law, while forbidding such procedure, left loopholes for circumvention. Now the Constitution sets up the rule that no person shall be apprehended except upon warrant issued by a judicial officer which specifies the offenses with which the accused is charged. He shall not be detained without adequate cause which must be shown in open court in his presence and in the presence of his counsel. Infliction of torture, as well as cruel punishment, is absolutely forbidden.

The two revisions of the Code of Criminal Procedure implement the constitutional safeguards in the spirit of a fundamental change of the criminological attitude. While the provisional revision restricts

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1. See Articles 31 - 40 of the Constitution of Japan.

2. Law for the Enforcement of the Code of Criminal Procedure Pursuant to the Enforcement of the Constitution of Japan, Law No. 75 of 1947, O. O. No. 314, 4/30/47.

19/ Appendix C, 21, Constitution of Japan (Articles 31-40)

itself to essential reforms and has been thoroughly supplemented and intensified by the final revision, it represents a more elaborate piece of legislation than the other provisional codes. The expedient of provisional legislation proved useful in this case because the legislators were in a position to learn from experience with the provisional law. Its provisions will be treated separately inasmuch as they were re-enacted in the final codification.

(2) Law for the Temporary Adjustment of the Code of Criminal Procedure Pursuant to the Enforcement of the Constitution of Japan. The most important reforms are those designed to carry out the principles of the Constitution with regard to arrest and detention. The law provides that no public procurator or judicial police officer shall have the power to issue a warrant of arrest or detention. Only a judge may issue such warrant. As a rule, a warrant of arrest must be procured before apprehending a suspect on reasonable ground of suspicion.

However, the need for a practical device to facilitate the prompt apprehension of a criminal necessitated two exceptions from the rule that the judicial warrant must precede the arrest. Exception is made when there are sufficient grounds to suspect the commission of a serious felony, if in addition, because of great urgency, a warrant of arrest could not be obtained beforehand from a judge. In such a case a public procurator or a judicial police official may apprehend the suspect, but must immediately request a warrant of arrest from a judge afterwards, and if such warrant is not issued must release the suspect at once. The second exception is made when an individual is apprehended in the actual commission of a crime.

In all cases of arrest the warrant of detention must be requested from a judge by the public procurator without delay, and in any event within seventy-two hours from the time of physical apprehension of

the individual. Under the old law this period began from the time the apprehended person was brought to the police station, which made it possible for a police official to delay delivery of the apprehended person by holding him in confinement at a place other then the police prison. The new time provision renders such tactics impossible since the 72 hour period starts from the moment of the physical apprehension and thus rectifies an old abuse. If the warrant of detention is not issued by the judge on request within 72 hours , the apprehended person must be released immediately.

The revised code provides another equally important guarantee of speedy trial. If the public procurator does not bring public action within ten days after requesting warrant of detention, the suspect must be released.*/

Following the principle established in Article 37 of the Constitution, the court must provide counsel for those who cannot afford to hire counsel themselves. Heretofore, the court had to appoint counsel only if the crime was a felony or in certain other special cases involving incompetents and minors and then only upon the advice of the public procurator.

To guard an accused further against arbitrary action, the law abolishes preliminary examination, which generally assumed the character of an "inquisition" and unduly prolonged the criminal process.

The right of privacy in the home, guaranteed by Article 35 of the Constitution, is unequivocally set forth in those provisions of the

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*/ The experience made in the application of this provision indicated that in complicated cases this period was inadequate. Therefore the final revision provides that the procurator may apply to the court for an extension of this period for not more than ten additional days.

law which permits a public procurator or judicial police officer to seize, search, or inspect only with a judicial warrant, except when a criminal is arrested while in the commission of a crime or when they are executing a warrant of arrest or detention.

(3) Law Concerning the Revision of the ~~New~~ Code of Criminal Procedure. The Law Concerning the Revision of the New Code of Criminal Procedure, which was passed by the Diet on 5 July 1948, will become effective on January 1, 1949.[20] The relatively long period between enactment and enforcement was considered necessary to enable judges, procurators, and lawyers to familiarize themselves in the meantime with the sweeping innovations. The account of the conferences preceding its formulation for its submission to the Diet has been related in another part of this report. The following are the highlights of the revision.

Under the old Code, procurator and police records of the examination of suspects, accused or other 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. Moreover, in many cases the only evidence or main proof of guilt offered during the trial was a confession obtained by torture or other third degree police methods.

Under the new Code, persons asked to appear for interrogation by police or procurators will even have the right to refuse and, if they do appear, may refuse to answer any questions and, if not under arrest, may leave at any time. Police and procurator interrogation records will not be referred to or submitted to the court with the indictment before trial and may not be used during the trial as a substitute for oral testimony

20/ Appendix H; 42, Law Amending the Code of Criminal Procedure; Law No. 131, July 6, 1948.

of witnesses who are available to testify in court but who are not called. Witnesses who are available will testify in the court where their demeanor can be observed and be subject to cross-examination. No conviction may be based solely upon a confession, whether the confession is made in open court or outside the court, and no confession will be admitted in evidence if there is any possibility it was not made freely and voluntarily.*/

Formerly, the accused was not given a copy of the indictment before trial and, since service by publication was permitted, his trial could be carried on in his absence without his knowledge. The new Code requires that a copy of the indictment must be served on the accused within two months after it is filed in the court or it will lose its validity retroactively. Service by publication will not be permitted. The accused must be summoned for the trial and, except in the case of relatively minor crimes, the trial will not proceed in his absence or that of his defense counsel. A new provision is made stopping the running of prescription during the time that a person is absent from Japan or so conceals himself that a copy of the indictment cannot be served upon him.

The court will notify the accused of his constitutional rights to defense counsel and to refuse to answer questions during the trial. An accused held under restraint will have the right to be informed in open court of the reasons for his detention and to be released if he has been detained for an unreasonably long period. Such release may be with or without bail. An accused who requests release upon bail shall be

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*/ The reference to confessions in open court was explicitly made in the law because the Supreme Court in one of its first interpretations of the new Constitution had held that para. 3, Art. 38, of the Constitution which states that "No person shall be convicted or punished in cases where the only proof against him is his own confession", did not apply to confessions in open court.

so released as a matter of right except in cases of very serious crimes or if he is an habitual criminal.

Under the old Code release on bail continued even after a conviction pending appeal or execution of a finally binding judgment. Under the new Code bail or suspension of detention will lose its effect at the time of rendition of sentence to imprisonment or graver penalty. However, the court will have discretion to allow bail to continue pending appeal.

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. As a general rule, the judge will ask preliminary questions before the questioning by the parties starts but he has discretion to permit the party which called a witness to examine such witness first if he deems it proper. The parties will also be given greater opportunity to challenge the probative value of testimony and to object to rulings and orders of the court. The court will have greater power to separate or consolidate trials in its discretion and will order separate trials when necessary to protect the interest of co-defendants.

The categories of persons who were privileged to refuse to testify or to testify unsworn under the old Code, because they were remotely related to the accused or had the accused as a patient or a client, are considerably reduced in the new Code. All witnesses who can understand the nature of an oath will be sworn, but a witness may refuse to answer any question which may tend to incriminate himself or a person who is or was his spouse, a blood relative within the third degree, a relative by affinity