within the second degree, a guardian, or a ward. Physicians, dentists, midwives, nurses, lawyers, patent agents, notary publics, and religious functionaries may refuse testimony in respect to secrets of their patients or clients or communicants unless the patient or client has consented to their testifying or the court finds that the privileges are invoked solely for the protection of the criminal and not the patient or the client, as for example where the latter is dead and cannot waive the privilege. Rules of the Supreme Court may permit other exceptional cases in which such testimony may be compelled. In addition to non-criminal enforcement fines, witnesses who refuse to appear or to be sworn in or testify without good reason will be subject to criminal penalties including fines or detention or both.

Perhaps the most important reform concerns the problem of appeal which, in the case of criminal procedure, is even more crucial than in that of civil procedure. The Japanese appeal system was based upon the continental law principle that the appellant is entitled to a complete retrial of all the facts in the appellate court on a Koso appeal. In a case which started in a Local Court, a complete retrial of the facts could be obtained on appeal to the District Court, a second complete retrial of the facts on appeal to the High Court, and finally a jokoku appeal on the law to the Supreme Court. With the shortage of judges, procurators and lawyers in Japan, this appeal system caused great expense and delay and resulted in an ever increasing accumulation of untried cases on appellate court calendars. The provisional Code provided for the same relief as was introduced in the Code of Civil Procedure by excluding, as a rule, jokoku appeal to the Supreme Court if the case was tried in first instance by the Summary Court. Since the new reforms in trial procedure require examination of all available witnesses in court by judges and parties, and the parties will have the right to object to admissibility of evidence, the process of trying a

case will be even slower and more complicated. To repeat this elaborate procedure all over again at least once and sometimes twice on appeal would place an intolerable load on the already overburdened procurators and appellate courts and make the constitutional right of speedy trial a mockery.

Under the old system of trial procedure, where the rights of the accused were not adequately protected, the full retrial by a court of second instance was felt to be a necessary safeguard. But with the far stronger protections now afforded the defendant under the new trial procedure full retrial of a case by an appellate court will no longer be necessary and would be wasteful and socially undesirable.

Consequently, the nature of kōso appeal has been essentially changed under the new Code. The appellate court will never completely re-try the case. It will examine the record of the court below, the arguments of appellant concerning errors committed during the trial, and may call some witnesses and hear some new evidence in order to determine whether or not the original judgment was correct. If the appellate court finds that the original court has made a material error in a finding of fact, it may order the lower court to re-try the entire case, or it may reverse, affirm or modify the judgment and render sentence if the true facts are sufficiently clear from the record of the lower court and such new evidence as has been heard on appeal.

All Kōso appeals, including questions of facts as well as of law, will be heard in the High Courts, whether from judgments in the District Courts or directly from the Summary Courts. The Supreme Court will only hear a limited type of jōkoku appeal based upon an alleged violation of the Constitution or an incompatibility of a judgment with the former decisions of the Supreme Court or of High Courts acting as courts

of appeal. However, the Supreme Court will have discretionary power to hear appeals in any other cases which it deems involve an important problem of construction of law. This type of appeal, somewhat similar to the writ of certiorari in the U. S. Supreme Court, will be allowed only in accordance with the rules of the Supreme Court.

Other important changes in the appeal system under the new Code include elimination of incidental or cross-appeal by the State in cases where the defendant appeals first, and a provision that where the State appeals unsuccessfully the accused shall be compensated for the expenses incurred by him because of the appeal. These changes will alleviate somewhat the hardship to defendants under the old system of unlimited state appeal.

Under the old Code, even after a judgment had become finally binding because it had been affirmed on appeal or because the time to take an appeal had expired, new trials or a re-opening of proceedings were permitted for the benefit of the state as well as the accused in certain very limited categories such as where there was proof of miscarriage of justice, bribery of a judge, or forgery of evidence in the court of first instance. In order to comply with the prohibition of double jeopardy under the new Constitution, new trials or re-opening of proceedings will in the future be permitted only for the benefit of the accused. Provisions concerning use of these procedures for the benefit of the State have been completely eliminated.

The far-reaching reform legislation concerning the Code of Criminal Procedure was absolutely required not only by the new Constitution, but also by the generally recognized need for a modernization and humani-

zation of the criminal process. As far as legal safeguards of the accused are concerned, Continental and common law ideas have both contributed to what, it is hoped, may be a merger of the two systems. The law, as it reads now, is certainly a modern instrument which will free the Japanese administration of justice of many weaknesses if it is energetically and faithfully applied.

(4) Law for the Amendment of the Juvenile Law.

~~(3) Laws Concerned with Juvenile Delinquency.~~ Up to the present time, the system for handling juvenile delinquency has been a complicated one. A juvenile who violated the provisions of a law or ordinance, and who was either apprehended by the police or referred to the authorities by his parent or guardian, was brought to one of the 10,000 offices of the Judicial Protective Society, a quasi-official organization under the control and supervision of the Attorney-General's Office. Decision was made there to refer the juvenile to welfare organizations, for supervision and rehabilitation, or to the District Procurator's Office, where the procurator decided if the juvenile should be treated as a criminal offender. If the juvenile was referred to a procurator's office or if he was brought in directly to a procurator, serious offenders were held for trial in the District Court, while in minor offenses warranting imposition of a light penalty the procurator referred the juvenile to one of the so-called "Juvenile Courts" (Shonen Shinpan Jo). The "Juvenile Court" which was established in the largest urban centers where delinquency was most prevalent functioned as a probation department of the procurator's office and was not part of the judicial system at all. Operating under the procurator, it constituted an agency of the Attorney-General's Office and was staffed by officials of that office.

This system had two basic defects. The procurator did not maintain supervision over the Judicial Protective Society and the institutions and homes to which the juveniles were committed by the responsible authorities, and there existed no system of checks to control the decisions made by the procurators.

As a result of ~~(a) The law for the juvenile law.~~ the Law for Amendments of the Juvenile Law, the Court Organization Law was amended to create an independent court called the "Family Court". One division of this court consists of the Domestic Relations Court, formerly a branch of the District Court, while the other division is the Juvenile Court. The Juvenile Court is, therefore, a division of an independent court, which is an inferior court and part of the judicial system, rather than a part of the Attorney-General's Office, as formerly. The court has jurisdiction over:

i. juveniles (under 20 years of age) who have violated any criminal law or regulation;

ii. those juvenile delinquents whose history is such that it appears likely they will commit crimes; ~~if they are referred to the court by welfare authorities;~~

iii. adults who commit certain specified offenses against juveniles.

The court may not impose a sentence more severe than detention (for less than 30 days) or a fine. If the Juvenile over 16 years has committed an offense punishable by death or penal servitude or imprisonment, the Juvenile Court may transfer the case to the public procurator if the Juvenile Court judge so desires. However, if the court decided

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~~2. Enacted into law on 5 July 1945 by the General Session of the National Diet.~~

that the juvenile whose offense falls within its jurisdiction should be tried by the Juvenile Court, then the "trial" may be conducted either in or out of the court room and must be conducted in camera and in an informal atmosphere. The juvenile and his guardian may have an "attendant" as counsel. If the attendant is not an attorney, the court's approval must be obtained for selection. The court may admonish a juvenile verbally, may return the juvenile to his guardian under such conditions as the court may determine, may commit the juvenile to a suitable institution, organization or individual, may place the juvenile under the supervision of the (Local Juvenile Protection Committee ~~District Youth Crime Prevention and Rehabilitation Board~~,) may send the juvenile to a Child Welfare Agency, or may commit him to a reformatory which is under the jurisdiction of the Attorney-General's Office. However, juveniles under 14 years must be placed under the supervision of welfare authorities.

Provision is made for the use of investigators and for use of such medical, psychological, educational, sociological and other technical aid as the court finds necessary. Appeals may be taken within two weeks of the decision by the Juvenile Court to a High Court on the grounds that the decision was in violation of laws and ordinances, that there were material errors in finding of fact, or that the disposition made was remarkably unfair. If the appeal is dismissed by the High Court, an appeal from the dismissal may be made to the Supreme Court, but only on the ground of unconstitutionality.

4. Miscellaneous New Legislation.

a. Habeas Corpus Act.[21] Article 31 of the new Japanese Constitution provides that "No person shall be deprived of life or liberty, nor

21/ Appendix H: 39, Habeas Corpus Act; Law No. 199, July 1, 1948.

shall any other criminal penalty be imposed, except according to procedure established by law." To implement this principle, essential to the preservation of civil liberties, some form of relief from arbitrary incarceration, along the line of the Anglo-Saxon writ of habeas corpus, had to be introduced into the Japanese law. The policy of the Government Section toward introducing such a novel device was that of waiting for the Japanese to take the first step, since in this field of legislation it would have been especially harmful to impose the legal concepts of the Occupant. It was gratifying that the Japanese, recognizing the need, took the initiative toward this reform. Several drafts were prepared, independently, by the old Supreme Court, the Ministry of Justice, the Provisional Legislative Investigating Committee, and a Bar Association. Although actually introduced by a member of the Diet, the Habeas Corpus Act as finally enacted incorporates the conclusions drawn from many months of study of the various proposals in which Courts and Law Division had been an advising participant.

The Act contains the procedures by which a person, whose physical freedom has been restrained other than by the proper legal processes, may apply for relief. It should be noted that the remedy applies only to illegal restraint. Therefore the court cannot go into the merits of a detention provided that it is made by the authority having legal power to do so. If a person is being so restrained, any person may present an application on his behalf to the High or District Court which has jurisdiction over the place of restraint. The application, which may be either oral or written, must be made by an attorney. However, in extraordinary circum-

~~1. Chairman of the Judicial Committee of the House of Councillors.~~

~~2. Enacted into law on 5/2/48 by the Second Session of the National Diet.~~

stances, it can be made by the applicant himself. The applicant must state the substance and reasons for the application and particularly, if known, the name of the person restrained and the place of restraint, and must offer necessary basis for presumptive proof.

The court which receives the application may dismiss it when it lacks an essential element or necessary presumptive proof. It may also transfer the case to such other court as it deems proper either upon request or upon its own initiative. The Supreme Court has the power to require a lower court to transfer a pending case, irrespective of the stage of its proceedings, and may dispose of it directly.

In order to prepare for an examination at a hearing, the court may make the necessary preliminary investigation of the reasons for the restraint and [redacted] other matters by hearing the statements of the person effecting the restraint, the legal representative of the applicant and interested parties. The preliminary investigation is conducted by one of the judges of the court. The court which received the application must immediately notify the Supreme Court of the case and report to it on the progress made and on the results. This enables the Supreme Court to determine whether or not it wants to take over the case.

The court may, subject to the condition of reappearance at any time in response to a summons, temporarily release the person being restrained either upon the guarantee of an attorney, or with or without the posting of a monetary bond, or take any other appropriate action before the issuance of a judgment.

When it is evident from the results of the preliminary investigation that no grounds exist for the application, the court may dismiss the

application by means of a ruling without conducting a hearing. In this case, when the court has released the person temporarily on condition of reappearance at any time in response to a summons, it summons the person to appear and surrenders him to the person effecting the restraint.

The usual procedure followed by the court is to designate a date and place for a hearing and to summon the applicant or his attorney, the restrained person and the person effecting the restraint. The court orders the person effecting the restraint to produce the person being restrained at the time and place specified and to submit by that date a written answer stating the time, place and reason for such restraint. A statement is appended notifying [redacted] the person effecting the restraint that he is subject to arrest and detention unless he complies with the said order and/or a fine not exceeding 500 yen per day for successive days of delay. There must be a three day period between the service of the order and the date of examination but in special circumstances this period may be shortened or lengthened. The court which originally issued the warrant producing the restrained person and the procurator concerned in the case are notified of the order given to the person effecting the restraint. Representatives of this court and of the Procurator's Office may be present at the examination.

The examination on the day of hearing is conducted in open court. The detained person and his attorney are required to be present and when there is no attorney, the court must select one from the members of the bar. Previous to this if the person being restrained had requested that an attorney be engaged the designated attorney must have been informed immediately by the person effecting the restraint. If no attorney was designated

or if the designated attorney was unable to serve, the person effecting the restraint must have transmitted the request to the local lawyers association in the district where the person was being restrained.

On the day of the hearing, the court considers the contents of the application, the reasons, and the answer of the person effecting the restraint and conducts an investigation on the basis of evidence. If the application is found to be groundless as a result of the hearing, the court rejects it by a judgment and delivers the restrained person over to the custody of the person effecting the restraint. If the application is found to have adequate grounds, the court immediately releases the person being restrained by means of a judgment. An appeal from the judgment of a court may be made to the Supreme Court within three days after such judgment has been rendered. The Supreme Court is also empowered to cancel or alter ex officio the decision or action taken by the lower court.

The act provides that any person who has removed, concealed the person restrained, or committed any other act which interferes with the relief provided by the Habeas Corpus Act or any person who has made a false statement in the written answer to the order requiring information as to the time, place and reason for the restraint of an individual, is subject to punishment by penal servitude of two years or less or by a fine of 50,000 yen or less.

Necessary rules governing the applications, hearings and other procedures may be made by the Supreme Court.

b. Amnesty Law. With the coming in force of the new Constitution on 3 May 1947, amnesty was no longer an imperial prerogative but the respon-

sibility of the Cabinet.*/ An Amnesty Law therefore, enacted by the 92nd Diet, came into effect on the same day as the Constitution.

The law contained provisions relating to the following types of relief afforded from the operation of criminal penalties: general amnesty, special amnesty, commutation of punishment, reprieve and rehabilitation.

(1) By General Amnesty, which is granted by a Cabinet Order specifying certain offenses, convictions lose their effect and the right of prosecution is extinguished.

(2) By Special Amnesty, which is granted individually to specified persons, convictions lose effect.

(3) General Commutation of Punishment, granted by a cabinet order which specifies the offenses or penalties to be commuted, mitigates the penalties, while Special Commutation of Punishment is granted by the Cabinet with the same effect to individual persons who have been condemned.

(4) Reprieve exempts a criminal from the execution of penalty and is granted individually.

(5) General Rehabilitation is granted by cabinet order specifying the conditions to be applied to those convicted criminals who have been deprived of, or suspended from, their civil rights or qualifications because of their conviction. Rehabilitation restores the deprived or suspended rights or qualifications.

(6) Special Rehabilitation applies individually and has the same effect.

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*/ Constitution, Article 73: "The Cabinet in addition to other general administrative functions, shall perform the following functions: ..... Decide on general amnesty, special amnesty, commutation of punishment, reprieve, and restoration of rights....."

Regulations concerning the enforcement of the Amnesty Law stipulated that a public procurator or chief of the prison where individuals are imprisoned may petition the Attorney-General to grant special amnesty, special commutation, reprieve or special rehabilitation. If these privileges are granted, the Attorney-General delivers a writ either of special amnesty, of commutation of punishment, of reprieve or of rehabilitation to the public procurator to be handed over to the persons concerned. The public procurator then enters the fact of amnesty whether it is general or special and other relevant information about it in the original of the court decision. None of these types of relief have a retroactive effect upon results already brought about by conviction.

The prisoner himself may apply for a release through the public procurator or the chief of the prison and this petition must be forwarded to the Attorney-General. Although a time limitation from the time of the pronouncement of the penalty and the time of presenting the petition has been imposed, the Attorney-General may permit the reduction of these periods if the situation warrants an immediate consideration of a petition.

In addition to the Amnesty Act, a Deliberative Committee for the System of Amnesty was established on authority of Article 20 of the Regulations for Enforcement of the Amnesty Law (Minister of Justice Ordinance 78 of 1947).

The Committee is designed to assume some of the prerogatives of the procurators who were formerly all-powerful in matters concerning amnesty.

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1. Ministry of Justice Ordinance No. 78 of 1947, O.G. No. 452, 10/4/47. Regulations for the Enforcement of the Amnesty Law.

2. Cabinet Order No. 288, Regulations governing the Organization of the Deliberative Committee for the System of Amnesty, O.G. No. 452 of 10/4/47.

The Commission investigates and deliberates on matters relating to the Amnesty Law, the Regulations for the Enforcement of the Amnesty Law, coordination of amnesty and parole and revision of the Parole Law, and submits its findings and recommendations in writing to the Cabinet for action.

The Committee under the jurisdiction of the Prime Minister, consists of the Attorney-General, the Director of the National Public Safety Committee, the Minister of Welfare, the Procurator-General, and four men appointed by the Prime Minister.

IV. ADMINISTRATION OF JUSTICE DURING THE OCCUPATION

1. Establishment of a Constitutional Court System.

a. Interim Supreme Court. The establishment of a constitutional Supreme Court and of the inferior court system involved a complete revision of the old judicial system and necessitated the original appointment of every judge in Japan, from the President of the Supreme Court down to the most remote Summary Court judge. With the new Constitution coming into effect as of May 3, 1947, and no Cabinet in being to make the necessary appointments before that date, the entire third branch of the Government was in anomalous state. To insure continuity of the law and to prevent a dislocation of the entire machinery of justice, the decision was made to continue the former Supreme Court personnel en masse as an "Interim Supreme Court" until such time as a new Cabinet was formed and the new Supreme Court could be appointed under the Constitution. The legal basis for such an interim court was found under Article 103 of the Constitution:

> "...judges in office on the effective date of this Constitution....shall not forfeit their positions automatically.... unless otherwise provided by law."

This step was at first opposed by officials of the old Ministry of Justice who were reluctant to see the existing Supreme Court panel set up as a Supreme Court outside their power and control even for the interim. Their last effort to control the Court was by an extraordinary interpretation of the Order for the Enforcement of the Court Organization Law whereby,

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~~Cabinet Order for the Enforcement of the Court Organization Law. Cabinet Order No. 21 of 1947, O.G. Extra (1), May 3, 1947.~~

contrary to the legislative meaning and intent, the 32 judges of the old Supreme Court would have been "deemed assigned to the Tokyo High Court" as of May 3, 1947, for administrative purposes. This brought into the open the tension between the old Supreme Court and the Ministry. Led by the vigorous pleas of President Hosono, a determined faction of the Court asserted and won the absolute independence of the judiciary and its freedom from all executive or administrative control even during its interim status. This was not a new role for Hosono as he had time and again contested executive encroachments on the judiciary, even to the extent of defying Premier Hideki Tojo at the height of his power.

b. Appointments to New Supreme Court. As provided by the Court Organization Law, a Judicial Consultative Appointment Committee for candidates for the Supreme Court was originally selected in April of 1947, with power to deliberate prior to the effective date of the Constitution. The original draft of names for such a committee supplied by the Ministry of Justice called for eleven persons, over half of whom were directly answerable to the Ministry. The Committee was finally made up of the President of the old Supreme Court, a judge of an inferior court, the President of the old Court of Administrative Litigation, the Vice-Minister of Justice, the President of the House of Peers, the Speaker of the House of Representatives, a member of the Imperial Academy, the President of Tokyo Imperial University and the Presidents of the three Tokyo Bar Associations. The Committee was to designate at least two candidates for each of the associate judges of the Supreme Court, and at least three for the President or Chief Justice. While the personal prestige of the Committee was remarkable its effectiveness was not, for in spite of its tremendous responsibility for selecting candidates worthy of the office, the committee acted

hastily and summarily. Apparently acting on political considerations, it proceeded to vote at once, without any discussion of the candidates' qualifications. For President of the Court, they submitted a slate of three persons, two of whom were obviously not acceptable to SCAP, thereby reducing the choice to the candidate favored by the committee from the start.

The result stirred up unfavorable public and official opinion and led to the dissolution of the Committee. The personnel of the second Consultative Committee was selected by a nation-wide vote of all judges to select four to serve on the Committee; a similar election among all lawyers to select four; the Procurator General was a member; the Prime Minister selected four learned men from the universities; and the President of the House of Councillors and the Speaker of the House of Representatives were members, completing the total membership of fifteen persons.

This Committee proceeded more cautiously but under the same Japanese procedure in which discussion and persuasion had no place. Each member submitted a list of persons he considered qualified and the lists were pooled. A total of 139 were nominated and their names published. During the week of publication, 48 persons, among whom were some of the leading legal minds of Japan, requested that their names be withdrawn from consideration. Thereafter the Committee again met and, after more voting, submitted two names for each of the fourteen associate positions on the Court and three names for the President. This list went to the Cabinet.

Although, according to the Constitution, the Cabinet was not bound by the designations of the Committee, it apparently felt itself bound by moral obligation and mandate. Thus, three of the judges and two of the lawyers who

had served on the Consultative Committee and who had managed to have their names included in the designations were appointed to the Supreme Court. Under these circumstances it was ~~almost inevitable~~ apparent that the members of the new Supreme Court would not necessarily be top-rank judicial personalities, ~~and initial~~ ~~appointees will the least distinguished bar members.~~

The appointment procedure delayed the formal establishment of the Supreme Court until November 21, 1947, when the first three cases were tried. In the meantime, it was necessary for the Court to select, for submission to the Cabinet, the names of all the candidates for the inferior court positions. Here the Court was impeded, not by too wide selection, but by a dearth of available judicial talent. When the drafters of the Court Organization Law set the standards for judicial qualifications they expected that many lawyers and scholars would be available for the new judicial positions. The opposite proved true, for not only did new talent fail to volunteer, but many former judges refused positions under the new court system, preferring the more lucrative fields of private law practice, teaching and writing. In addition, an average of thirty district court judges were resigning each month due to economic conditions and the pressure of work. As a result, filling the ranks of the inferior court system has been a long and searching process and one which has definitely added to the back-log of cases and inefficient operation of the court system as a whole.

2. Economic Condition of Judges and Prosecutors. Throughout Anglo-Saxon countries the position of a judge is never made comparable to that of an ordinary government official and provision for salaries is never measured by that pattern. In the United States the salaries of judges are purposely

put at a very high level to insure that in the administration of justice, the possibility of corruption, or physical, social or mental discomfort is reduced to a minimum. With the adoption of the new Constitution of Japan, the elevation of the judicial system has been guaranteed and provision is specifically made that judges "shall receive...adequate compensation."[22/]

The low position and esteem accorded the judges in the past is best reflected in the pitifully inadequate salaries they have received and the official indifference to their official space and housing needs. The procurators have been similarly handicapped.

A survey conducted by the Supreme Court revealed that by the end of 1947 the average judge ran into a monthly excess of expense over income amounting to over five thousand yen, or 148 percent over his income. This deficit was made up by drawing on savings, selling furniture and personal effects, assistance from relatives, borrowing, and even supplementing the meager income by having to engage in side work. This straitened economic condition inevitably undermined what had once been a high ethical standard and greatly increased the possibility of corruption in the judicial system. In addition, confusion and overwork had resulted from piling up of cases causing many judges to resign from the bench. Thus, the difficulty in attracting new personnel with the necessary competence and experience was equalled only by that of holding the good judges who were already in judicial office.

Since they were not assured even the minimum necessary for existence the very people charged with interpreting and carrying out the law sometimes found themselves forced to engage in economic transactions of questionable nature. Concern over this situation led to proposals by the Supreme Court

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22/ Appendix C: 21, The Constitution of Japan (Article 79).

for remedial legislation, toward which the Supreme Commander displayed a sympathetic attitude, as indicated by the following excerpt from his letter of April 1, 1948, to the President of the Supreme Court:

"Thank you so much for the cordial expression contained in your letter of March 29. I believe, as you do, in the establishment of judiciary power as one of the three powers in accordance with the principle of division of powers as expressed in the Japanese Constitution.

"In order to insure the independence of the judges in the exercise of their conscience, it is indeed essential that they enjoy the prestige commensurate with their high office, as well as freedom from economic worries. This can only be accomplished by establishing a level of remuneration for judges which will be a guarantee that the administration of justice is not impeded by a possible temptation of corruption or a standard of living for the judiciary less than that consistent with decency and comfort."

The Diet, on June 15, 1948, passed legislation which raised the compensation of judges and procurators to levels commensurate with their position.

3. Analysis of Attitudes and Particular Cases. In studying the operation of the Japanese judicial system as exemplified by the day-to-day procedure in the conduct of cases in the courts, it is important to remember that the Japanese custom of compromise, in a society so tight and intricate, almost demands the settlement of disputes. Settlement by lawsuit and the use of the judicial process is the last possible resort. Moreover, the Japanese concept of justice differs widely from the Anglo-Saxon. In the American courts, for

instance, the province of a judge is to hear the testimony presented by the litigants and witnesses and to determine from all the evidence. Japanese judges, however, consider it their duty to interrogate and investigate, determine whether evidence is lacking and if so go out and obtain it. Very often a judge will go to the place where the act which is the subject of the controversy or prosecution occurred. Trials are delayed over long periods of time; continuations and postponements are granted as a matter of course and the day of judgment is sometimes never reached.

A few selected cases will serve to illustrate the practice of multiple public proceedings, judgments characterized by indecision rather than decision, the relatively impotent way in which specific legal problems are met - all contributing seriously to the slowness with which the judicial machinery moves. These cases indicate a strange aloofness and inadquacy of outlook on the part of judges who, wearing "judicial blinders" and showing an inclination to apply the provisions of the law legalistically, betrayed a general failure to grasp the political, ethical and social significance of the individual cases before them or the practical consequences of their decisions. There was not the slightest evidence that the judges had yielded to bribery, political influence or intimidation. Nevertheless, there has been mounting criticism, not only from Allied observers but among the Japanese people themselves, of the extreme slowness of judicial processes, and a growing apprehension that political forces were exerting undue influence behind the scenes.

One of the most flagrant cases of defiance of law and abuse of the judicial machinery was that of Kinosuke Ozu, a notorious leader of the Japanese

underworld in Tokyo, whose career received attention even in the foreign press. He was alleged to have been involved in every form of intimidation, extortion, and physical violence together with violations of economic regulations. In April 1947 he ran for the Diet on the Liberal ticket but was defeated. He was arrested on June 27, 1947, and indicted on July 3rd for crimes of violence. Between that date and September 11th, there were 15 public trials. Because of the gravity of the charges, a collegiate body of 3 judges tried the case, prosecuted by two procurators. Three chief defense lawyers and nine other advocates represented Ozu. Four applications for bail were made by the defense on grounds of illness and [redacted] pending civil suit, and four additional motions for bail and physical examination of the defendant were made and heard but refused. On the 12th of September, however, the judges released Ozu to Tokyo University Hospital and suspended detention on the basis of a doctor's statement that the defendant was "suffering from headache, stomach catarrh, neurosis and weakening of his consitution due to the trial." One of the judges even considered it his duty to call on the defendant at the hospital. However, police investigations disclosed flagrant violation of residential restrictions in that Ozu, in company with his lawyers and henchmen, had left the hospital for several hours at a time to visit his old haunts. The pressure of public opinion was so severe that upon application of the procurator the suspension of detention was cancelled. The procurator in charge of the case was transferred to an insignificant position elsewhere and three additional charges were brought against Ozu in December 1947 for violation of price control regulations, intimidation and extortion. Public trials on these charges did not begin until April 17, 1948. At the

time of this report final decision and execution of sentence had only been rendered on the first criminal case when on June 19, 1948, Ozu was sentenced to eight years and 500,000 yen.

In September 1946, a civil action brought in the Tokyo District Court by eleven plaintiffs charged Ozu with illegally occupying land to which he had no title or interest, and erecting a market thereon and renting out stalls. In February 1947, upon application by Ozu for arbitration, the judge appointed an arbitration committee, which action suspended the civil suit under Japanese procedure. After thirteen meetings, the arbitration committee came to a final agreement in October 1947 and all parties considered the matter settled satisfactorily. Strangely enough, Ozu was given until September 1948 to vacate the buildings and in addition one-half of the stall rentals would be paid to Ozu and the other half to the plaintiffs.

Criticism of the handling of the case centered around the long delay in proceedings and the questionable method of permitting arbitration in view of the known criminal tactics employed by Ozu in securing the market by intimidation and his general reputation as a gangster. The court, with its purely technical approach, took the narrow view completely divorced from reality. The case further illustrated the sometimes strange applications of the Japanese theory of "compromise" in considering a case of this sort "settled satisfactorily."

The use of bail in Japanese criminal procedure has been subject to widespread abuse, the leniency with which it is granted to the influential accused being particularly objectionable. The reasons given for this practice are; the increase in crimes of grave nature, shortage of personnel, and the lack of facilities for detention. Habitual offenders, ex-convicts and underworld characters have been released

on bail, resulting in an increase in crimes committed by persons out on bail. Release on bail is often facilitated by "bail lawyers", former judges and procurators who are in a position to use their influence over their old court associates. Such releases are not only discouraging to the policemen who risk their lives to apprehend the criminals (some of whom have sought out and attacked the arresting officers) but undermine the people's confidence in the courts.

In December 1947, for example, Kenen Maki, another Tokyo gang boss with political connections and influence, was arrested on charges of extortion and illegal possession of weapons. Yet on January 30, 1948, he was released from jail for eleven days because of illness of himself and his wife, and in April he was again released for twenty days so he could assist in turning certain hoarded goods over to the government. The defendant's alleged illness, a government workers' strike, the reversal of previous testimony by many witnesses for the prosecution, all delayed the trial. But at last, on May 10, 1948, the court sentenced Maki to two and one-half years imprisonment.

A third prominent case illustrating the use of time-consuming tactics which would try the patience of any American court but which in Japan are countenanced in matter-of-fact fashion, is that involving Rikizo Hirano, former Cabinet member who, upon being purged from public office by the Japanese Government's Screening Committee, appealed to the courts. The District Court, holding that the Committee's action was illegal, issued a temporary injunction prohibiting the Prime Minister from enforcing the Committee's decision. Since the entire purge program, although effected through imperial ordinances and cabinet orders, was in implementation of a directive of the Supreme Commander,

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See section on the removal of obstruction-ists.

the President of the Supreme Court intervened in the matter and declared that the court in question had exceeded its judicial power and that its decision was null and void and without legal effect. When the criminal court then proceeded to take up the charge that Hirano had falsified his questionnaire under the purge ordinances, his counsel contended that the court lacked jurisdiction to hear the case, twisting the Supreme Court's action on the injunction to suit their contention. Counsel even demanded that the court obtain assurance from General Headquarters that any subsequent decision of the court would not be rescinded or overruled through SCAP action. These jurisdictional obstructions being overcome after several more hearings and delays, defense counsel then challenged the right of the sitting judge to hear the case, on the ground that he was prejudiced. This challenge was overruled, but up to early July 1948 no further progress had been made in trying the case.

As an illustration of purely formalistic reasoning without consideration for practicability, the case of Katsumi Kikunami is valuable. Two members of the Elite Masses Party, a rightist political organization, intent on "persuading" Kikunami, a labor leader, against calling a projected strike, called at his house and attacked him with knives, producing serious injuries. At the first public trial the court made the following finding:

> "This case is neither an attempted murder nor a case of political terrorist -- organizations. It is rather a simple case of wounding brought about from indignation -- than that they attempted to carry out their point by resorting to violence."

An application by the defense for bail was granted on the ground that there was no evidence of the existence of any of the grounds for detention under the Code of Criminal Procedure. It required eleven months and a change of judges to bring the case to final hearing. The newly constituted court, however,

sentenced the defendants to ten years penal servitude, and in a courageous decision, ~~made the following statements~~ characterized the crime as:

"...manifestation of the feudal idea of violence which runs counter to the freedom of speech and thought guaranteed under the provisions of the new Constitution."

A peculiar practical result of legalistic application and delay in judicial determination is illustrated in the Aikodo Printing Case. Following a union pay-hike demand a number of union members occupied the Aikodo Company's printing plant in September 1947 and conducted "production control," a Japanese version of the sit-down strike in which the workers assume control of the company and attempt to continue production. The workers were duly arrested, but after their release on bail they immediately reoccupied the plant and continued "production control" until the end of May 1948. The workers not only refused to return the materials deposited in the plant by the company's customers, but in defiance of the company's business policy took and executed new orders and paid the workers' wages out of the profits during the nine-month siege. The court finally held that such a struggle method infringed on the provisions of the new Constitution safeguarding private property and should not be tolerated. Sentences were given for infliction of injuries, breaking into buildings and obstruction of business, ranging from three to six months in jail--all with two years' probation.

One final case should be cited as illustrative of the unusual approach to judicial determination and the length of time it takes to make up the "judicial mind." In the widely publicized "Lese Majesty" case, the Supreme Court on May 26, 1948 dismissed a jokoku appeal from the judgment of the Tokyo High Court which had been filed by one Matsushima on June 28, 1947.

The accused, a member of the Communist Party, had participated in the Tokyo Food Demonstration in May 1946 and had carried a placard written by himself, which read:

"Imperial Rescript of Hirohito:

The national polity is maintained; We, the Sovereign, are eating our fill; Ye, our subjects, be starved and die!

The Imperial Signature and Seal."

The procurators considered this act to be disrespectful towards the Emperor and indicted the defendant on the charge of Lese Majeste under Article 74 of the Criminal Code. On November 2, 1946, one day before the promulgation of a General Amnesty which would have automatically covered this particular case, the Tokyo District Court sentenced Matsushima to penal servitude for eight months, under the general provisions of Article 230 of the Criminal Code covering the crime of libel or defamation.

Both the procurator and the accused appealed to the Tokyo High Court. The case attracted considerable attention inasmuch as it was the first case to raise an issue of infringement upon personal rights and liberties.

During this very period, in connection with the discussions between the Government Section and the Japanese lawmakers on the reform of the Criminal Code, the Japanese were already aware that in the view of the Supreme Commander, the retention of the crime of lese majeste would be an anachronism. In reply to a letter from Prime Minister Yoshida arguing for the retention of the pertinent clauses in the Penal Code, the Supreme Commander in February 1947 had written as follows:

"Dear Mr. Prime Minister:

"I have carefully considered your letter of December 27th in which you request reconsideration of the instruction conveyed by General Whitney to the Minister of Justice on December 20th that Articles 73 and 75, as well as Articles 74 and 76, of the Penal Code be abrogated. In your letter you submit three reasons for the retention of these articles: first, the position of the Emperor under the new Constitution; second, the position of the Imperial family in relation to ordinary individuals; and third, the special provisions which you assert exist in a monarchy such as England for the protection of the King.

"As to your first point, it would appear that to consider an act of violence against the person of the Emperor as "of a character subversive of the State" would be undesirable and inconsistent with the spirit of the new Constitution. As the symbol of the State and of the unity of the people, the Emperor is entitled to no more and no less legal protection than that accorded to all other citizens of Japan, who, in the aggregate, constitute the State itself. To hold otherwise would violate the fundamental concept, clearly and unequivocally expressed in the new Constitution, that all men are equal before the law, with the necessary implication therefrom that no individual, whatever his position, shall be vouchsafed judicial safeguards denied the ordinary citizen, the ultimate repository of all state authority.

"The respect and affection which the people of Japan have for the Emperor form a sufficient bulwark which need not be bolstered by special provisions in the criminal law implying suzerainty. The former concept of a peculiar Japanese national ethic distinctly differing from universally recognized ethical principles was repudiated by the Emperor himself in his Rescript of January 1, 1946, eschewing the myths and legends from which this concept was created.

"As for your second point, I feel that there is even less basis for rationalizing a special position for other members of the Imperial family. The elevation of these members to a higher status under the law could only be construed as a discrimination based upon family origin, the essence of which is repugnant to the emergency of a free and democratic society.

"As for the third point, there is no statutory provision in British law comparable to Articles 73 and 75 of the Japanese Penal Code. In fact, under the statute of 5 and 6 Victoria, Chapter 61, assault upon the British Monarch is punishable as a misdemeanor. Although the ancient Statute of Treasons, ordained prior to representative government during the reign of Edward III, took a more serious view of violence against the King's person and, because a medieval sovereign then embodied in his person all the powers of state, included such acts of violence within the crime of treason. This six hundred year old statute, last revised a century ago, is a remnant of and derived from the age of Germanic feudalism and there is no record of its modern application, nor is there the slightest analogy to the situation now existing in Japan.

"Furthermore, the experience of the United States, where there has never existed any such special safeguards, demonstrates the adequacy of general legislation to punish crimes against even the head of the State. In all instances in American history where violence has been attempted or perpetrated against the person of the President of the United States, even though death has resulted, prosecution of offenders has proceeded under no special statute but in accordance with the general law of the State having jurisdiction.

"Now that sovereignty is vested in the Japanese people, and as in the United States, there is no other sovereign, retention of Articles 73 and 75 of the Penal Code relating to 'acts of violence against the person of the Sovereign' would be an anachronism. It would at once provoke scepticism both among the peoples of the Allied world and the people of Japan as to the good faith embodied in the new concept underlying the constitutional provision for sovereignty.

"In view of the fact that the Japanese Penal Code provides the death penalty for murder and severe penalties for acts of violence against persons, the dignity of human life and the inviolability of the character and person of the individual are fully recognized. It follows that all articles of the Penal Code relating to crimes against the Imperial House are surplusage and should be eliminated by appropriate Ordinance."

Sincerely yours,

DOUGLAS MacARTHUR

The Prime Minister
Tokyo, Japan

The defendant argued that the provisions of Lese Majeste could not be applied because they were contrary to the provisions of SCAPIN 93 which explicitly emphasizes the right of the individual to freely discuss the Emperor and the Imperial institution.[23] Nor could he be punished for libel since the law allowed prosecution only on complaint of the injured party and in this case no complaint had been made by the Emperor. The procurator contended that the sentence of the lower court was improper since Lese Majeste had been covered by the General Amnesty of November 3, 1946. The Tokyo High Court, obviously following the procurator's theory, overruled the sentence of the District Court and found that Lese Majeste had been committed, but acquitted the defendant on the basis of amnesty. Finally, after eleven months of deliberation, the Supreme Court avoided the important and apparent issue of Lese Majeste in a purely technical ruling based on the consideration that in consequence of the Amnesty public action was automatically cancelled and no decision as to guilt or innocence could be made.

23/ Appendix B: 2d, Removal of Restrictions on Political, Civil and Religious Liberties, SCAPIN 93, October 4, 1945.

Early in May 1948 the Diet, acting through its Upper House Judicial Committee and under its constitutional capacity as "the highest organ of state power," initiated an investigation into the conduct and disposition of criminal cases by the courts in general. The reason given for such action was that the judges, as in pre-war times, were exercising their independent judicial powers from a very narrow, formalistic viewpoint without considering social conditions and implications. While not attempting to seek changes in any judgments of the courts, the Committee would in flagrant cases, turn over the results of the investigation to the Impeachment Committee. Some of the cases aired before the Diet Committee have already been referred to. At the time of this report the investigation had not been completed, although a large number of witnesses had been called to testify. Although argument has been advanced that the committee's action is an infringement on the judiciary, this focusing of public and press attention in the manifold shortcomings of the nation's judicial process has already had a salutary effect. Certainly, continuing public ignorance and official condonation of the judiciary's errors and inadequacies could only result in increased incompetence in the courts and endanger the entire administration of justice.

4. Practical Educational Needs

The foregoing factual account has of necessity been candid. The somber picture it presents is relieved, however, by a notable and earnest eagerness of individual judges and procurators to learn and profit from the experience of others.*/ Actual contact with their situation and discussions with them throughout Japan would impress the most pessimistic observer that there are many men of ability in the judicial system who, given constructive criticism and education, have the capacity to install life into the reforms wrought in the judicial system under the Occupation and realize the goals set by the new Constitution.

*/ Since the writing of this report encouragement is found in the fact that the Supreme Court, for the first time in the history of Japan, exercised its novel power of constitutional review in voiding the judgment of a lower court on the grounds that it was based on inadmissable evidence, namely on a confession made after prolonged detention.

The Supreme Court early recognized its responsibility and under the leadership of President Mibuchi brought in key judges from all over Japan for consultation on substantive and procedural matters. As part of its program to build a well-informed judiciary, conversant with the operation of courts in a democracy, the Court assigned representatives of the various High and District Courts to study specific topics of law. Among the subjects were Criminal Evidence, Justice of Peace and Police Courts, Misdemeanors, Labor Legislation, Administrative Procedure, Contempt of Court, Rule-Making Power, Anti-Trust Legislation, and United States Supreme Court decisions regarding unconstitutionality. It was gratifying to see these judges, under severe handicap, poring over the complicated English print, making copious notes and posing interesting and pertinent questions. A prime requirement of the Japanese is access to an adequate, up-to-date working law library, for which constructive plans are now underway.

A most welcome movement would be in the development of visual education and preliminary steps have already been taken in that direction. One of the first was a series of pictorial posters depicting the rights of an accused in a criminal case, such as arrest and detention, public action, right to counsel, search and seizure and fair trial. These were distributed throughout every court and procurators' buildings in Japan. A series of documentary films on American court procedure and legal research would have a profound effect in accelerating the Japanese judicial machinery.

5. Lawyers and Bar Associations.

The relatively insignificant role played by the legal profession in Japanese society, as compared to other countries, is emphasized by the fact that in a population of nearly eighty million people there are only 6,000 lawyers

engaged in active practice, while there are only 1,732 judges provided for by the Court Organization Law. Every lawyer must belong to the bar association in the prefecture where he does business which supervises and disciplines him, and he may belong to a national organization.

At the time the second Consultative Committee made recommendations for the new Supreme Court the three Tokyo bar associations, in an interesting experiment, conducted a joint poll as to the qualifications of each candidate. Questionnaires were submitted to the membership which required answers to the following questions:

> Do you have sufficient information concerning the candidate to express an enlightened opinion in regard to his qualifications?
>
> Does he possess sufficient academic knowledge and experience?
>
> Is he diligent?
>
> Has he the refinements and good qualities of a judge?
>
> Is he honest and open-minded?
>
> Is he cooperative with his colleagues and a person who takes all the factors into consideration?
>
> Can he exercise painstaking scrutiny and make a fair judgment?
>
> Do his personal habits coincide with the dignity of justice?
>
> Do you have confidence in his character?
>
> Would he tend to be bureaucratic, opinionated, or arbitrary?
>
> Would he participate in activities which tend to degrade the qualifications of a judge?
>
> Do you reserve any doubt as to his qualifications as a judge of the Supreme Court of Japan?

The results of the survey were not made public, but the committee in charge did submit to the Cabinet for its consideration in determining the Supreme Court appointments tabulations of the answers received.

At the present time there is considerable conflict of opinion as to the jurisdiction over admission to and the right to practice law. In the past, the former Ministry of Justice exercised that function under the Law for Lawyers and some pressure exists to carry the function over into the Office of the Attorney-General. The Supreme Court, however, sponsors the idea that the study of law, preparation for admission to the bar, and disciplinary control of the legal profession are inherent powers of the highest court of justice of the state, corollary to the jurisdiction over the Rules of the Court which it enjoys under the Constitution. Between these two views, there is that held by the bar associations that lawyers should be able to legislate the practice of law exclusively through the associations.

6. Civil Liberties Union

While in the past there had been sporadic civil liberties movements among labor farmer parties and lawyer groups, the first such movement to be organized on a country-wide basis was the Japanese Civil Liberties Union. Sparked by the initiative of the bar association and a timely visit by Mr. Roger N. Baldwin, Secretary-General of the American Civil Liberties Union, a preparatory committee met in Tokyo in May 1947 and organized the Civil Liberties Union of Japan which held its inaugural meeting on November 23, 1947. The first branch of the Union was established in Kyoto in February 1948 and since then other branches have been set up in all principal parts of the country. The Union functions through five permanent standing committees--investigation, information, legal, public relations and finance. Other temporary committees are those for investigation of the new police system, protection of personal rights, and criminal proceedings. The beneficial effect of the Union was felt early and much has been

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done in connection with public safety commissions, the new civil and criminal codes, domestic relations, labor standards, women and juvenile bureaus. Following the example of other democratic nations which maintain agencies to protect the rights of their citizens, the Japanese Government under the new Constitution has established a Civil Liberties Bureau within the Attorney-General's Office.

The first of their kind in Japan, the Bureau and the Union are confronted with more than the usual difficulties, for with all the advances toward democracy and freedom achieved under the Occupation, it is only natural that time and practice in the use of democratic devices will be required to make them fully a part of the daily thinking and habits of the people. As Mr. Shinichi Umeo, the Director-General of the Union points out in the Nippon Times:

> "...the insular spirit, fostered by the seclusion policy pursued for several centuries past, and the feudalistic habit of mind ingrained by as long years of feudalistic government, cannot be wiped out by a mere revision of laws.
>
> "We are aware that there still occur many instances of infringement on personal rights, but this state of affairs will no doubt be remedied measurably as the economic reconstruction of Japan progresses."

V. CONCLUSION

The reform of Japan's judicial and legal system was an undertaking of monumental scope. Some of the laws were but norms used by a hierarchial government to minimize the rights and powers of the people and maximize its own. To free the Japanese people from the shackles of authoritarianism required a thoroughgoing change of the legal foundations on which the system was based. The time available for the accomplishment of this task was brief. So brief, indeed, that some errors, oversights, or deliberate omissions were inevitable. Yet such was the situation that delay or inaction pending attainment of perfect solutions were

inadmissible. The decisive question was to what extent and in what fashion the laws had to be revised.

Of primary interest in determining the scope of revision were the political aspects of the basic codes for these had a direct bearing on Occupation objectives. The fundamental rights of the people had to be protected, interference by the state in the life of the individual must be restricted to the minimum necessary for the public welfare, and complete equality before the law had to be established. To enable the courts to apply the new Constitution and the implementing legislation impartially and courageously, the judiciary must be transformed into a truly independent branch of the government. These political objectives did not include the improvement of other features of the Japanese legal system, such as awkward legislative technique, unreasonable complexity, and sometimes strange economic theories. Consequently, the first three books of the Civil Code, for instance, which deal with general provisions, property and obligations, remained virtually unchanged, and no overall revision of the Commercial Code was attempted, however useful that would have been from a professional point of view. That the Occupation felt responsible for only certain reforms did not, however, prevent Japanese drafters of the legislation from using the opportunity to effect additional improvements advocated for a long time.

Of equal importance with the substance of the revisions was the method by which they were brought about. Even within the limitation of Occupation objective the principle applied was that no particular piece of legislation should be categorically required or dictated, for it was firmly believed that new legal institutions, if imposed by fiat of the conqueror, would be short-lived. Actually not a single formal directive was issued to the Japanese Government concerning the revisions of the Codes. The desired ends were arrived at through informal con-

ferences featuring suggestions, exchange of ideas, advice and persuasion. In the continuous contacts between the American and Japanese jurists a mutual understanding of the two different legal systems developed which proved extremely helpful for the final solution of the complicated problems involved. The Japanese were eager to know what the American law provided in certain cases, and frequently expressed the desire to adopt similar devices. Sometimes they had even to be discouraged from doing so because the intended reform did not fit into the Japanese legal system. In the field of jurisprudence, the only successful method of persuading others is through constant personal contact, discussion, and argument. Even in an occupied country, this method, if genuinely applied, makes the representative of the occupied state forget the fact of occupation so that he looks at the discussion partner as a kind of colleague with whom he has in common an interesting assignment.

While many legal reforms were thus inspired by SCAP, they were not ordered, and this very fact may justify a certain optimism with regard to their post-occupation survival. It would be erroneous to assume that they will not last merely because of their connection with the Occupation. History teaches that lasting effects were brought about on nations by contacts with the civilization of other countries. The example of Napoleon I may be recalled who, as a pioneer of the ideas of the French Revolution, greatly influenced the political pattern in the European countries which he conquered and occupied. The opinion may be ventured that America, the nation primarily responsible for the occupation of Japan, is the last powerful citadel of the democratic forces in their struggle with totalitarianism whether of the left or of the right. In endeavoring to impress the Japanese people with the ideals of democracy, persuasion, not force, was the instrument, and those ideals have not yet lost their persuasive power.

To rule out altogether the possibility that some time after the Allied Occupation the Japanese will discard as alien and obnoxious all the new concepts which they have accepted with such apparent eagerness and understanding would be self-deception. It is, of course, within the realm of possibility that the laws might be abolished, bypassed or conveniently misinterpreted. It would be idle to deny that among certain reactionary elements such an eventuality would be heartily received, and it may even be expected that a tendency in that direction may actually develop as a temporary reaction immediately following the Occupation. The extent of such a reaction, if it does occur, will in part depend upon how well the courts will interpret the laws in the spirit of the new Constitution. The younger generation of judges promises to live up to this historic task. However that may be, it will be difficult to turn the clock back and actually deprive the people of the rights newly won by legislation. The individual safeguards guaranteed by laws such as the revised Code of Criminal Procedure and the Habeas Corpus Act should not be looked upon even now as mere paper stipulations in statute or code textbooks, for there are vital and powerful social forces at work in their activation. The working classes, organized in new social movements, are beginning to grasp the significance of the reforms for the betterment of the life and happiness of the common man. Japanese women, suppressed for centuries, have come to appreciate the opportunities opened to them in consequence of the abolition of the old house system and the implementation by law of the principle of equality of sexes. They are becoming increasingly aware of their new legal status and, in their own interest, may be expected to strive to integrate it into the actual customs of society. Liberty once enjoyed is not readily given up.