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PROSECUTORIAL INDEPENDENCE IN JAPAN

A. Didrick Castberg†

I. INTRODUCTION AND OVERVIEW

The position of public prosecutor¹ was created in 1872, four years after the start of the Meiji era (1868 - 1912), in a legal system based on both French and German models.² This system was essentially inquisitorial, and judges and prosecutors were given equal status within the Ministry of Justice, to the point that judge and prosecutor sat side by side in the courtroom,³ but initially, at least, the prosecutor did not have independent investigatory powers.⁴ Prosecutors were given these powers starting in 1897 in response to public demands after large numbers of cases resulted in acquittals due to insufficient evidence.⁵ As convictions increased, public confidence in prosecutors grew. The power of the prosecutor reached its zenith during the 1930s, a period also marked by repression and uncontrolled police pow-

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1. Or as it is frequently referred to in Japanese English-language publications, "procurator." However, here we will use the term "prosecutor." See Nagashima Atsushi, *The Accused and Society: The Administration of Criminal Justice in Japan*, LAW IN JAPAN: THE LEGAL ORDER IN A CHANGING SOCIETY 297, 298 (Arthur Taylor von Mehren, ed., & B.J. George, Jr., trans.) (1963).

2. See B.J. George, Jr., *Discretionary Authority of Public Prosecutors in Japan*, 17 LAW IN JAPAN 42, 42 (1984), and Marcia E. Goodman, *The Exercise and Control of Prosecutorial Discretion in Japan*, 5 UCLA PAC. BASIN L. J. 16, 20 (1986).

3. Dando Shigemitsu, JAPANESE CRIMINAL PROCEDURE 14-15 (B.J. George, Jr., trans.) (1965).

4. Goodman, *supra* note 2, at 20; Nagashima, *supra* note 1, at 298.

5. Nagashima, *supra* note 1, at 298.

ers.⁶ With the defeat of Japan in World War II, the entire legal system changed, and with it the role of the prosecutor. The judiciary was taken out of the Ministry of Justice and given independent status under the Diet, and while prosecutors remained within the Ministry, they were given almost complete independence. The essential power of the office and the public's trust in prosecutors did not change, despite abuses that took place prior to World War II.

The allied occupation resulted in substantial changes to the Japanese governmental structure, starting with the writing of a new constitution, penal code, and code of criminal procedure, but it did not change the Japanese character, which has traditionally had a great deal of respect for authority and somewhat different concepts of justice than are found in the West.⁷ Japanese prefer, for example, to focus on those factors that led the individual to commit the offense to a greater extent than strict adherence to the rule of law, a philosophy that is exemplified in the policies and practices of Japanese prosecutors and in the great degree of discretion that they are allowed. This philosophy also supports the Japanese prosecutorial practice of examining not only the evidence, but the circumstances surrounding the offense, including the background of the offender. While this is also done by prosecutors in the U.S. and other countries, the balance between evidence sufficient to convict and mitigating or aggravating factors in the background of the defendant is balanced far more toward the latter in Japan, as we shall see below.⁸ In addition, Japanese are, all else being equal, more likely to opt for restitution whereas Americans more often opt for some form of punishment, usually incarceration.⁹ What we find in Japan, then, is a Constitution and laws made by or greatly influenced by U.S. occupation officials, but with policies and procedures which guide daily decision-making that are unique to Japan.

More importantly, however, this evolution has led to a system of prosecution that is highly independent while strictly adhering to the rule of law. As we shall see below, such independence allows Japanese prosecutors to investigate, and indict if warranted, the most most powerful politicians and captains

6. Goodman, *supra* note 2, at 20.

7. See generally William Clifford, CRIME CONTROL IN JAPAN, 51 - 52 (1976). Some scholars would deny that there is a "Japanese" character. In order to avoid an extensive discussion of this topic, I will simply state that there are unique aspects of Japanese society.

8. On Japanese attitudes toward law, see generally Kawashima Takeyoshi, *The Status of the Individual in the Notion of Law, Right, and Social Order in Japan*, THE JAPANESE MIND 262-87 (Charles A. Moore, ed.) (1967).

9. V. Lee Hamilton and Joseph Sanders, *Punishment and the Individual in the United States and Japan*, 22 LAW & SOC'Y REV. 301, 323-4 (1988).

of industry, as well as suspend prosecution of those who have committed serious crimes. This independence also allows a great deal of discretion in the daily handling of a wide variety of criminal cases. Before prosecution is examined in detail, it will be put into its cultural context through a description of the training of prosecutors, the administrative structure within which they work, and the laws they enforce.

II. BECOMING A PROSECUTOR

Becoming a prosecutor in Japan is significantly different than it is in the U.S., and while there are similarities in their functions, the differences in the way they perform those functions and in the final product of their work is substantial. In the U.S., one may apply to any of hundreds of law schools, normally after completion of a bachelor's degree, and upon graduation from law school, apply to work for a prosecutor's office in one of many different jurisdictions.¹⁰ In Japan, there is only one "law school," the *Shihō Kenschūsho*, or Legal Training and Research Institute (hereafter "Institute"),¹¹ and prosecution is centralized at the national level. Prior to the allied occupation, judges and prosecutors were trained together, while private attorneys received different, and probably inferior, training,¹² but since the end of WWII, all three categories of legal professionals are educated at the Institute. The selection process in the U.S. involves initial admission to and graduation from an undergraduate institution, admission to and graduation from a law school,¹³ and finally, hiring by a prosecutor's office. In Japan, while the initial admission to an undergraduate institution is similar to the U.S. model, admission to the Legal Training and Research Institute is more difficult than getting into even the most selective law schools in the U.S., with only about 700, or about 3%, of the approximately 24,000 of those who apply being admitted.¹⁴ Thus, only a very

10. There are some exceptions to this process, as it is possible in some universities to combine one's senior year with the first year of law school. There are almost two hundred law schools accredited by the American Bar Association (ABA), with many others either accredited by the state in which they are located or not accredited at all.

11. The Institute is located in Chiba Prefecture, just outside of Tokyo, in very modern facilities. While many students major in law as undergraduates, a degree in that subject does not qualify them to practice law. Only graduation from the *Shihō Kenschūsho* permits a person to practice law as a private attorney, public prosecutor, or judge.

12. Goodman, *supra* note 2, at 20.

13. Admission is based primarily on undergraduate grade point and the Law School Aptitude Test score.

14. In 1995, 24,488 sat for the exam, with only 738 passing. THE JAPAN TIMES, Nov. 1, 1995, at 4. For data on the Japanese Bar Exam pass/failure rate for 1949-1976, see Abe Hakaru, *Education of the Legal Profession in Japan*, THE JAPANESE

select group are admitted; most are males, and a disproportionate number are graduates of elite private and public universities. The curriculum of the Institute consists of classroom instruction for two four-month periods, at the beginning and end of the two-year program, divided by four-month periods spent in district courts (civil and criminal departments), district prosecutors' offices, and prefectural bar associations.¹⁵

Japanese graduate legal education, then, consists of both classroom and apprentice training, as contrasted to the three-year curriculum of U.S. law schools which emphasizes classroom instruction. It should also be noted that most students at the Institute have completed a bachelor's level degree in law, focusing on the Six Codes (*Roppō*),¹⁶ and are therefore already well-versed in statutory law, but lack practical knowledge and training.¹⁷ U.S. law schools, on the other hand, do not expect their students to have any prior legal training. Inasmuch as Japan is a civil law nation, little emphasis is placed on reading appellate court decisions in undergraduate Japanese law programs or at the Institute, whereas such decisions are the major ingredient of legal training in the U.S., a common law nation. The recent Institute graduate, then, has trained in both the theory and practice of law over at least a four-year period (two years of upper division undergraduate work, and two years of graduate work at the Institute), while the U.S. law school graduate has almost exclusively studied appellate court decisions in a three-year program.¹⁸ Successful Institute graduates may choose to become lawyers in private practice (*bengoshi*), assistant judges¹⁹ (*hanji ho*), or prosecutors (*kenji*). About 11% choose to become prosecutors.²⁰

LEGAL SYSTEM: INTRODUCTORY CASES AND MATERIALS, 566, 577 (Tanaka Hideo, ed., 1976). The "bar examination" (*shihō shiken*) consists of three parts: a basic exam testing background knowledge, a multiple-choice and essay exam which tests the legal knowledge of the candidate, and an oral exam which is open only to those who have passed the second exam phase. See *id.*, 566-68, and Noda Yosiyuki, INTRODUCTION TO JAPANESE LAW 142-43 (Anthony H. Angelo, ed. and trans., 1976).

15. Tanaka, *supra* note 14, at 568.

16. The Constitution (*Kenpō*), Civil Code (*Minpō*), Penal Code (*Keihōten*), Commercial Code (*Shōhō*), Code of Civil Procedure (*Minji Soshōhō*), and Code of Criminal Procedure (*Keiji Soshōhō*).

17. On the significance of law as an undergraduate major in Japan, see Byung Chol Koh, JAPAN'S ADMINISTRATIVE ELITE 94-99 (1989).

18. U.S. law schools are starting to put more emphasis on the practical aspects of law, with many requiring clinical training and strongly urging between-term internships in courts or law offices.

19. After ten years in that capacity, these assistant judges will become judges (*hanji*).

20. Government of Japan, Ministry of Justice, CRIMINAL JUSTICE IN JAPAN, 45-46 (1960). A slightly larger percentage opt for the judiciary, while about 75% go into private practice. The Ministry of Justice, under which the Institute is operated, may deny a graduate's first choice — some are not allowed to become judges or

Upon graduation, the fledgling Japanese prosecutor is appointed to the Tokyo District Public Prosecutor's office and undergoes a two month training session, after which he or she is assigned to a large prosecutor's office (somewhere other than in Tokyo) for further on-the-job training and, initially, to work on minor cases.²¹ Prosecutors' offices in Japan are hierarchically divided into 448 Local Prosecutors (*Ku Kensatsuchō*), 50 District Public Prosecutors' Offices (*Chihō Kensatsuchō*), eight High Public Prosecutors (*Kōtō Kensatsuchō*), and the Supreme Public Prosecutor's Office (*Saikō Kensatsuchō*),²² and deal with cases heard in Summary, District, High and Supreme Courts, respectively. District Prosecutors, which handle the investigatory and trial phases of all serious criminal cases,²³ are functionally divided into departments of Public Safety, Traffic Affairs, General Affairs, Criminal, Investigation, and Public Trials.²⁴ While there is generally no specialization with respect to specific categories of offenses in either investigation or trial divisions, Tokyo, Nagoya and Osaka have Special Investigation Departments (*Tokubetsu Sōsa-bu*) devoted solely to cases involving official corruption and white-collar economic offenses, with prosecutors specifically selected for that department based on their experience, expertise, and motivation.²⁵

The Office of Public Prosecutor is nominally part of the Ministry of Justice (*Hōmushō*), but the Prosecutor-General (*Kenji Sōchō*) is appointed by the Cabinet, and the Minister of Justice (*Hōmu Daijin*) is prohibited by law²⁶ from exercising control over specific cases. Political interference is almost unheard

prosecutors. One commentator has suggested that the reason so few opt for prosecution is the difficulty of the work and frequent transfers. See Yamashita Terutoshi, *Criminal Justice in Japan — Prosecution*, at 1 (1996) (paper written for the 103rd Course of the United Nations Asia and Far East Institute (UNAFEI)).

21. Yamashita, *supra* note 20, at 2.

22. *Id.*

23. Japanese law does not make a distinction between misdemeanors and felonies but does include a category of crime called "minor offenses," which includes offenses that in the U.S. would be defined as trespassing, possession of burglar tools, disturbing the peace, loitering, etc. *Keihanzaihō*, or Minor Offenses Law, No. 39 (1948, as amended).

24. In 1996, the departments of Public Safety in medium sized offices were replaced by departments of Special Criminal Affairs, which handle white-collar crimes. Tokyo alone has a department of Special Trials to deal with corruption. See Ueda Koichi, *International Cooperation in the Economic Crime Investigation*, at 2 (Oct. 30, 1996) (UNAFEI working paper), and interview with Prof. Akane Tomoko, United Nations Far East Institute (Sept. 16, 1997).

25. Koichi, *supra* note 24; Interview with Prof. Akane, *supra* note 24; Ito Shigeki, *Characteristics and Roles of Japanese Public Prosecutors*, at 71 (Dec. 1986) (UNAFEI Resource Material Series), and Yamashita, *supra* note 20, at 6.

26. *Kensatsuchō Hō*, or Public Prosecutor's Office Law, No. 61, Art. 14 (1947, as amended) [hereinafter PPOL].

of.²⁷ Compare this process to that in the U.S., where the head prosecutor²⁸ is either appointed or elected, both results of political processes, and where deputy or assistant prosecutors, or U.S. attorneys, are not always protected by civil service provisions.²⁹ The Japanese prosecutor has been referred to as a quasi-judicial and executive officer simultaneously,³⁰ a phrase which emphasizes the independence and authority of the office. As B.J. George, Jr. has pointed out, Japan has adopted the principle of discretionary, as opposed to mandatory, prosecution, which means in practice that the judge can exercise no authority until after an indictment has been filed, and that the office of the prosecutor is essentially independent of executive, legislative, and judicial bodies.³¹ Japanese prosecutors, therefore, have a great deal of independence in deciding whether to indict.³²

New prosecutors quickly learn these norms. Throughout their careers, prosecutors can expect to be transferred every two or three years, and will therefore gain experience in large cities and relatively small communities, as well as absorb the norms of the various offices in which they work. There is, therefore, a great deal of consistency in rules and procedures from office to office.³³ Some of this consistency, of course, is due to the Public Prosecutor's Office Law (*Kensatsuchō Hō*), the Prosecutor's Manual (*Kensatsu Kōgian*), and internal rules, but in large part it

27. There is only one known occasion where a Minister of Justice directed the Prosecutor General on how to handle a specific case. Public criticism was immediate and harsh, and the Minister resigned almost immediately. Ito, *supra* note 25, at 74.

28. The head prosecutor may have the title of "prosecutor," "state's attorney," "district attorney," etc.

29. An assistant U.S. attorney in Chicago was recently fired after a number of the convictions he obtained against gang members were overturned due to prosecutorial misconduct. See *Ex-U.S. Prosecutor In Rukn Case Appeal Firing*, CHICAGO TRIBUNE, May 15, 1996, via [www <http://www.chicago.tri. . .higago/9605150216.html>](http://www.chicago.tri. . .higago/9605150216.html).

30. Shikita Minoru, *Prosecutorial Powers and Discretion in Japan*, in *ROLE OF PUBLIC PROSECUTORS IN CRIMINAL JUSTICE: PROSECUTORIAL DISCRETION IN JAPAN AND THE UNITED STATES* 5, 5 (1980).

31. George, *supra* note 2, at 48.

32. The indictment of former Prime Minister and powerful politician Tanaka Kakuei is only one example, while the Sagawa Kyubin case resulted in the indictment of the company's president, Watanabe Hiroyasu, and several politicians. See *infra*, at 342-45. Whether Japanese prosecutors were always this zealous, however, is questionable. See Charles Smith, *Gunning for Graft: Public Backs Prosecutors Hard Line on Corruption*, 157 FAR EAST. ECON. REV. 20 (Dec. 1993 & Jan.1994).

33. Frequent transfers also reduce the likelihood of corruption and the establishment of relationships that might compromise prosecutorial objectivity. Prosecutors may be assigned to non-prosecutorial duties as well, including duty in Japanese embassies, teaching at the Legal Research and Training Institute, and teaching at the United Nations Asia and Far East Institute.

derives from shared norms and professional goals.³⁴ This contrasts to the U.S., where each county, and many large cities, have their own prosecutors, and where at the state level the state attorney general may exercise prosecutorial functions. In any given state, prosecutors enforce the same state (and, in the case of city prosecutors, municipal) law, but policies and norms vary considerably, resulting in substantial differences in how violations of the same law are prosecuted.³⁵ At the federal level, U.S. attorneys, appointed by the President, enforce federal statutes, and there is therefore a great deal more consistency in federal prosecutorial functions across the nation. In Japan, one agency enforces one set of laws for the entire country. Japanese prosecutors can be fired only under extraordinary circumstances, and by law are supposed to undergo review every three years by the Committee for the Examination of Qualifications of Public Prosecutors (*Kensatsukan Tekikaku Shinsakai*).³⁶ Finally, there are only about 1000 prosecutors in Japan, which has a population of approximately 125 million, compared to the U.S. with a population of approximately 265 million and over 20,000 prosecutors (state and federal),³⁷ or a ratio of 1:13,250 in the U.S. and 1:125,000 in Japan.

III. THE PROSECUTORIAL PROCESS

A. INITIATION AND INVESTIGATION

Japanese prosecutors are granted statutory authority and operate under specific provisions of the law, ranging from the Pub-

34. There may be regional variations in prosecutorial policies. Prosecutors in the Kansai (Osaka) area are said to recommend somewhat lesser sentences for routine offenses than prosecutors in the Kanto (Tokyo) area.

35. Too much should not be made of differences in prosecutorial policies from one jurisdiction to another in the U.S., however. A major study completed in 1982 found that there are general principles and policies of prosecution that cut across jurisdictional lines, what the authors call the "amazing consistency that prevails in prosecutorial decision making systems throughout the United States." See JOAN E. JACOBY ET. AL., U.S. DEP'T OF JUSTICE, PROSECUTORIAL DECISION MAKING: A NATIONAL STUDY 27 (1982).

36. PPOL, art. 23 (2) - (4). There is some question as to whether this review actually takes place, as no prosecutor that I interviewed was aware that they had undergone such a review. They are, of course, supposed to be reviewed by their superiors and receive feedback on these reviews.

37. Japanese data from personal interview with Sakai Kunihiko, Tokyo District Public Prosecutors Office, Mar. 5, 1996. See also Tanaka, *supra* note 14 at 553. U.S. data from Dawson, et. al. (Dep't of Just., Bureau of Just. Stat., 1993), p. 14 (1992 data). It should be noted that in addition to prosecutors in Japan there are assistant prosecutors (*fuku-kenji*) with limited responsibility and authority. See PPOL, arts. 16 and 18. There is increasing concern that the number of prosecutors (and judges) is inadequate to handle the increasingly complex types of crimes facing Japan. See *Bold Judicial Reform Needed*, THE DAILY YOMIURI (Sept. 22, 1996) <<http://www.yomiuri.co.jp/newsj/0922dy13.htm>>.

lic Prosecutors Office Law (*Kensatsuchō Hō*) to the Code of Criminal Procedure (*Keiji Soshōhō*).³⁸ This statutory authority is quite broad, allowing prosecutors not only to initiate cases on their own, but to exercise considerable control over the police.³⁹ It also gives them the power to suspend prosecution “in the interests of justice,”⁴⁰ a power that we will examine in more detail below. In addition to the laws noted above, there are rules and policies applicable at the national level as well as at the individual office levels. Laws, if any, dealing with the authority of prosecutors in the U.S. are generally much more vague. Prosecutors in Japan, unlike their counterparts in U.S., may appeal unfavorable verdicts, including sentences.⁴¹

The vast majority of cases handled by prosecutors in Japan, of course, are ordinary crimes, sent to them by the police. After receipt of a case, a prosecutor in the investigations division of the prosecutor’s office reviews the material sent by the police and then decides whether or not to indict. It should be noted, however, that the police in Japan, as in the U.S., have some discretion to screen out cases they feel should not be prosecuted.⁴² As is the case in most countries, the initial investigation of most crimes in Japan takes place by the police, but crimes involving political corruption and many other “white-collar” offenses most often are initially investigated by prosecutors, and it is not unusual to see on Japanese television news a raid by prosecutors on an office or a home, something virtually unheard of in the U.S. Regardless of whether the investigation is initiated by the prosecution or police, investigation is quite thorough, and involves factors not normally relied upon by either police or prosecutors in the U.S. and other countries, factors which will be discussed below.

One of the great fears of Japanese prosecutors is that a suspect will destroy evidence, so many initial investigations, especially in corruption cases, are made secretly to gather sufficient

38. A. DIDRICK CASTBERG, *JAPANESE CRIMINAL JUSTICE* 57 (1990).

39. See Ito, *supra* note 25, at 67.

40. *Keiji Soshōhō* (Code of Criminal Procedure), art 248, Law No. 131 of 1948, as amended [hereinafter CCP].

41. See, e.g., *Prosecutors Appeal Fujinami Acquittal*, *The Daily Yomiuri* (Nov. 30, 1996) <<http://www.yomiuri.co.jp/news/1130dy12.htm>> (discussing prosecutors’ appeal of the acquittal of a member of the House of Representatives who was alleged to have taken a bribe in the infamous Recruit Scandal, to be discussed below.)

42. Article 246 of the CCP states that police shall, upon completion of investigation, send all cases to the prosecutor except cases as designated by the prosecutor. Prosecutors send policy guidelines on such cases to the police, and police are supposed to send a list monthly to the prosecutor listing all cases not forwarded and the reasons therefore. This process is known as *bizai shobun* (disposition of minor crimes). See Daniel H. Foote, *The Benevolent Paternalism of Japanese Criminal Justice*, 80 CAL. L. REV., 317, 342-46 (1992).

evidence for a search warrant and an arrest warrant so that the suspect may be detained long enough for prosecutors to seize all relevant evidence and use that evidence to bring about an indictment.

B. DETENTION

In Japan, a suspect may be detained for a maximum of 23 days prior to indictment. The implications of this are many. In the U.S., for example, a person who has been arrested must be taken before a neutral magistrate (judge) within a fairly short time after arrest, normally 48 hours, at which time the magistrate informs the accused of his or her rights, arranges for counsel should the accused be indigent, sets bail, and establishes a date for a preliminary hearing.⁴³ In Japan, the accused may be held for up to 48 hours by the police and then either released or transferred to the custody of the prosecutor, who may hold the accused for another 24 hours before deciding either to release the individual or to request a judge to extend the detention period by up to ten days. If additional time is needed for investigation by the prosecution, another ten day extension may be requested of a judge.⁴⁴

The police and prosecution have, then, a considerable period of time during which to interrogate the suspect, but in difficult cases this amount of time may be insufficient, so the practice of *bekken taiho*, or "arrest for a different crime" has developed.⁴⁵ This controversial practice allows police (and rarely, prosecutors) to arrest a suspect for an offense for which there is ample evidence to indict and detain that suspect while developing evidence to arrest for another more serious, and sometimes separate, offense.⁴⁶ Each offense for which a suspect is arrested can result in a maximum of 23 days of detention within which the prosecutor must either indict or release the suspect, so it is possible to keep a person in custody for a considerable period of time by consecutively arresting that person for different offenses. *Bekken taiho* is only used in serious cases and then only infrequently, as judges

43. Specific practices may vary to some extent from state to state, but the requirement to be brought before a neutral magistrate soon after arrest is a firmly established constitutional right.

44. CCP, arts. 203 - 208. Suspects must be informed of their right to counsel upon arrest.

45. See William B. Cleary, *The Law of Criminal Procedure in Contemporary Japan*, 41 THE HOKKAIDO L. REV. 1284, 1337-38 (1991); Daniel H. Foote, *Confessions and the Right to Silence in Japan*, 21 GA. J. INT'L & COMP. L., 415, 440-45 (1991), and Ishimatsu Takeo, *Are Criminal Defendants in Japan Truly Receiving Trials by Judges?*, 22 LAW IN JAPAN, 143, 148 (1989).

46. On this practice, see Cleary, *supra* note 45, at 1338, and Foote, *supra* note 45, at 440-445. Such practices are not, of course, unheard of in the U.S.

may dismiss the case against a defendant whose multiple arrests and subsequent detention were the result of *bekken taiho*. An example of *bekken taiho* may be found in a 1997 case involving the kidnapping and murder of a 13-year-old girl in Nara Prefecture. A suspect in the case was arrested for kidnapping on July 23, which gave prosecutors a deadline of August 13 to indict or release. He at first denied any knowledge of the crimes, but after extensive interrogation he led police on August 1 to the body of the girl, and on August 3 admitted to killing her. On August 8, he was arrested separately for the killing, thereby giving police and prosecutors at least another ten days to question the suspect. Investigators said that the suspect decided to confess after he was reminded that his family would suffer if he did not.⁴⁷

Once the suspect is indicted, prosecutors may ask a judge to hold a defendant without bail;⁴⁸ judges have considerable discretion in bail decisions but give great weight to recommendations of the prosecutor.⁴⁹ Bail is provided for in Article 89 of the Code of Criminal Procedure, but it is not a constitutional right, as it is in the U.S., and there are many grounds on which a judge may deny bail. Under Article 39 (1) of the Code of Criminal Procedure, detained suspects have the right to talk to their attorneys,⁵⁰ but Section 3 of the same article states that prosecutors may control access of defense counsel (as well as anybody else) to a detained suspect, and while in most cases prosecutors do not object to such access, under some circumstances this power is exercised such that access is severely restricted.⁵¹ Prosecutors argue that unlimited access risks the destruction of evidence, leaks to the media, and other problems, but have in recent years eased up on such restrictions, at least in part due to criticism from defense attorneys and scholars.⁵²

47. *Nara Suspect Rearrested in Murder of 13-Year-Old Girl*, ASAHI NEWS (Aug. 13, 1997) <<http://www.asahi.com/english/enews/enews.html>>.

48. CCP, art. 89.

49. During an interview with a judge, I asked why judges do not simply tell prosecutors what to do or what not to do more often, as it seemed from prior interviews as well as media reports that judges "ask" prosecutors to, for example, turn over evidence, rather than "tell" or "direct" them. The response was that judges and prosecutors have to work together very closely and it would not be appropriate under those circumstances for judges to exercise all of the power granted them by law. Neither wanted the relationship to be defined by power. Interview with Judge Megumi Yamamuro, Legal Research and Training Institute, (Mar. 12, 1996).

50. CCP, art. 39 (1).

51. See Foote, *supra* note 45, at 432-33, and Goodman, *supra* note 2, at 32. The right of the prosecutor to control access of counsel to detainee was upheld by the Supreme Court in *Sugiyama v. Osaka*, Supreme Court Judgment of July 10, 1978, 32 *Minshu* 820, 903 *Hanrei Jiho* 20.

52. Interview with Prof. Masahito Inouye, Tokyo University (Mar. 21, 1996). See also B.J. George, Jr., *Rights of the Criminally Accused*, 53 *LAW & CONTEMP. PROBS.* 71, 94 (1990), and Cleary, *supra* note 45, at 1337. This is not just an abstract

There is a right to counsel in Japan, but counsel for the indigent is not provided by the government until after indictment, thereby placing few restrictions on police and prosecutorial control of the suspect during the pre-indictment confinement period. Attorneys are available to those who have been arrested, however, and the Japanese Bar Association, which has a branch in every prefecture, has an on-call service which will provide basic advice to those who avail themselves of the opportunity. Most of those arrested do not. Those who can afford their own counsel, of course, may have access to that counsel prior to indictment, subject to the above-noted limitations. This differs significantly from the U.S., where the accused has a right to counsel from the arrest stage on, and where access to counsel is not controlled by the police or prosecutors, other than for security reasons.

Suspects may be detained in either of two facilities, the *kōchisho*, pretrial detention houses under the jurisdiction of the Ministry of Justice, or *ryūchijo*, police detention cells.⁵³ The prosecutor recommends which facility to use when requesting detention. The vast majority of suspects are held in the police cells, which are more numerous than *kōchisho* and much more convenient for police, prosecutors, and defense attorneys. Detention in these facilities is controversial however, as it is alleged that relentless police interrogation of the suspect can occur in the *ryūchijo*, interrogation that would not be as easy in Ministry of Justice facilities, which may be some distance from police stations or prosecutors' offices.⁵⁴ Nevertheless, such detention and interrogation has consistently been upheld by appellate courts, unless it was accompanied by procedural irregularities. It is generally accepted in Japan that detention is for the purpose of questioning, that questioning involves more than just the details of the crime itself, and that confessions are best obtained through prolonged contact between suspect and interrogator.⁵⁵

issue. A lawyer working for the Aum cult, which is accused of the poison gas attacks on Tokyo subways, has admitted taking cult documents to cult members detained by the police, documents which urged them to remain silent and instructed them on how to respond to a new law which was to take effect soon thereafter. *See Aum Lawyer Admits He Delivered Asahara's Messages to Detainees*, YOMIURI SHIMBUN (May 22, 1996) <<http://www.yomiuri.co.jp/newsj/0523dy08.htm>>.

53. Police detention cells are also known as *daiyō kanagoku*, or "substitute prisons." *See* Horiuchi Kunihiro, *Japan*, in *CRIMINAL JUSTICE PROFILES OF ASIA: INVESTIGATION, PROSECUTION, AND TRIAL* 69, 73 (UNIFEI, Horiuchi Kanihiro, ed., 1995), and Murai Toshikumi, *Pre-Trial Detention and the Problem of Confinement*, 23 *LAW IN JAPAN* 85 (1990).

54. *See* Christopher James Neumann, *Arrest First, Ask Questions Later: The Japanese Police Detention System*, 7 *DICK. J. INT'L L.*, 253, 259-62 (1989).

55. *See* Hirano Ryūchi, *Diagnosis of the Current Code of Criminal Procedure*, 22 *LAW IN JAPAN* 129, 133, 135-36 (1989).

IV. NATURE OF THE OFFENSE: DEFINITIONS

Laws enforced by Japanese prosecutors include the Penal Code (*Keihōten*), the Minor Offenses Law (*Keihanzaihō*), the Income Tax Law (*Shotokuzeihō*), the Securities Exchange Law (*Shōken Torihikihō*), the Political Funds Control Law (*Seiji Shikin Kisei Hō*), the Law Controlling Possession of Firearms and Swords (*Jūhō Tōkenrui Shojitō Torishimarui Hō*), the Law Concerning Prevention of Unjust Acts by Organized Crime Members (*Boryokudan Niyoru Hutōna Kōi no Bōshi Nado ni Kansuru Hōritsu*), and others. Many of the laws regulating political contributions, financial transactions, environmental protection, and professional negligence that in the U.S. are civil in nature, or are most frequently applied that way, are criminal in Japan.

Prosecutors in Japan received and initiated cases involving 2,095,047 suspects in 1994, 297,202 (14%) of which were juveniles, a 3.9% decrease over 1993.⁵⁶ See Table I.

56. Government of Japan, Research and Training Institute, Ministry of Justice, *Summary of the White Paper on Crime 1995* at 55 [hereinafter *Summary 1995*].

Table I
Number of Suspects Received by Public
Prosecutors, 1994

<i>Penal Code Offense</i>	<i>PC Article</i>	<i>Total</i>	<i>Juveniles</i>
Homicide	199	2,211	77
Robbery	236	2,972	1,093
Bodily Injury†	204	25,087	8,235
Assault	208	4,141	835
Extortion	249	9,354	5,059
Larceny	235	132,277	81,314
Fraud	246	11,350	579
Embezzlement	252-254	33,811	27,764
Rape	177-181	1,446	—
Indecent Assault	176	1,610	656
Public Indecency	174	900	—
Dist. of Obscene Material	175	917	67
Arson	108-110	824	87
Bribery	197-198	408	—
Gambling	185-186	3,398	48
Violent Acts		2,823	791
Traffic Prof. Negligence	209-211	659,188	49,092
Other		19,636	3,351
<i>Special Law Offenses</i>			
Firearms and Swords		3,771	461
Stimulant Drugs		20,079	990
Poisonous Agents		11,812	7,335
Road Traffic Violations		1,097,472	107,313
Others		49,560	2,055
Total		2,095,047	297,202

Adapted from Ministry of Justice, *Summary of the White Paper on Crime 1995*, Table II-1, p. 55.

† Includes death caused by bodily injury.

There are no degrees of offenses in Japan. In addition, a wide variety of criminal behavior is encompassed in Japan under one category of offense. Thus, each category of offense may include conduct that in the U.S. would be considered a separate crime. Embezzlement, for example, is defined in the Japanese Penal Code, Article 252, as “wrongful appropriation of a thing which he holds on behalf of another,” and it is punishable by up to five years in prison. The Penal Code, in Article 254, also defines embezzlement as “wrongful appropriation of a lost article, driftage, or other property of which another person no longer has possession.” A person who takes a bicycle belonging to another person from a train station and then abandons it, for example, has committed theft, but another person who then finds the abandoned bicycle and takes it has embezzled as defined by Article 254. While it is true that most such offenses are not sent

to the prosecutor's office by the police, some are, thereby making the figures such as are found in the table above somewhat confusing, at least to an outsider.

As another example, homicide is simply defined as the killing of another (Art. 199), thereby including diverse behaviors that would, in the U.S., constitute separate crimes. For example, in the U.S., negligent homicide is normally restricted to deaths from traffic accidents. In Japan, it comes under Article 211 of the Japanese Penal Code,⁵⁷ which reads: "A person who fails to take necessary precautions in the conduct of business and thereby kills or injures another shall be punished with penal servitude for not more than five years or a fine of not more than five hundred thousand yen. The same shall apply to a person who, by gross negligence causes the death or injury to another." The driving of a vehicle under all circumstances is considered to be "conduct of business" and is listed in the above table as "traffic professional negligence." The same article would apply to the foreman on a construction site who negligently allows a crane to fall on a person, or to a physician who kills or injures a patient through negligence.⁵⁸ There are many such examples in the Penal Code, so it is important to understand that categories listed in official Japanese statistics may or may not include conduct that is included in the crime with the same name in the U.S. and other countries.

Since a wide scope of criminal behavior is encompassed within each category of offense, sentences are based upon the nature of the crime, upon the behavior of the defendant before, during, and after commission of the offense, upon the feelings of the victim (or the family of the victim), and to a large extent upon the recommendation of the prosecutor. Japanese law allows a great deal of discretion in sentencing; robbery, for example, is punishable by not less than five years in prison.⁵⁹ This is in contrast to the current trend in the U.S. that limits sentencing at the discretion of judges, with the Federal Sentencing Guidelines being perhaps the most controversial. In

57. Although counted as a crime and listed under the Penal Code in crime statistics, the law itself — *Bōryoku Kōi Tō Shobatsu Ni Kansuru Hōritsu*, or Law to Control Violent Acts — is considered a supplement to the Penal Code rather than part of it per se. Violent Acts in this Table includes "intimidation" and "unlawful assembly with weapons."

58. Kawashima, *supra* note 8, at 269.

59. Prosecutors, for example, investigated a mid-air collision between two news helicopters that took place in 1994 to determine not only whether aeronautics law was violated but whether in addition there was evidence of professional negligence. See *Prosecutors Take Over Case of Fatal Helicopter Crash*, DAILY YOMIURI (Nov. 16, 1996) <<http://www.yomiuri.co.jp/news/1116dy13.htm>>.

addition, in Japan sentences are determinate and there is no plea bargaining.⁶⁰

While some cases are screened out by the police, as will be discussed below, the table above lists the vast majority of cases received by public prosecutors in 1994. While it is clear that Japan is not crime-free, it is also clear that there is considerably less crime in Japan than there is in the U.S. It should also be noted that Table I lists the number of suspects received by the prosecutors, not the number of crimes reported. The number of homicides⁶¹ reported to the police in 1994, for example, was 1,453, meaning that there were multiple suspects in a number of cases. This number can be compared to the total number of homicides reported in the U.S. in 1994 — 23,305⁶² — or 1,561 in New York City alone⁶³ (Japan has a population of approximately one-half that of the U.S.). The table is therefore an accurate indication of the annual workload of prosecutors in Japan, but not of the number of offenses committed.

V. THE DECISION TO INDICT

In a police-initiated case, the initial report will very likely be quite voluminous, as Japanese police tend to be meticulous in their investigations.⁶⁴ After the case has been turned over by the police to the prosecutor's office, the investigations prosecutor reviews the file, which will contain not only details about the crime but about the suspect as well. If the prosecutor has sufficient information from the police report to indict, no further investigation will take place. If there is insufficient or unclear information, the prosecutor may ask the police to investigate further, or the prosecutor may decide to obtain the necessary information using resources in the prosecutor's office.⁶⁵ Prosecutors virtually always interview the suspect prior to an indictment decision. Prosecutors in Japan place a great deal of emphasis on investiga-

60. Penal Code of Japan, Law No. 45 of 1907, as amended, art. 236 [hereinafter PC].

61. It has recently been proposed, however, that plea bargaining (as well as wiretapping) be authorized in Japan as a means of more effectively dealing with organized crime. See *Government to Beef Up Fights Against Organized Crime - Anonymous Testimony, Plea Bargaining, Wiretapping Envisaged*, DAILY YOMIURI (June 16, 1996) <<http://www.yomiuri.co.jp/newsj/0617dy01.htm>>.

62. This includes "pure" homicides as well as deaths caused by robbery, arson, assault, negligence, professional negligence, and accidental fires. See JAPAN TIMES, *White Paper on Police - 1995 (excerpt)*, 1996, at 86.

63. FBI figures obtained from the World Wide Web <<http://www.fbi.gov/ucr/ucr95prs.htm>>.

64. FBI Uniform Crime Report 1996 Preliminary Annual Release, at 6.

65. See Castberg, *supra* note 38, at 39-47, and Miyazawa Setsuo, POLICING IN JAPAN: A STUDY ON MAKING CRIME, 43-96 (Frank G. Bennett, Jr. & John Haley trans., 1992).

tions. One prosecutor/scholar estimates that about 60% of a prosecutor's time is spent on investigation after having received a case from the police, largely because "[t]he Japanese prosecutor focuses on obtaining the substantive truth of any incident as his primary objective."⁶⁶ In addition, documents based on the investigation are virtually always used in lieu of witness testimony in trials,⁶⁷ a process that will be described in more detail below.

Once the investigation is complete, the prosecutor must decide whether to indict. One might assume that if there is sufficient evidence to win a conviction, an indictment would be almost automatic. As Table II shows, however, in 1994, 36% of all persons whose cases were forwarded to the prosecutor's office by the police were not indicted. Of this 36%, 94% of the cases resulted in suspended prosecution and 6% were not indicted for other reasons (usually insufficient evidence).⁶⁸ When suspension of prosecution is broken down by offense, we note wide variations in the extent to which the authority to suspend prosecution is used. See Table III.⁶⁹

Table II
Disposition of Suspects Whose Cases Were
Forwarded to Prosecutors, 1994

<i>Disposition</i>	<i>Indicted Prosecuted</i>	<i>Total Non- Prosecution</i>	<i>Not Indicted, Prosecution Suspended</i>	<i>Not Indicted, Other Non- prosecution</i>
Number	1,173,845	658,164	621,422	36,742
Percentage	64	36	94	6

66. Larger offices have prosecutor's investigation officers who are members of the staff.

67. Shikita, *supra* note 30, at 5. See also Ito, *supra* note 25, at 71-72.

68. Shikita, *supra* note 30 at 7.

69. Government of Japan, Supreme Public Prosecutor's Office, Annual Report of Prosecutorial Statistics (*Kensatsu Tokei Nempō*), 1994, p. 21.

Suspension of Prosecution

Table III

Rate of Suspended Prosecution for
Selected Offenses—1995

<i>Penal Code Offense</i>	<i>Prosecution Rate</i>	<i>Suspension of Prosecution Rate</i>
Homicide	43.8	4.3
Robbery	80.6	6.5
Bodily Injury	72.8	24.1
Extortion	59.5	33.8
Larceny	54.9	41.3
Fraud	62.2	29.6
Embezzlement	13.9	85.0
Rape	67.3	13.7
Indecent Assault	47.5	14.3
Arson	60.6	14.2
Bribery	67.0	22.9
Gambling	64.0	35.5
Violent Acts	71.3	24.9
Traffic Professional Negligence	15.0	84.6
<i>Special Law Offenses</i>		
Public Offices Election Law	48.7	50.6
Firearms and Swords	62.5	32.3
Stimulant Drugs	87.5	6.6
Poisonous Agents	92.9	6.3
Road Traffic Violations	93.7	5.9

Adapted from *Summary of the White Paper on Crime, 1996.*

The suspension rate is calculated by dividing the total number of suspects granted suspension by the total prosecuted and granted suspension, then multiplying by 100. Suspension rates of prosecution vary from 4.3% for homicide to 85% for embezzlement. Why, one might ask, would a Japanese prosecutor suspend prosecution in a homicide case? Or why would a prosecutor suspend prosecution in the vast majority of traffic professional negligence and embezzlement cases? The prosecution rate of Penal Code offenses varies considerably as well, ranging from a high of 80.6% for robbery, to lows of 15% for traffic professional negligence and 13.9% for embezzlement. What accounts for these differences? As we have seen above, both embezzlement and traffic professional negligence, as defined in the Japanese Penal Code, have no direct equivalents in U.S. law. Given the nature of the vast majority of these offenses and the offenders who commit them, Japanese prosecutors feel that there are few benefits that come from prosecution in such

cases.⁷⁰ The seemingly low rate of prosecution for homicide is somewhat more complicated, but again is based on the nature of the offense and the offender. Some of the homicides are in reality murder-suicides, often involving a mother killing her child and then herself,⁷¹ while others are cases of self-defense. As noted above, the Japanese Penal Code's definition of homicide is so broad that it includes diverse behavior that results in the death of another, not all of which is considered punishable. To understand these figures, one must examine the goals of prosecution in Japan as well as the definitions of the crimes themselves.

A. SUSPENSION OF PROSECUTION

There would seem to be no political motives in Japanese prosecution, even though prosecution has great political implications. Japanese prosecutors, unlike their American counterparts, do not have to worry about re-election or re-appointment, nor do they have to worry about being fired for failure to indict enough defendants or win enough convictions.⁷² Thus Japanese prosecutors can feel free to act in what they feel is both the best interests of society and of the accused.⁷³ In a surprisingly large number of cases, prosecutors determine that it is not in the best interest of either society or the defendant to indict.

When a person is indicted in Japan, it is because the prosecutor feels that the defendant deserves, and society is best served by, some form of punishment of that person. Conversely, when prosecution is suspended, it is because the prosecutor feels that punishment is not warranted.⁷⁴ We have noted above that the police are allowed some discretion in the cases they forward to the prosecutor for review, so it is safe to conclude that those cases that reach the prosecutor's office are serious enough that they were not screened out initially.⁷⁵ Article 248 of the Code of

70. Summary 1995, at 57.

71. Personal communication with Akane Tomoko, public prosecutor now assigned to the United Nations Asia and Far East Institute, Tokyo (Mar. 27, 1996).

72. On Japanese attitudes toward this type of crime, see Richard B. Parker, *Law & Language in Japan and the United States*, 34 *OSAKA U. L. REV.*, 47, 55-63.

73. Which is not to say that performance is not a factor in promotion or assignment in Japan, as it clearly is. But in Japan a prosecutor may be rewarded as much for suspending prosecutions in appropriate cases as in winning convictions in major crimes. Japanese prosecutors can only be fired for inability to perform duties as a result of physical or mental disability, "inefficiency or such other reasons," and only after review by the Committee for the Examination of Qualifications of Public Prosecutors. PPOL, art 23.

74. Technically, a person does not become a defendant until he or she is indicted, but I will refer to all persons against whom the prosecutor has sufficient evidence to indict as defendants.

75. Yamashita, *supra* note 20, at 15.

Criminal Procedure, which authorizes prosecutors to suspend prosecution, reads:

In case it is unnecessary to prosecute according to the character, age and environment of an offender, the weight and conditions of an offense as well as the circumstances after the offense, the public prosecution may not be instituted.

This rather vague provision gives prosecutors a great deal of discretion in decision-making, although more detailed guidelines are contained in the Prosecutor's Manual,⁷⁶ and all suspensions of prosecution must be approved by a superior. And while it is understood in the U.S. that prosecutors may decline to prosecute "in the interests of justice," no U.S. prosecutors are given such broad powers or statutory factors to be considered when making such decisions, although internal policy documents may provide such guidance in some jurisdictions. It should be noted, however, that prosecutors in the U.S. do not always prosecute cases, even though there is sufficient evidence to do so, when they feel that non-prosecution is in the best interests of the suspect and of society. This is especially true in the case of young first-offenders who commit minor crimes against property.

The practice of suspension of prosecution in Japan can be traced back to the 1880s. While it was it was practiced increasingly over the years following, and was noted in official reports starting in 1909, it was not codified until the Code of Criminal Procedure of 1922.⁷⁷ It has, therefore, a long history in Japanese prosecutorial decision-making and broad acceptance by the Japanese public. It has been suggested that suspension of prosecution started shortly after the Meiji Restoration as a means of reducing the number of minor criminal cases facing an already overburdened court system, but has survived due to its focus on rehabilitation rather than administrative efficiency.⁷⁸ What is important, however, is that there are safeguards against abuse of these powers.

The first variable listed in Article 248 that must be considered is "character," which in the Japanese context generally concerns personality, mental status, and any previous offenses. Dando Shigemitsu⁷⁹ distinguishes between inborn and acquired personality traits, noting that inborn traits considered serious

76. See Foote, *supra* note 45, at 342-46, on how and why police utilize the *bizai shobun* option.

77. See Goodman, *supra* note 2, at 26.

78. Dando Shigemitsu, *System of Discretionary Prosecution in Japan*, 18 AM. J. COMP. L., 518, 518 (1970); Satsumae Takeshi, *Suspension of Prosecution: A Japanese Longstanding Practice Designed to Screen Out Offenders from Penal Process*, Report for 1977 and Resource Material Series No. 15 100, 102-03 (UNAFEI, 1977).

79. Yamashita, *supra* note 20, at 15.

mental disorders by psychiatrists or psychologists (equivalent to "insanity" for defense purposes in the U.S.) would not result in suspended prosecution but rather referral to an appropriate medical facility. If, on the other hand, the disorder is merely "abnormal" or "subnormal," prosecution may be suspended, regardless of whether the disorder was inborn (low I.Q., for example) or the result of societal or environmental factors (e.g., dysfunctional family situation). Previous brushes with the law normally weigh against suspension of prosecution, although as we shall see below the recidivism rate of those with suspended prosecution is relatively insignificant and it is not unheard of to suspend prosecution more than once for some offenders. Age is a factor in two ways: if the offender is under twenty years old, the family court has jurisdiction, and the prosecutor loses the power to suspend prosecution.⁸⁰ In cases where the suspect is at least twenty, prosecutors tend to suspend prosecution more frequently for older offenders.⁸¹

Prosecutors investigate the environment of the offender, including both the past and the present. The past is used as a possible explanatory factor for the offense, and the present as positively or negatively related to suspended prosecution.⁸² A great deal of weight is given to family, school, and work environments, and it is not unusual for prosecutors to interview family members, former teachers, and employers in order to better understand the circumstances surrounding the offender's personality and state of mind. An offender who came from a broken and/or abusive family, or who was bullied in school,⁸³ but who now has a responsible job, for example, would be seen as a good candidate for suspended prosecution. While Japanese prosecutors do not ignore an offender's individual responsibility for his or her own actions, they do see the offender's past environment as an important variable in explaining the offender's behavior. If the offender's current environment is supportive of rehabilitation — the offender is attending college or working full-time — there is greater incentive to suspend prosecution than there would be if the offender was not working or attending school and was associating with a motorcycle gang.

The weight and conditions of the offense depend on both how serious the crime is perceived to be (normally defined by the punishment for that crime) as well as the manner in which the

80. Dando, *supra* note 78, at 522.

81. *Shōnenhō* (Juvenile Law)(Law No. 168 of 1948, as amended), arts. 2, 3.

82. Dando, *supra* note 78, at 522-23. Dando explains this in terms of the increased responsibilities and less inclination to commit crimes among older people, perceptions common among prosecutors in Japan.

83. *Id.* at 524.

crime was committed. Table III, above, illustrates that there is a wide variation in the rate of suspended prosecution from offense to offense. Prosecution of offenses against a person (such as homicide, robbery, and rape) is suspended less often than prosecution of offenses against property (such as larceny, fraud, and embezzlement). But because the definitions of the offenses listed in Table III are so broad, the manner in which the crime was committed is the major determining factor in the suspension decision. Other factors such as the use of weapons, the causing of bodily injury during the commission of the offense, and particular cruelty are considered to be aggravating circumstances that would weigh against suspension; while being an accomplice (rather than the leader), not engaging in violence, and other such factors tend to mitigate in favor of the accused.

Circumstances arising after the offense are perhaps just as important as the conditions of the offense itself in suspension decisions, as they concern the attitudes of both the offender and victim (or victim's family). Remorse, manifested by the offender's own statements and behavior, as well as apology (*shazai*) and compensation (*higai benshō*) to the victim, are extremely important, not only in influencing the prosecutor's suspension decision, but also in influencing the actions of the police and the sentencing decisions of judges in cases where indictments are made, as we shall see below.⁸⁴ Similarly, the feelings of the victim and/or the victim's family are very important, and since the prosecutor in Japan feels that it is his or her job to represent the victim and/or family, suspension decisions may be based to a large extent on the victim. It is important to note that prosecutors discuss cases with victims or victims' families and may even suggest that forgiveness would be appropriate in a particular case.⁸⁵ As a former Prosecutor-General has said, "[n]o one but a public prosecutor can speak for the victim and express fairly and accurately the feelings of the victim. They make every effort to induce in judges a thorough and accurate grasp of the victim's feelings."⁸⁶

84. Bullying, or *ijime*, is a serious problem in Japan and is responsible for a high proportion of suicides among juveniles. It has only recently been given the attention it deserves by the police and the Ministry of Education. See National Police Agency, *White Paper on Police 1994 (excerpt)*, English version published by the JAPAN TIMES, at 66.

85. A great deal has been written about apology and compensation by offenders. See, e.g., Haley, *Comment: The Implications of Apology*, 20 LAW & SOC'Y REV. 499 (1984), and Hiroshi Wagatsuma & Arthur Rosett, *The Implications of Apology: Law and Culture in Japan and the United States*, 20 LAW & SOC'Y REV. 461, 481-83 (1986).

86. See Castberg, *supra* note 38, at 45-47.

To date, only one empirical study of factors associated with suspension of prosecution has been conducted. The study, by Professor Mitsui Makoto,⁸⁷ examined larceny (PC art. 235, *set-tōzai*) and bodily injury by violence (PC art. 208, *bōryoku shō-gaizai*) cases during the years 1967 and 1968 in one jurisdiction in Japan. In larceny cases, Mitsui correlated factors related to the crime itself and factors related to the suspect, primarily the likelihood of recidivism.⁸⁸ The factors that correlated significantly to the crime were *modus operandi*, prior offenses, value of goods stolen, number of accomplices, and police recommendations, while factors that correlated significantly to the suspect were prior record, age at first offense, and the family or employer's willingness to take responsibility for the offender.⁸⁹ With respect to bodily injury through violence, Mitsui related the nature of crime and recidivism variables with age at time of offense, responsibility of the victim for his injuries (or motive), treatment time for injuries suffered (the Japanese legal method of measuring seriousness of injuries),⁹⁰ education level of the offender, age at time of first offense, prior criminal record, and police recommendations. The crime itself was significantly correlated with motive and seriousness of injuries, while the suspect was correlated with factors such as prior record, age at first offense, and education level.⁹¹ Mitsui concluded that prosecutors tended to focus more on factors associated with the likelihood of recidivism than on factors associated with the crime itself, and that specific variables could affect the decision to suspend or indict if they are unusually strong, such as a victim's argument for severe punishment.⁹² While the findings are important, it must be remembered that this study used data that was almost 30 years old and taken from only one jurisdiction, and involving only two offenses. None of Mitsui's findings, however, are inconsistent with the case studies cited by Goodman⁹³ or Castberg,⁹⁴ and the suspension/indictment decision ultimately depends on a variety of factors that the prosecutor, consistent with law and policy,

87. Ito, *supra* note 25, at 73.

88. Mitsui Makoto, *Kensatsukan no Kisō Yūyō Sairyō*, pt. 4 [Prosecutor's Discretion in Suspension of Prosecution], 91 *Hōgaku Kyōkai Zasshi* [Journal of the Jurisprudence Association] 1693 (1974).

89. *Id.* at 1718.

90. *Id.* at 1718-19.

91. The amount of time it takes to treat injuries resulting from a crime is an important factor in initial charging decisions as well as sentences, and is frequently reported in media accounts of crimes.

92. *Id.* at 1726-27.

93. *Id.* at 1736-38.

94. See Goodman, *supra* note 2, at 38-43.

must take into consideration, each case offering unique factual, legal, and moral issues.

B. IMPLICATIONS OF PROSECUTORIAL DISCRETION

There are many implications of the power to suspend prosecution. The most obvious are the seeming leniency of prosecution in Japan, the reduced burden on the corrections system resulting from this leniency, and the opportunity for many offenders to escape the stigma of indictment. Less obvious, at least to those in the West, are the personal, as opposed to legal, factors that play such a large role in the decision. Remorse, compensation, and apology play a minimal role, if any, in prosecutorial decision-making in the U.S., but are crucial elements of the process in Japan. One is tempted to ask, then, why this is the case, and how effectively Japanese prosecutors can judge the true feelings of the offender. Because it is common knowledge in Japan that one is expected to be remorseful after having committed a crime, only professional criminals and those clearly alienated from society are not likely to profess some remorse after arrest. Police and prosecutors in Japan are nevertheless quite confident that they can distinguish the truly remorseful from those who only pretend to be. One cannot help but think, however, that a few offenders who are good actors slip through the system.

It has been also suggested that suspension of prosecution might be used where there is insufficient evidence to convict,⁹⁵ but there is scant evidence of this, and all prosecutors interviewed by the author stated firmly that this is simply not done and stressed that each decision to suspend prosecution is carefully reviewed by a superior before being finalized. Of the 77,302 cases not prosecuted in 1994, 78.3% were suspended, 15.2% were dropped for insufficiency of evidence, 2.5% for lack of a valid complaint, .6% for lack of mental capacity, and 3.4% for other reasons.⁹⁶ This shows that prosecutors are not reluctant to drop cases for lack of evidence. Finally, there are two mechanisms available to victims or other citizens who feel that prosecution should not have been suspended.

C. PUBLIC REVIEW OF PROSECUTORIAL DECISION-MAKING

The first mechanism is *kensatsu shinsakai*,⁹⁷ or Prosecution Review Commission, which is provided for in the Prosecution

95. See Castberg, *supra* note 38, at 65-66.

96. See Goodman, *supra* note 2, at 46, and Foote, *Benevolent Paternalism*, *supra* note 42, at 373.

97. *Summary, 1995*, Table II-5, at 58.

Review Commission Law (*Kensatsu Shinsakaihō*).⁹⁸ Each commission consists of eleven members, selected by lot from among those persons who have the right to elect members of the House of Representatives in the relevant jurisdiction, usually the district court.⁹⁹ The members serve for terms of six months,¹⁰⁰ and the commission is charged with reviewing decisions not to prosecute and giving advice on the improvement of prosecution practices.¹⁰¹ A commission may receive requests from victims of crime or others who have demanded prosecution, or may initiate action on its own.¹⁰² Commissions are assisted by secretaries, who are appointed by the Supreme Court, and they are required to meet at least four times per year (in March, June, September, and December), but may meet at any time if necessary.¹⁰³ Each commission has the power to summon and interrogate witnesses, enforceable by the appropriate court.¹⁰⁴ Eight votes are necessary to override a prosecutor's decision to suspend prosecution.¹⁰⁵ The decisions are sent to the Chief of the District Public Prosecutor's Office and to the Committee for Examination and Qualification of Public Prosecutors.¹⁰⁶ Decisions of the commissions are advisory only — Article 41 of the law states that the Chief Prosecutor shall “. . .take proceedings for indictment, if he deems, after consideration of the decision, a public action should be instituted.” In the vast majority of cases, commissions approve of the suspension of prosecution. In 1994, the Commission dealt with 1691 cases: 1583 cases stemming from complaints from victims and others, and 108 self-initiated cases. It made recommendations in 1288 of those cases, agreeing with the decision to suspend prosecution in 878 cases (68%), recommending prosecution in 209 cases (16%), and dealing with the remainder in other ways.¹⁰⁷ 1994 figures on prosecutorial response to Commission recommendations show that prosecutors initiated prose-

98. Usually translated as “inquest of prosecution.” A more literal translation is “prosecution review commission,” which will be used here. See George, *supra* note 2, at 64.

99. Law No. 147 of 1948, as amended.

100. Art. 4.

101. Art. 14.

102. Arts. 2 (1) and (2).

103. Arts. 2 (2) and (3), resp.

104. Arts. 20 and 21, resp.

105. Art. 37.

106. Art. 27. The Commission may also, of course, agree that the failure to indict is proper or that the decision to indict is proper. See Mark D. West, *Prosecution Review Commissions: Japan's Answer to the Problem of Prosecutorial Discretion*, 92 COLUM. L. REV. 684, 698 (1992).

107. Art. 40.

cution in 28.4% of the cases recommended by the Commission.¹⁰⁸

D. JUDICIAL REVIEW OF PROSECUTORIAL DECISIONS

The other check on suspension of prosecution is *saibanjō no junkiso tetsuzuki*, or "quasi-prosecution through judicial action."¹⁰⁹ This process is provided for in Article 262 of the Code of Criminal Procedure, and allows those who object to non-prosecution in cases of abuse of authority or use of violence and cruelty by a public officer (PC arts. 193 - 196) or public security investigative officers (Art. 45, Subversive Activities Prevention Law), to request that the appropriate District Court institute criminal proceedings against the accused. The complainant, however, must first submit a request for prosecution to the prosecutor who decided not to prosecute within seven days of being notified that prosecution was suspended (or not undertaken for other reasons).¹¹⁰ Although the law is somewhat vague, it appears that should the prosecutor again decide not to prosecute, the complaint will then be heard by a panel of judges which may dismiss the complaint or refer it to an appropriate district court for trial,¹¹¹ in which case the court will appoint a member of the bar to act as prosecutor.¹¹² Due to the limited applicability of this process and the likelihood of failure, it is infrequently used. From 1987 through 1990, a total of 979, or about 245 cases per year, were received, 1158 were disposed of (some were carried over from prior years), and only two resulted in prosecution.¹¹³ One might well conclude that this form of redress is almost useless, but it is impossible to measure the effect this has on prosecutorial decision-making as it may well act as a powerful deterrent against non-prosecution.¹¹⁴

E. SUSPENSION OF PROSECUTION—DOES IT WORK?

The real issue with regard to suspension of prosecution is not really whether it is abused, but whether it works, and the best way to measure the effectiveness of suspension is to examine the

108. *Heisei Rokunen ni Okeru Keiji Jiken no Gaikyō* (General Conditions Regarding Criminal Cases in 1994), 48 *Hōsō Jihō* (Legal Profession Review), 448 table 143 (1996).

109. Table 146, at 209.

110. Also referred to simply as "quasi-prosecution" or, not so simply, "analogical institution of prosecution through judicial action." See George, *supra* note 2 at 66-68.

111. CCP, art. 262 (2).

112. *Id.* arts. 265-67.

113. *Id.* art. 268.

114. *Summary, 1991*, Table III-21, p. 107.

recidivism rate of those whose prosecution was suspended. Unfortunately, these data are not routinely kept, or at least published, by the Ministry of Justice. The only study known to this author is one done by Momose, et. al., and published by the Research and Training Institute of the Ministry of Justice in 1986.¹¹⁵ The study followed those accused of theft, embezzlement, fraud, extortion, bodily injury through violence, and assault,¹¹⁶ whose prosecution was suspended in 1980. A total of over 1500 persons whose prosecution was suspended had been arrested again by 1986. See Table IV:

Table IV
Rates of Recidivism for Specified Offenses

	Total	Theft	Embezzle- ment	Fraud	Extortion	Bodily Injury	Assault
Male	13.4	11.2	10.6	25.7	28.6	14.3	14.7
Female	1.9	.8	10.0	-	-	-	-
Arrested	22.3	12.7	25.0	32.8	32.4	14.3	37.5
Not Arrested	7.8	6.4	8.7	12.2	16.7	13.7	11.3
20-29 years old	12.4	10.5	4.5	27.3	-	27.3	16.7
30-39 years old	11.7	7.2	18.8	26.5	36.8	5.0	4.8
40-49 years old	15.0	7.5	13.0	28.9	37.5	26.1	31.3
50 and older	6.6	5.5	6.3	16.7	-	-	9.5
First Offense	5.1	3.9	3.1	8.8	5.9	8.9	9.3
Second or more	34.1	31.3	46.2	45.8	41.4	31.8	22.2

Adapted from Momose, *supra*, p. 20.

Although there are no great surprises here, it is interesting to note that the 40 to 49 year age group had the highest percentage of recidivism; these offenders would have been from 37 to 46 when prosecution was suspended, and therefore in an age group generally considered a safe risk, all else being equal. Without knowing the original offense for which the prosecution was suspended, it is difficult to analyze the differences in recidivism rates among the offenses studied. It is not remarkable that those with more than one previous offense were more likely to be recidivists, but one wonders why prosecutors originally

115. See Dando, *supra* note 78, at 529; George, *supra* note 2, at 68; and Suzuki Yoshio, *Safeguards Against Abuse of Prosecutorial Powers*, in *ROLE OF PUBLIC PROSECUTORS IN CRIMINAL JUSTICE: PROSECUTORIAL DISCRETION IN JAPAN AND THE UNITED STATES* 13, 13-14 (Japan Society, ed., 1980).

116. Momose, et. al., "*Genkō keiso shikogō ni okeru kiso yūyo seido un'yō no jittai to kiso yūyōsha no saihan*" [Study on the Actual Administration of the System of Suspended Prosecution after World War II and Recidivism by Those for Whom Prosecution Has Been Suspended], *Hōmu Sogō Kenkyūsho Kenkyūbu Kiyō* [Bulletin of the Criminological Research Department], vol. 29, Research and Training Institute, Ministry of Justice, 1986.

suspended prosecution for these offenders. Considering the fact that in a given year over 200,000 offenders are likely to have their prosecution suspended, the recidivism rate observed here is quite low.¹¹⁷ When we compare recidivism among other categories of offenders, this is confirmed:

Table V
Rates of Recidivism by Disposition

	Total	Theft	Embezzle- ment	Fraud	Extortion	Bodily Injury	Assault
Suspension of Prosecution	11.5	8.1	10.4	24.1	28.3	13.9	14.3
Fine, Short Detention	16.3	-	-	-	-	29.1	22.0
Suspension of Sentence, No Probation	21.5	28.2	6.3	14.1	14.5	21.6	25.0
Suspension of Sentence with Probation	35.4	37.5	12.5	28.6	25.0	36.8	16.7
Release on Parole	44.5	57.5	16.7	23.2	47.2	35.1	100.0
Served Entire Sentence	57.2	65.7	37.5	66.0	51.9	50.7	55.6

Momose, *op. cit.*, p. 19

It should be noted that while the prosecutor has complete control over suspension of prosecution, prosecutors have considerable influence over the other dispositions as well, with the exception, of course, of release upon expiration of sentence. As noted above, prosecutors' recommendations to judges with respect to sentencing carry great weight and even influence parole decisions. Thus, the prosecutor who decides not to suspend prosecution but instead recommends suspending execution of sentence with probation, for example, can feel quite confident that such a sentence will be imposed.

It would seem, then, that suspension of prosecution is an effective method for diverting offenders from the criminal justice system with low risks of recidivism combined with a reduced strain on the resources of the system. The prosecutor is assisted in efforts at rehabilitation by the Law for Offenders Rehabilitation Services (*Kōseihogo Jigyōhō*),¹¹⁸ which regulates

117. PC arts. 235, 252, 246, 249, 204, and 208, resp.

118. The number (and rate) of suspended prosecution has been increasing significantly. In 1985 there was a total of 3,447,436 suspects, 236,364 of whom had

rehabilitation services, and the Offenders Rehabilitation Law (*Hanzaisha Yobōkōseihō*), which applies to those who have served their sentences, whose execution of sentence was excused or suspended, and those whose prosecution was suspended.¹¹⁹ The aid is provided for a maximum of six months, either by the government itself, or, as is usually the case, by a private group (“rehabilitation aid society”) licensed by the Ministry of Justice.¹²⁰ The aid may take the form of re-integrating the offender into the community through direct financial aid, training, employment, education, medical treatment, or lodging.¹²¹ However, few offenders — approximately 1000 per year — avail themselves of this service.¹²²

It should also be noted that those who have been found not guilty may be compensated for the costs incurred in the defense, under Article 188 of the CCP and similar provisions in the Criminal Compensation Law (*Keiji Hoshō Hō*),¹²³ and those suspects who are arrested but not prosecuted due to a lack of evidence are also eligible for compensation.¹²⁴ Finally, the prosecutor who decides not to indict, for whatever reason, is required to notify the victim or complainant of this decision.¹²⁵

VI. INDICTMENT AND TRIAL

A. INDICTMENT

Japan does not have a grand jury system, nor does it utilize a preliminary examination process, so the prosecutor has the sole responsibility for filing the indictment (*kiso*).¹²⁶ Under Article 256 of the Code of Criminal Procedure, the indictment must name and describe the accused, specify the facts constituting the offense, and specify the offense and the number of counts of that offense. Article 256 (6) provides: “Documents and other articles that may cause the judge to create presupposition on the case shall not be attached to the indictment, or the contents of which shall not be cited therein.” This provision strictly limits what

their prosecutions suspended. The 1994 figures were 2,126,988 and 621,463, respectively. *Summary 1995*, at 7.

119. This law, enacted in 1995, repealed the Law for Aftercare of Discharged Offenders (*Kōsei Kinkyū Hogohō*). See *The Community-Based Treatment of Offenders System in Japan* (1995), at 4.

120. *Id.*

121. *Id.* at 40.

122. *Id.* at 14.

123. Momose, *supra* note 116, at 8.

124. Law No. 1 of 1950, as amended. The Law also provides for compensation for those who win appeals.

125. Under the *Higisha Hoshō Kitei*, or Regulation for Suspect Compensation, Ministry of Justice Order No. 1 of 1957.

126. CCP, art. 260.

may be included in the indictment itself, and appellate courts have reduced sentences when extraneous information has prejudiced the sentencing judge.¹²⁷ It should also be noted that a prosecutor may withdraw the indictment at any point up to the judgment,¹²⁸ although this is extremely rare.¹²⁹ In almost all cases, then, once prosecution is initiated, it is carried out to completion.

The prosecutor may choose to have the case heard in a summary proceeding or in a formal trial, or may refer the case to the Family Court (*Katei Saibansho*).¹³⁰ Of the 338,070 criminal cases disposed of by prosecutors in 1995, 132,185, or 39.1% were referred to Family Court.¹³¹ It is safe to assume that virtually all of these offenders were juveniles (under 20 years of age).¹³² Although the prosecutor will investigate and prepare the case against the juvenile, once the case is sent to the Family Court the prosecutor no longer plays a role in the process, as prosecutors are not allowed to appear in Family Court in juvenile cases, although the juvenile does have the right to counsel. The prosecutor may, however, ask that the accused be sent back for trial as an adult in a district court, provided that the juvenile is 16 years of age or older.¹³³

Slightly over one-third of cases prosecuted in 1995 were handled through summary proceedings. When the prosecutor feels that prosecution is necessary, but that the appropriate punishment is a fine rather than incarceration, the case will (with the approval of the defendant) be sent to a Summary Court for proceedings that may result in a fine of not over ¥500,000.¹³⁴ The proceedings are *in camera*.¹³⁵ District Courts can entertain a

127. CCP, art. 247, and PPOL, art. 4. The preliminary examination in Japan was eliminated in 1964, thereby shifting the authority to establish probable cause from the judge to the prosecutor. See Hirano, *supra* note 55, at 132.

128. See Cleary, *supra* note 45, at 1323, for a discussion of the Osaka High Court Judgment of September 27, 1982, 481 Hanrei Taimuzu 146. It is interesting to note that the Court reduced the sentence rather than overturning the conviction, as would likely have been the case in the U.S.

129. CCP, art. 257.

130. Dando, *supra* note 78, at 521-22, cites 84 prosecutions out of a total of 3,079,878 in 1968.

131. Prosecutors may not prosecute juveniles in Family Court, but may prosecute child welfare cases in this venue. There are currently efforts to change this, however. See *Bar Ass'n May Endorse Revision of Trial Procedures for Minors*, THE DAILY YOMIURI (May 2, 1998) <<http://www.yomiuri.co.jp/newse/0502cr13.htm>>.

132. From *Summary*, 1995, at 60.

133. *Shōnenhō* [Juvenile Law] Law No. 168 of 1948, as amended, art. 2 (hereafter "JL"). Art. 37, however, provides for the prosecution of adults accused of certain offenses in Family Court.

134. JL, art. 20.

135. CCP, arts. 461-62. Some cases with penalties of fines only must, however, be prosecuted in District Court.

summary trial through a simple and abbreviated process,¹³⁶ and the current policy in most District Prosecutors' Offices is to request summary trials in District Courts rather than transferring the case to a Summary Court.

It is possible to amend an indictment once it has been filed,¹³⁷ a process that is infrequently used but which is sometimes necessary, especially in cases where additional information becomes available after the indictment is filed.¹³⁸ The defendant has no right to a hearing to oppose such an amendment when the amendment adds a lesser-included offense or changes the alleged offense to one that is less serious, but does have the right to a hearing to oppose an amendment that would affect the ability of the defendant to defend himself.¹³⁹ Ultimately the court decides whether an amendment to an indictment will be allowed, but as we have seen with respect to other matters within the discretionary power of the prosecutor, the courts give a great deal of weight to a prosecutor's requests.

It is well-known that the vast majority of criminal cases in the U.S. are settled through plea bargaining, with only about 10% of all felony cases going to trial.¹⁴⁰ It is not so well-known, perhaps, that there is no plea bargaining process in Japan, at least as it is known in the U.S. Japanese prosecutors and scholars often cite this difference as a strength of the Japanese and a weakness of the U.S. systems. Some American scholars, however, have suggested that a form of plea bargaining does in fact take place in Japan. It has been suggested, for example, that lenient treatment in return for a confession is a form of plea bargaining, that defense attorneys may influence charging decisions, and that suspension of prosecution is equivalent to plea bargaining.¹⁴¹ It is not clear, however, just what is being bargained for in these scenarios, nor why defense attorneys' influence over charging decisions constitutes plea bargaining. While it is true that defense counsel may try to affect prosecutorial decision-making by, for example, strongly arguing for suspension of prosecution or for a less serious charge than the evidence may suggest, this is not true plea bargaining. In a true plea bargain, such as is found in the

136. Ito, *supra* note 25, at 11.

137. CCP, arts. 291-2 and 463. A case may be handled through summary procedures if the defendant admits to all of the charges, if all parties agree, and if the offense is one punishable by incarceration for one year or less.

138. CCP, art. 312.

139. See Cleary, *supra* note 45, at 1290-1306.

140. *Id.* at 1301-02.

141. On plea bargaining in the U.S., see MALCOLM M. FEELEY, *Plea Bargaining and the Structure of the Criminal Process*, in CRIMINAL JUSTICE: LAW AND POLITICS (George F. Cole, ed., 7th ed. 1993); MILTON HEUMANN, PLEA BARGAINING (1978); CANDACE MCCOY, POLITICS AND PLEA BARGAINING (1993).

U.S., each party must have something to offer the other; typically the defendant offers a guilty plea in return for the dropping of one or more charges, reduction in charge(s), or for a recommendation of leniency in sentencing. The overall goal is to avoid a trial.

In Japan, there is no guilty plea as such, as the accused can only admit or deny the facts as set forth in the indictment.¹⁴² And by the time the indictment is filed, the defendant has generally given a statement in which he or she confesses or admits to most of the facts charged. Thus the defendant in Japan has little with which to bargain.¹⁴³ Finally, trials in Japan, as we shall see below, differ significantly from trials in the U.S., with less incentive to avoid the process.

B. TRIAL

Because a defendant in Japan cannot be convicted solely on the basis of a confession,¹⁴⁴ a hearing or trial must be held in all cases where indictments have been filed.¹⁴⁵ Japanese trials are scheduled for several hours per day, usually only one day per month, so cases involving multiple defendants and/or complex issues may take years to complete. The primary purpose of the Japanese trial is to examine evidence, just as in the U.S., but the manner in which the evidence is examined is quite different. There is no complete discovery in the Japanese system and the Japanese prosecutor is required to provide the defense only with evidence that will be used at the trial, and need not disclose evidence favorable to the defendant.¹⁴⁶ The court has absolute discretion with respect to discovery and admissibility of evidence.

142. See Foote, *supra* note 45, at 97-102, Goodman, *supra* note 2, at 35-36, and West, *supra* note 106, at 690, n.35.

143. Defendants are not arraigned in Japan, and are not asked to plead at any stage of the process, but rather admit in whole, in part, or deny the facts of the case as presented by the prosecutor, even though the English-language Japanese press often implies otherwise. See, e.g., *Aum Leader Refuses to Enter Plea as Trial Opens*, JAPAN TIMES (Apr. 24, 1996) <<http://www.japantimes.co.jp/news/news4-96/lead4-24.html>>.

144. Japanese media has referred to plea bargaining in some corruption cases, most notably that of Kanemaru Shin, LDP leader, who provided a signed confession for failure to disclose political donations and was given a summary indictment rather than the more formal indictment that would have required a court appearance and a more severe sentence had he been convicted. See Barbara Wanner, *Prosecutor Indicts Top LDP Members in Sagawa Case* <<http://www.gwjapan.com/cgi-bin/webf...+Members+In+Sagawa+Case%2Dcrb%2D830>>, and Goodman *supra* note 2, at 39-42.

145. *Kenpō* [Constitution of Japan], art. 38, and CCP, art. 319 (2).

146. Japanese laws translated into English use the term "trial" even though what takes place may seem more like a hearing in the U.S. The term trial will be used here for the sake of consistency.

While one side may request that evidence held by the adverse party be turned over, the requesting party must know generally what evidence is held by the adverse party in order to request it. This disadvantages the defense, as the prosecutor virtually always has far more evidence than the defense.

If the defendant admits to all of the charges, the trial is perfunctory. The court first reviews the evidence, and ensures that the defendant is aware of his or her rights and that any confession obtained was voluntarily given. If the defendant does not admit to some or all of the facts alleged by the prosecution, a complete trial is held. This trial process differs significantly from that in the U.S. At the beginning of a Japanese trial, the prosecutor reads the indictment.¹⁴⁷ The court then reads the rights of the defendant. The defense then has an opportunity to make a statement regarding the case,¹⁴⁸ and the court then rules on evidence.¹⁴⁹

Although it is beyond the scope of this article to discuss in detail the rules of evidence in Japan, it is worth a short review of the rules in order to gain a more complete understanding of the powers of the prosecutor. As in the U.S., hearsay evidence is normally inadmissible, but there are exceptions in Japan that are more significant than those in the U.S. If the defendant admits the charges against him or her, it generally means that the defense has agreed to the introduction of virtually all of the evidence held by the prosecution, including confessions and admissions made to police and prosecution and duly included in their reports, which would otherwise be considered hearsay.¹⁵⁰ If the defense does not agree, the court may call the defendant to testify, and be subject to direct and cross-examination. The prosecutor may ask leading questions when examining a defendant who opposes the introduction of prior statements.¹⁵¹

The exclusionary rule exists in Japan, but not to the degree that it does in the U.S. In both systems, the exclusionary rule resulted from a Supreme Court opinion.¹⁵² In Japan, the rule is based on Constitutional due process (art. 31) and the Code of Criminal Procedure (arts. 1 and 218). This rule is not applied as

147. CCP, arts. 299, 306. See also Ito, *supra* note 25, at 13.

148. CCP, art. 291 (1). In criminal trials in the U.S., the indictment is read at the arraignment and the prosecutor makes an opening statement at the beginning of the trial.

149. *Id.* art. 291 (2). See Cleary, *supra* note 45, at 1301-02.

150. CCP, art. 292.

151. CCP, art. 322. See also William B. Cleary, *The Law of Criminal Procedure in Contemporary Japan* (2), XLI HOKKAIDO L. REV. 1914 (1991); and Ito, *supra* note 25, at 18.

152. Rules of Criminal Procedure, art. 199-3(4). See Hirano, *supra* note 55, at 139, and Ito, *supra* note 25, at 19.

rigorously as it is in the U.S., and most evidence seized in Japan is done so pursuant to a search warrant rather than incident to arrest, so there are fewer challenges. The prior record of a defendant may be introduced under some circumstances as evidence in determining intent or motive in a Japanese court, a practice strictly prohibited in the U.S.¹⁵³ Overall, then, it is safe to conclude that rules of evidence are much more favorable to the prosecution in Japan than in the U.S., and that there are proportionately fewer challenges to the admissibility of evidence in Japan.

Evidence in Japanese courts consists primarily, if not exclusively in most cases, of documents. The documents are usually in the form of a dossier (*chōsho*) that contains statements made by the defendant and witnesses, as well as other relevant information about the defendant, and are given great credibility by the court, so much so that trials are often referred to as "trials by dossier" (*chōsho saiban*).¹⁵⁴ Therefore, when these documents are weighed by judges against statements made by the defendant in court (who by this time has had an opportunity to talk with defense counsel), the documentary evidence almost always prevails.¹⁵⁵ As Hirano stated: "The current Code has adopted the principle of the primacy of the indictment (*kisojō ipponshugi*) and has sought to separate the trial from the investigation. But in practice. . . most of the documents are submitted without objection."¹⁵⁶ The importance of these documents explains the great deal of time and attention that is devoted to investigation by both police and prosecutors. This balance is not found in the U.S., where confessions and admissions made prior to indictment are virtually always challenged by the defense, despite the fact that the Miranda warnings are required before a suspect can be questioned,¹⁵⁷ and that the testimony of witnesses is expected during the trial. Just how many of these differences are attributable to a particularly "Japanese way of doing things" and how many to the fact that there is no jury system in Japan is difficult

153. Compare *Mapp v. Ohio*, 367 U.S. 643 (1961); 32 KEISHU 1672 (1978). See Cleary, *supra* note 151, at 1948-49, for a discussion of the Japanese case.

154. See Cleary, *supra* note 151, at 1949-50, for a discussion of Supreme Court Judgment, Nov. 22, 1966, 20 *Keishu* 1035, 67 *Hanrei Sjiho* 65. The fact that there is no jury system in Japan may account for at least some of the difference.

155. Foote, *supra* note 42, at 339; Hirano, *supra* note 55, at 138; Ishimatsu, *supra* note 45, at 145-52.

156. Japanese judges are especially reluctant to place great veracity on the testimony of witnesses who must testify in front of the defendant, much preferring witness statements taken under confidential conditions. See Ishimatsu, *supra* note 45, at 150.

157. Hirano, *supra* note 55, at 139.

to determine. Non-jury (bench) trials are considerably more efficient than those with a jury.¹⁵⁸ As Hirano stated:

It seems as though Japanese judges and others involved in the justice process in Japan do not really believe that the courtroom is suited to clarifying the truth. They seem to think that one person will tell another the truth only when the two of them are alone and the first person can open up to the other, and that when a person is in a public place such as a courtroom that person, out of a variety of considerations, will simply say whatever he or she pleases. In short, the trial is viewed as simply a ceremony where one lets people say whatever they want, and that truth is something that will be found later, when the judge quietly reads over the dossier and fits it together with the images of what went on in court.¹⁵⁹

Japanese are uncomfortable with U.S. trial procedure, and some recently publicized U.S. trials notably underline the differences.

One of the primary issues concerning confessions in Japan is the relative emphasis given to voluntariness and to reliability. In the U.S., it is assumed that a confession that was not voluntary is not reliable, but in Japan the issues are seen as separate. This is so because of the great emphasis placed on investigation at the pre-indictment stage of the proceedings, investigation that will or will not support the confession. The investigation, and the documents summarizing it, then, are crucial, for if the investigation truly is thorough, unbiased, and consistent with the confession given to investigators, it should be given credence. If, on the other hand, “. . .the collection of evidence. . .focuses on assembling evidence that meets the goal of establishing the facts as found by the investigation itself,”¹⁶⁰ voluntariness and reliability become intertwined. Inasmuch as the prosecutor effectively controls the investigatory stage of the criminal process, it is critical that the court trust the prosecutor. Some would question such trust were it not for the facts that such a high percentage of cases result in suspended prosecution and so few convictions are overturned on appeal.

158. *Miranda v. Arizona*, 384 U.S. 436 (1966).

159. It should be remembered, however, that while the current Code of Criminal Procedure is based on the pre-War code, a significant number of changes were made under U.S. occupation. It is also important to note that Japanese trials are segmented rather than continuous, with each segment taking perhaps one or two hours and the next segment not being heard until the following month, a method that is not only inefficient but which prolongs the length of many trials.

160. Hirano *supra* note 55, at 142.

VII. CRITICISM OF PROSECUTORIAL DECISION-MAKING

Not all judges, nor all of the Japanese public, have such trust in prosecutors, of course. Some judges feel that prosecutors have too much power and that the mechanisms set up to control that power are ineffective,¹⁶¹ while other segments of the Japanese legal community feel that prosecutorial reliance on confessions puts too much unsupervised power in the hands of the police.¹⁶² Critics point to several well-known reversals of convictions of men sentenced to death based on false confessions, documented in a report published by the Japanese bar associations.¹⁶³ Virtually all of the blame in such cases is placed on the police and the system that allows them virtually uninterrupted access to suspects over the maximum 23-day detention period. By implication, however, prosecutors are blamed, as they are allegedly too willing to accept police reports without undertaking independent investigations.

While it is not the purpose of this article to discuss police practices, it is clear that there is a close working relationship between the police and prosecutors. While similarities to the U.S. can be found, in Japan, prosecutors exercise substantially more control over the police than one would find in the U.S., even at the federal level.¹⁶⁴ What responsibility, then, does the prosecutor have for reviewing police practices to ensure that the rights of defendants are protected? Little, if any. Prosecutors are almost exclusively concerned with the nature of the evidence obtained by the police, not the methods by which that evidence was obtained. That is the responsibility of the defense attorney. Should the evidence, especially a confession, be found to have been illegally obtained, however, the prosecution's case would fall apart, so prosecutors virtually always ensure that there is other evidence that supports the confession, often developing or supporting the evidence independently of the police and always interviewing the suspect. This is not to say that the police could not coerce the confession and concoct other evidence and thereby fool the prosecutor, but that to do so would jeopardize the close working relationship. If the deception were discovered,

161. Ishimatsu, *supra* note 45, at 151.

162. See, e.g., *id.*

163. See Theresa Watanabe, *Victims of a Safe Society: Behind Japan's Low Crime Rate and Civilized Streets Is a Criminal Justice System Criticized as the Most Backward in the Industrialized World*, THE LOS ANGELES TIMES (Feb. 27, 1992), at A-1. See also *Justice System in Japan - Letter to the Editor*, THE LOS ANGELES TIMES (Mar. 20, 1992), at B-6 (offering a rebuttal to the article by a noted scholar of Japanese law, John O. Haley).

164. Watanabe, *supra* note 163, at A-3.

it would very likely result in disciplinary action against the police officers involved. Prosecutors, whether in the U.S. or Japan, are always reluctant to institute criminal charges against a police officer, but it nevertheless takes place with some regularity.¹⁶⁵

Decisions to indict or suspend, as well as convictions, are subject to judicial review. Thus there is some judicial overview of prosecutorial discretion. However, Japanese courts, like their U.S. counterparts, have historically been reluctant to overrule a prosecutor's decision. It is interesting that the Japanese case involving prosecutorial discretion receiving perhaps the most publicity was one in which an appellate court found that the prosecutor should have suspended prosecution.¹⁶⁶ And while the Tokyo High Court decision in *Japan v. Kawamoto* was not overturned by the Supreme Court, the High Court's decision was not validated, either. The Supreme Court decision upheld the principle of judicial review of prosecutorial decision-making and found that the prosecutor in the instant case did not properly consider all of the factors that must be taken into consideration to suspend prosecution, but it did not overturn the conviction.¹⁶⁷

A second case, *Japan v. Fukumoto*, had a similar outcome, although the subject matter was different, as was the reasoning of the High Court which found in this case that since the prosecutor did not prosecute a politician accused of buying votes it should not have prosecuted others involved who were no more culpable.¹⁶⁸ On appeal, the Japanese Supreme Court overturned this decision. The Court stated that as long as there was no misuse of suspension of prosecution (none was found by the High Court), discrimination on the part of the police should not result in invalidating Fukumoto's prosecution. The Supreme Court of Japan has, then, validated the principle of reversal of convictions based on misuse of prosecutorial discretion but has never upheld such a reversal, thus making such judicial overview ambiguous at best.

VIII. PROSECUTION OF CORRUPTION

Perhaps the greatest challenges that have faced Japanese prosecutors during the past 30 years have been cases involving corruption, both public and private. Corruption is not a new phenomenon in Japan, but it is probably safe to say that it is getting much more attention from the media and from prosecutors

165. CCP, art. 193.

166. See Castberg, *supra* note 38, at 43, 133. Most indictments of police officers are for crimes they have committed rather than for corruption or rights violations.

167. *Japan v. Kawamoto*, 348 HANREI TAIMUZU 179 (Tokyo High Court decision of June 14, 1977). For a discussion of this case, see Goodman, *supra* note 2, at 69-76.

168. *Id.* at 74-76.

than ever before.¹⁶⁹ All of the discretion described above comes into play in such cases, and the low-visibility decision-making that characterizes most prosecutorial decisions disappears in the prosecution of corruption.

There is little controversy among the Japanese public over the prosecution of those accused of corruption, and in fact there is a great deal of public support for such prosecutions, even though they may involve well-known politicians and business leaders.¹⁷⁰ It is not the political aspects of these cases that pose the greatest difficulty for prosecutors, but their complexity. As is the case with alleged violations of bribery and campaign spending laws in the U.S., it is not always easy to distinguish between legitimate contributions and bribery, nor is it easy to find and analyze the evidence necessary to obtain indictments and convictions. And finally, those who are most likely to commit such offenses are, in contrast to most other criminal suspects, not likely to confess.

It is important to note that most cases involving official corruption are developed by prosecutors rather than the police. In 1993, for example, the Special Investigations Department of the Tokyo District Public Prosecutor's office initiated 15 cases, only one of which was sent to them by the police.¹⁷¹ Some corruption cases come to the attention of prosecutors via the media, some as the result of anonymous letters or telephone calls, and some stem from investigations of other cases.¹⁷²

169. 409 HANTA 56 (Decision of the Hiroshima High Court of Feb. 4, 1980). See Goodman, *supra* note 2, at 76-82, and West, *supra* note 106, at 692.

170. Just why corruption is so pervasive is difficult to say, but one distinguished scholar, Chalmers Johnson, suggests that dominance by a single political party and its corruption of the bureaucracy, the alliance of politicians, corporate executives, bureaucrats, and organized crime, and the amount of money spent on politics are all factors. Johnson compares Japan with Italy with respect to single party dominance and the alliance referred to. He also states that Japan spends four time more per capita on politics than any other nation, a situation that certainly provides great opportunity for corruption. See CHALMERS JOHNSON, *JAPAN: WHO GOVERNS?* 212-215 (1995).

Another scholar, Brian Woodall, feels that the symbiotic relationship between public sector elite and certain private sector interests, which he calls "systematized clientelism," is to blame for the pervasive corruption in Japan. See BRIAN WOODALL, *JAPAN UNDER CONSTRUCTION: CORRUPTION, POLITICS, AND PUBLIC WORKS* 9-11 (1996).

171. See Smith, *supra* note 32. Some scholars, however, feel that the Japanese public is quite tolerant of political corruption. See Mamoru Iga & Morton Auerbach, *Political Corruption and Social Structure in Japan*, 17 *ASIAN SURV.* 556 (June 1977).

172. Information provided by the Special Investigations Department, Tokyo District Public Prosecutor's office, Mar. 4, 1996.

A. THE LOCKHEED SCANDAL

The first case of Japanese political corruption to capture the attention of the Western press, the "Lockheed Scandal," combined all of the elements mentioned in Johnson's analysis. Tanaka Kakuei, a politician from rural Niigata, rose in the ranks of the Liberal Democratic Party (LDP), ultimately becoming prime minister in 1972.¹⁷³ Although the details of the case are complex,¹⁷⁴ Tanaka, who resigned as prime minister in 1974, was accused in 1976 of accepting \$2.1 million in bribes from the Lockheed Company to influence All Nippon Airways (ANA) to buy Lockheed Tristar aircraft. The bribe first came to light in the U.S. in 1976 when A. Carl Kotchian, a vice-president of Lockheed Aircraft Corporation, testified before Senator Frank Church's sub-committee of the Senate Foreign Relations Committee, that Lockheed paid ¥500 million (\$1.4 million) to bribe various Japanese officials to facilitate the purchase of the Tristar. Shortly thereafter, Prime Minister Miki Takeo requested all relevant documents and information on the case from President Gerald Ford. Ford agreed, providing that the information would remain confidential and be used for investigative and trial purposes only. An agreement was signed to that effect and shortly thereafter the material was supplied to Japanese officials and relayed to the Tokyo District Prosecutor's office.¹⁷⁵ Based upon this information, and the Japanese prosecutor's own investigation (which included testimony from Lockheed officials under a grant of immunity from Japan as well as widespread seizures of evidence in Japan), Tanaka, several other politicians, and several ANA executives were indicted and arrested on charges of perjury, bribery, and violation of the Foreign Exchange and Foreign Trade Control Law (*Gaikoku Kawase Oyobi Gaikoku Bōeki Kanrihō*).¹⁷⁶ While the evidence that surfaced in the U.S. Senate hearing stimulated Japanese action, virtually all of the trial evidence in the case was obtained through interrogations and seizures by Japanese prosecutors. Prosecutors obtained confes-

173. *Id.*

174. On Tanaka, see Johnson, *supra* note 170, at 183-211, and JACOB M. SCHLESINGER, *SHADOW SHOGUNS: THE RISE AND FALL OF JAPAN'S POSTWAR POLITICAL MACHINE* (1997).

175. See PETER J. HERZOG, *JAPAN'S PSEUDO-DEMOCRACY*, 158-73 (1993); Johnson, *supra* note 170, at 192-201; Takahashi Yuzuru, *Lockheed Case (Marubeni Route) - From the Perspective of Mutual Assistance*, Lecture at UNAFEI seminar (Oct. 29, 1996).

176. *Id.* at 2-4.

sions from most of the defendants, confessions that were repudiated at their trials.¹⁷⁷

Four different trials were held, differentiated by how the payoffs were channeled. Tanaka's trial was called the "Marubeni Route Trial" as the relevant bribe was channeled through the Marubeni Corporation. Tanaka denied all of the allegations against him; other defendants either remained equally as steadfast, made partial admissions, or agreed completely with the prosecution's case against them. Throughout his trial, Tanaka refused to admit any wrongdoing, and his defense team, which included former prosecutors, judges, and a retired Supreme Court justice, tried to refute all of the allegations and evidence presented by the prosecution.¹⁷⁸ Tanaka's trial involved 191 hearings over a four-year period, and it is alleged that during that period he used his influence within the LDP to have justice ministers appointed who were sympathetic to his cause and who from time would publicly criticize the prosecutors handling the case.¹⁷⁹ That the administrative superiors of the prosecutors were unable to influence the case shows quite clearly just how much independence Japanese prosecutors enjoy. All of the defendants were found guilty, including Tanaka (on October 12, 1983). Tanaka was sentenced to four years at hard labor and a fine of ¥500 million.¹⁸⁰

As might be expected, all of the defendants appealed their sentences. Tanaka alone had 19 lawyers.¹⁸¹ Tanaka argued, among other things, that as Prime Minister he did not have the power to determine which aircraft ANA should buy. Despite the effort made by his lawyers, however, the Tokyo High Court in 1987 rejected his appeal, as well as those of his four co-defendants.¹⁸² Four of the five subsequently appealed to the Supreme Court. Immediately after his conviction, Tanaka was re-elected to a 15th term in the lower house of the Diet by a record vote.¹⁸³ In February, 1985, Tanaka suffered a stroke, ending his career in the Diet but diminishing only slightly his political influence. He died in December 1993, and in February of 1995 the Japanese Supreme Court handed down a decision upholding Tanaka's con-

177. Herzog, *supra* note 175, at 163-64, and Johnson, *Tanaka Kakuei, Structural Corruption, and the Advent of Machine Politics in Japan*, 12 JOURNAL JAPANESE STUD. 1, 15 (1986).

178. *Id.* at 164. Repudiation of a confession at a Japanese trial is uncommon.

179. Schlesinger, *supra* note 174, at 147.

180. *Id.*

181. *Id.* at 166.

182. *Id.* at 167.

183. Takahashi, *supra* note 175, at 7, 14. Itō Hiroshi, a director of Marubeni, was originally sentenced to two years imprisonment, which the Tokyo High Court modified, suspending the sentence for four years.

viction (but finding the testimony given under grants of immunity inadmissible).¹⁸⁴ In September, 1997, Prime Minister Hashimoto Ryutaro appointed one of the convicted Lockheed defendants, Sato Koko, to head the Management and Coordination Agency in his formation of a new cabinet. The outcry was substantial and Hashimoto had to ask for Sato's resignation, an indication of the feeling of the Japanese public about the Lockheed scandal and corruption in general.¹⁸⁵

In the Tanaka case, prosecutors showed no hesitation to prosecute the most powerful politician in Japan at the time. The prosecution was not simply symbolic in nature, and there was considerable cooperation between Japan and the U.S. However, despite his prosecution and conviction, Tanaka's constituents overwhelmingly returned him to office. This case also helped clarify the distinction between "political contributions" and "bribes."¹⁸⁶ Finally, the Lockheed Scandal ultimately led to the temporary downfall of Tanaka's party, the Liberal Democratic Party, even though it took many more scandals and twenty years before that was to occur.

B. THE RECRUIT SCANDAL

One of these scandals, the "Recruit" scandal of the late 1980s, implicated a former prime minister, a number of sitting politicians, business executives, and prominent academics. The Recruit empire, which in 1987 had sales exceeding ¥350 billion and included 27 subsidiaries and over 6000 employees, started in 1960 as a small business run by a University of Tokyo student.¹⁸⁷ As the company grew, its founder and president, Ezoie Hiromasa, established close ties to the Ministries of Education, Labor, and Telecommunications, ministries which played a major role in approving and regulating various existing and proposed Recruit enterprises. In 1986 a major subsidiary, Recruit Cosmos, offered shares of its stock to 159 politicians, business executives, and academics before it went public.¹⁸⁸

The shares were sold for ¥3000 each, and the price rose significantly after it went public,¹⁸⁹ greatly enriching those lucky enough to have been offered the stock prior to its public listing. These activities came to light largely through an article in the

184. Johnson, *supra* note 170, at 200.

185. Sam Jameson, *Tokyo Upholds Final Lockheed Guilty Verdicts*, L.A. TIMES, Feb. 23, 1995, at A-12. See also Takahashi, *supra* note 175, at 15-19.

186. See *Hashimoto Says He's Sorry*, ASAHI NEWS (Sept. 23, 1997) <http://www.asahi.com/english/enews/enews.html#enews_10295>.

187. Johnson, *supra* note 170, at 199.

188. Herzog, *supra* note 175, at 175.

189. *Id.* at 77. This is a classic case of insider trading.

Asahi Shimbun, one of Japan's leading newspapers, about Komatsu Hideki, the deputy mayor of Kawasaki City, who received the unlisted shares allegedly in return for favorable treatment in a land deal in Kawasaki.¹⁹⁰ Further revelations named former prime minister Nakasone and Prime Minister Takeshita, Finance Minister Miyazawa Kiichi, and Justice Minister Hasegawa Takashi as recipients of the Recruit shares.¹⁹¹ Recruit tried to persuade a member of the Diet known for his aggressiveness in such cases, Narazaki Yanosuke, not to initiate an investigation by offering him ¥5 million, an offer that was videotaped by Narazaki and turned over to the Tokyo District Public Prosecutor's Office.¹⁹² In addition to the sale of the unlisted shares, Recruit had for many years made substantial contributions to select politicians, including hiring their wives as "special consultants."¹⁹³

Twelve politicians, including four secretaries of high-ranking LDP officials, former Chief Cabinet Secretary Fujinami Takao, and lower house member Ikeda Katsuya, as well as Ezoie Hiromasa and his colleagues and three executives of Nippon Telegraph and Telephone (NTT), were indicted and tried. Ten have been found guilty.¹⁹⁴ Why more prominent politicians, such as one former and one current prime minister, were not indicted is not known, although it would have been difficult to prove a direct relationship between the stock purchases and their effect on public policy in many of the cases, or that the individuals involved knew that the shares would increase in value over time.¹⁹⁵ It should also be pointed out that prosecutors appealed several of the not guilty verdicts, including that of Fujinami, who was found not guilty in September 1994, the first verdict involving a politician.¹⁹⁶ In late March of 1997, the not-guilty verdict was reversed by the Tokyo High Court.¹⁹⁷ Fujinami was given a

190. *Id.*

191. RICHARD H. MITCHELL, *POLITICAL BRIBERY IN JAPAN* 124 (1996).

192. *Id.*, and Woodall, *supra* note 170, at 13. The information received by the *Asahi Shimbun* was evidently from inside the Recruit organization. See Kojiro Shiraishi, *The Recruit Scandal and 'Money Politics' in Japan*, Occasional Paper 90-10, Program on U.S.-Japan Relations, Harvard University, 1990, at 15.

193. *Id.*

194. Shiraishi, *supra* note 192, at 5-6.

195. Mitchell, *supra* note 191, at 125, and *Fujinami Not-Guilty Verdict Overturned*, *DAILY YOMIURI*, Mar. 25, 1997, at 1.

196. Interview with Kasama Haruo, Deputy Director, Special Investigations Department, Tokyo District Prosecutor's Office (Mar. 29, 1996). Japanese bribery law requires proof that money be accepted by a public official in connection with his duties in order to benefit the person who offered the money, while criminal law in general additionally requires *mens rea* (guilty mind). See PC 197.

197. Sam Jameson, *Former Official is Acquitted in Japan Bribe Case*, *L.A. TIMES*, Sept. 28, 1994, at A-4.

three-year prison term, suspended for four years.¹⁹⁸ The Tokyo High Court ruling in the Fujinami case made it much easier for prosecutors to prove bribery in future cases by clearly distinguishing between political donations and bribery. Thus, while sitting politicians in the scandal resigned, including Prime Minister Takeshita, consequences for the others were mixed at best, although one cannot underestimate the loss of “face” that resulted, the effect the scandal had on subsequent LDP losses at the polls, and the precedent set by the Tokyo High Court.¹⁹⁹

C. THE SAGAWA KYUBIN SCANDAL

Soon after indictments were handed down in the Recruit scandal, another scandal involving high government officials, major corporations, and organized crime shook the Japanese public. Sagawa Kyubin, a trucking firm based in Kyoto, was accused of using organized crime (*bōryokudan*) to raise money for payoffs to politicians. When news of the scandal first broke, there was some doubt that prosecutors would fully investigate the case: “party leaders, academics and analysts alike allege that the payoffs are so widespread — including money paid to leading politicians in all major parties except the Japan Communist Party — that the prosecutor’s office may find it too hot to investigate fully.”²⁰⁰ Watanabe Hiroyasu, Sagawa Kyubin’s president, confessed to paying off over 100 politicians. Ultimately named as recipients of the payoffs were, among others, Prime Minister Miyazawa Kīchi, former Prime Minister Takeshita Noburo, former Cabinet Secretary Ozawa Ichiro, Niigata governor Kaneko Kiyoshi, and LDP Vice-President Kanemaru Shin.²⁰¹ Police and prosecutors raided Sagawa Kyubin offices, seizing evidence that led to indictments. Prosecutors alleged that Sagawa offered loan guarantees that allowed organized crime figures to borrow from banks and other financial institutions without collateral in return for substantial kickbacks to Sagawa, and that the money then went to politicians and others, including \$250,000 paid to former President Bush’s brother, Prescott, for consultation work in a

198. *Fujinami Not-Guilty Verdict Overturned*, *supra* note 195, at 1. This was the second such reversal of a not-guilty finding in the Recruit case, and indicates the tenacity of the Tokyo District Public Prosecutor’s Office.

199. Editorial, *Political World Must Reflect on Ruling*, DAILY YOMIURI, Mar. 25, 1997, at 6. This outcome is notable in several respects. In Japan, an appellate court may overturn a not-guilty verdict and set the sentence, neither of which is possible in the U.S.

200. The trial of one of the Recruit defendants, Ono Toshihiro, lasted almost eight years, ending in September 1997 after Ono finally admitted his guilt. See *Ex-Recruit Exec Gets Suspended Term*, DAILY YOMIURI (Sept. 18, 1997).

201. Leslie Helm, *New Scandal over Political Payoffs Threatens Japan’s Leadership*, L.A. TIMES, Feb. 14, 1992, at A-9.

former gangster boss's attempt to acquire U.S. investments.²⁰² The size of the payoffs and the involvement of *bōryokudan* and right-wing groups distinguished this scandal from the Lockheed or Recruit scandals. Kanemaru was alleged to have received ¥500,000,000 (\$4 million) in payoffs, and at least 50 other politicians allegedly received over ¥98,400,000 (\$800,000) each.²⁰³ Kanemaru promptly resigned his LDP post, admitted not reporting the Sagawa "contribution" in violation of the Political Funds Control Law, and paid a fine of ¥200,000 (\$1600).²⁰⁴ Shortly thereafter he resigned from the Diet, but said that he had passed on the money received from Sagawa to other politicians to help in their campaigns.

Initially, prosecutors said they had insufficient evidence to indict any of the politicians,²⁰⁵ but public outcry forced them to reconsider. Raids on Kanemaru's homes and offices revealed over ¥6 billion in cash, gold bullion, and debentures.²⁰⁶ Responding to public outrage over the Kanemaru case, the Number One Tokyo Prosecution Review Commission (*kensatsu shin-sakai*) determined that the decision not to indict and bring Kanemaru and others to trial for violation of the Political Funds Control Law was inappropriate.²⁰⁷ In March, 1993, Kanemaru and his former political secretary, Haibara Masahisa, were arrested and indicted for tax evasion, as the prosecutors decided not to follow the recommendations of the Commission to indict him for the more serious offense.²⁰⁸

The failure of the Tokyo Public Prosecutor's office to initially indict Kanemaru was even criticized by another public prosecutor, Sato Michio, of the Sapporo High Public Prosecutor's Office, an extremely rare break in the ranks of prosecution

202. *Id.*, and Helm, *News Analysis: Japan Washes Its Political Dirty Laundry*, L.A. TIMES, Nov. 28, 1992, at A-6.

203. Helm, *supra* note 201.

204. See also Sam Jameson, *Japan Political Kingpin Tied to Firm's Huge Loss*, L.A. TIMES, Sept. 25, 1992, at A-6, and Woodall, *supra* note 170, at 153.

205. Johnson, *supra* note 170, at 219. The law limits contributions to political candidates to ¥1.5 million (\$12,000) from any one source in a given year. Kanemaru was charged under a "summary indictment," which may be done at the discretion of the prosecutor and approval of the defendant, in "minor cases," and which carries with it financial penalties. See CCP, arts. 461-470.

206. *Tokyo Lawmakers Won't be Charged*, SAN DIEGO UNION-TRIBUNE, Jan. 30, 1993, at A-12.

207. Woodall, *supra* note 170, at 12. Prosecutors carried out eight raids, searching a total of 94 locations, and seizing 5,827 items. A total of 917 prosecutors, assistants, and police officers were involved. Information obtained from Special Investigations Department, in Tokyo District Public Prosecutor's office (Mar. 5, 1996).

208. *Prosecutors Again Fail to Indict Kanemaru*, JAPAN TIMES (Feb. 28, 1996) <<http://www.japantimes.co.jp/news/news2-96/news2-28.html>>.

that became public.²⁰⁹ Interestingly, Kanemaru was able to avoid questioning by prosecutors, claiming that the mass of reporters outside his apartment prevented him from making a “dignified” appearance at the prosecutor’s office.²¹⁰ The prosecutor’s failure to interrogate Kanemaru was criticized by Sato as well: “A prosecutor should never relinquish his authority to question a suspect face to face — his most effective weapon in the fight against crime — just because the individual under investigation submits a written explanation or the affair has turned into a media circus.”²¹¹ Kanemaru’s trial began in July, 1993, but was repeatedly delayed by his illness, and he died in late March, 1996, before conclusion of the trial.²¹² A day after his death, his former aid Haibara was convicted of tax evasion, fined ¥81,000,000 (\$660,000), and sentenced to 28 months in prison, suspended for four years.²¹³

The court, ruling in Haibara’s case, found that the funds received by Kanemaru were kept for his personal use rather than for future political activities.²¹⁴ Thus, the ruling on tax evasion in effect found Kanemaru guilty of the more serious offense of violating the Political Fund Control Law, a crime for which the prosecutors refused to indict (except on a summary basis). That is not to say, however, that prosecutors could have won a conviction on that charge had the case gone to trial. A bribery charge would have been even more difficult to prove, as Kanemaru’s position as Vice President of the LDP did not allow him, in theory, to exert direct influence over any government agency or official.

209. *Japan Party Leader Faces New Charge*, SAN DIEGO UNION-TRIBUNE, Mar. 28, 1993, at A-31. They were indicted for tax evasion rather than bribery as the former was easier to prove, given the amount of cash and other valuables found in Kanemaru’s possession.

210. Sato, *The Duty of a Public Prosecutor*, translated by the Asia Foundation after originally appearing in the ASAHI SHIMBUN, June 16, 1992 (Nov. 23, 1992) <<http://www.gwjapan.com/ftb/pub/oped/tafjv/1992/1606sato.txt>>.

211. Clayton Jones, *Japanese Backlash Grows over Feeble Prosecution of Figures in Bribery Case*, CHRISTIAN SCI. MONITOR, Sept. 28, 1992, at 8.

212. Sato, *supra* note 210.

213. *Scandal-Felled “Godfather” of Japanese Politics Dead at 81*, NEWS TIMES (Mar. 28, 1996) <<http://www.newstimes.com/archive/mar2896.inh.htm>>. The tax case was not finally resolved until early 1997, when the Tokyo Regional Taxation Bureau dismissed a challenge by Kanemaru to their attempt to recover taxes on ¥3.34 billion (\$27 million) allegedly accumulated between 1986 and 1989. This was in addition to the ¥1.84 billion he was originally charged with hiding. After his death, the debt passed to his heirs. See *Kanemaru Complaint on Tax Collection Dismissed*, DAILY YOMIURI, Mar. 17, 1997, at 2.

214. *Kingmaker’s Former ‘Money Man’ Given Suspended Jail Term*, SAN DIEGO DAILY TRANSCRIPT (Mar. 29, 1996) <http://sddt.com/files/librarywire/9...03_96/DN96_03_29/DN96_03_29_1f.html>.

It was during the trial of Sagawa Kyubin president Watanabe Hiroyasu, however, that perhaps the most damning information was revealed: the ties between the LDP and organized crime. Although Kanemaru's name was not mentioned, prosecutors alleged that a "top politician" had close ties to Ishii Susumu, then-head of Inagawa-kai, one of the larger crime syndicates, and that the "top politician" used these ties through Watanabe to stop right-wing harassment of Takeshita Noburo during Takeshita's 1989 campaign to become prime minister.²¹⁵ It was not the threat of violence by Inagawa-kai that stopped the harassment, but rather the close ties between organized crime and right-wing groups that have existed for many years in Japan.²¹⁶ Watanabe was convicted of aggravated breach of trust, a violation of the Commercial Law, and sentenced to seven years in prison. It came as no surprise to the Japanese public that ties existed between politicians, organized crime, and right-wing groups, but the amount of money involved, the high political office of the politicians, and the notoriety of the organized crime figures was nevertheless shocking.

It is not clear why prosecutors failed to indict Kanemaru and others for the more serious crimes of which they were suspected. As mentioned above, it is often difficult to prove a direct link between "campaign contributions" and political favors. It was quite easy to prove that the money and other assets found in Kanemaru's office had not been reported to tax authorities. Since the Prosecution Review Commission found non-prosecution inappropriate, and a high prosecutor from another office publicly criticized his colleagues in Tokyo, one has to wonder whether Kanemaru received special treatment. Perhaps prosecutors knew of Kanemaru's terminal illness and felt that a long trial would accomplish little, but to date no explanation for his seemingly lenient treatment has been offered, despite substantial criticism from the media. Prosecutor Sato summed up his feelings on the subject as follows: "Preferential treatment for the powerful is absolutely forbidden in our system of justice. The Japanese people have had faith in that system largely because prosecutors and judges have been free from favoritism in administering the law. To let the ruling party's boss off with a minimal fine would betray the principles our predecessors have lived by."²¹⁷

215. *Kanemaru Aide Haibara Evades Tax, Prison*, JAPAN TIMES, (Mar. 29, 1996) <<http://www.japantimes.co.jp/news/news3-96/news3-29.html>>.

216. Jones, *supra* note 211; Jones, *Japanese Political Scandal Reveals Role of Gangsters*, CHRISTIAN SCI. MONITOR, Nov. 23, 1992, at 6.

217. See Helm, *supra* note 202, at A-6.

D. CORRUPTION IN THE CONSTRUCTION INDUSTRY

Evidence gathered by prosecutors in the Sagawa Kyubin case led to another scandal involving politicians and corporations, in this case the construction industry. Investigators found among Kanemaru Shin's papers a list of construction firms and their political contributions.²¹⁸ The investigation that followed resulted in the indictment of the Mayor of Sendai, Ishii Tōru, the Governor of Ibaraki Prefecture, Takeuchi Fujio, the Mayor of Miyagi Prefecture, Honma Shuntaro, former Sanwa Mayor Oyama Mahahiro, former Construction Minister Kishirō Nakamura, and high officials of the Hazama, Nishimatsu, Shimizu, Taisei, and Kajima construction companies, Mitsui Trading Company, and the President of the Japan Federation of Construction Organizations.²¹⁹ In all, 33 people were arrested. It was also alleged that twice per year the Kajima Corporation made cash "gifts" of as much as ¥10 billion (\$91 million) to former Prime Minister Takeshita and Kanemaru, from 1989 until the "gifts" were discovered in 1993.²²⁰ A vice president of Kajima was alleged to have paid a bribe of ¥10 million (\$95,000) in 1992 to Nakamura Kishiro, then Minister of Construction, in return for Nakamura's convincing the Fair Trade Commission not to pursue collusion charges against a cartel of construction firms in Saitama prefecture. Since Nakamura was a member of the Diet, prosecutors had to request Diet permission through the Tokyo District Court to make an arrest. The request was the first to be granted in 27 years. The Kajima executive, Kiyoyama Shinji, was arrested again, as he was already on trial in another bribery case.²²¹ Shimizu Construction alone allegedly had an annual budget of ¥2 billion for "gifts" to politicians. In total, the National Tax Agency estimated all of the corporations gave ¥59.5 billion to politicians in 1993.²²² In January 1997, Ishii was found guilty of taking ¥140 million (\$1.2 million) in bribes and sentenced to three years in prison, and in March of the same year Honma was sentenced to two and one-half years in prison. Ishii appealed immediately after his conviction.²²³

218. Sato, *supra* note 210.

219. McCormack, at 36.

220. *Id.*; Barbara Wanner, *Construction Scandal May Benefit Hosokawa Policy Agenda* (undated policy document from Gateway Japan) <<http://www.gwjapan.com/cgi-bin/webf...HOSOKAWA+POLICY+AGENDA+%2Dcrb%2D938>>.

221. Wanner, *supra* note 220.

222. Sam Jameson, *Japan Parliament Asked to OK Bribery Arrest of Member*, L.A. TIMES, Mar. 9, 1994, at A-4.

223. McCormack, *supra* note 219, at 37. Shimizu Corporation is the largest construction firm in Japan, with 1993 sales of over ¥2 trillion (\$16.6 billion). See Woodall, *supra* note 170, at 31, for a list of the top construction firms in Japan.

Bribery of politicians by construction firms in Japan is not a new phenomena, but the cases described above represent the most significant effort on the part of prosecutors to curb this practice. As Brian Woodall points out in his well-documented study of construction firms in Japan, *Japan Under Construction*, such bribery has been taking place since at least the mid-1950s, when the LDP's dominance became complete.²²⁴ Local politicians historically played a key role in determining which construction firms could bid on projects and which would win, and payoffs to politicians commonly range from one to three percent of the total cost of the project. Firms even ranked politicians as to their ability to affect the outcome of the bidding process.²²⁵ Yet there have been few successful prosecutions of either politicians or corporation officials until recently because, for reasons discussed above, it has been difficult to legally distinguish between contributions or gifts and bribery.

Further complicating this situation is *dangō*, the illegal but common practice of price-fixing in Japan. Although it is not within the scope of this article to discuss *dangō*, it should be noted that much of the Japanese "economic miracle" is built upon *dangō*, and little has been done to stop it as it benefits the industry and the politicians in power.²²⁶ Successful prosecutions in other bribery cases, and favorable appellate court decisions, however, as well as increased public outrage fed by media revelations, have made it easier to prosecute those suspected of bribery in the construction industry even though prosecutions for *dangō* itself are still not common.

E. THE MINISTRY OF HEALTH/HIV SCANDAL

Official corruption affects all public sectors in Japan, as was brought to light in early 1996 during legislative hearings on the infection of hemophiliacs by the HIV virus that was in contaminated blood-clotting concentrates used in Japan in 1983 and 1984. While such hearings in the U.S. might have resulted in censure, dismissal, loss of license, or some other non-criminal penalty, in Japan criminal charges arose out of this incident. Abe Takeshi, a former president of Teikyo University and head of the AIDS research team of the Ministry of Health and Welfare in the early 1980s, was charged in September 1996 with professional negligence, negligence which resulted in the death of a hemophiliac in 1991 from AIDS contracted from infected blood administered by

224. *Ex-Miyagi Governor Gets 2 1/2 Yrs for Bribery*, DAILY YOMIURI, Mar. 22, 1997, at 1.

225. Woodall, *supra* note 170, at 11-16.

226. *Id.* at 40.

Abe in 1985, at least one year after Abe learned that the blood was possibly tainted.²²⁷ In addition, other Ministry officials are under investigation for professional negligence and have been criticized for their close relationship with Green Cross Corporation, supplier of the blood products, and both criminal and civil complaints against former Ministry and Green Cross officials by families of those who died as a result of AIDS contracted from the products.²²⁸ The complaints resulted in the arrest and indictment of the president and two former presidents of Green Cross, and of Matsumura Akihito, former head of the Biologics and Antibiotics Division of the Ministry of Health.²²⁹ The case is complicated by the fact that there are multiple motives, including great reluctance on the part of the Ministry to acknowledge that the infected hemophiliac in 1983 was Japan's first AIDS victim, fear on the part of Green Cross officials that their company would be seriously damaged by exposure of their part in the cover-up, and Abe's financial relationship with drug companies.

Prosecutors have been particularly aggressive in the blood scandal, conducting comprehensive investigations of numerous pharmaceutical firms, the Ministry of Health and Welfare, and their present and former officials. A great deal of evidence was seized from companies and from the homes of officials, and intensive interrogations of everybody connected to the scandal were carried out. Indictments were then handed down. And while the original issue involved only hemophiliacs, it soon included what the Japanese media calls "non-hemophiliac" victims as well.²³⁰

While the knowing distribution of possibly tainted blood by a pharmaceutical firm in itself gives rise to legal action, the negligence or even complicity of a government ministry is possibly the most important factor explaining the aggressive actions of the prosecutors. It is not unheard of for private industry to cut corners in search of a profit, even if it threatens the lives of its customers, but that is not the case for the government ministry that is responsible for the health of its citizens, especially if that ministry has as its officials medical doctors bound by professional ethics as well as government regulations and guidelines. And what

227. *Id.* at 48-50.

228. *Abe Knew Unheated Blood Unsafe in '84*, DAILY YOMIURI, (Sept. 4, 1996) <<http://www.yomiuri.co.jp/newsj/0904dy07.htm>>.

229. *Ex-Ministry Official Accused in HIV Lawsuits*, DAILY YOMIURI (Sept. 19, 1996) <<http://www.yomiuri.co.jp/newsj/0919dy03>>.

230. *3 Ex-Green Cross Execs Indicted in Blood Scandal*, MAINICHI DAILY NEWS, Oct. 9, 1996; *Matsumura Indicted*, MAINICHI DAILY NEWS (Oct. 25, 1996) <<http://www.mainichi.co.jp/mdn/dom2.html>> and <<http://www.mainichi.co.jp/mdn/bus3.html>>.

perhaps separates Japan from other industrialized nations, including the U.S., is Japan's routine use of the criminal law to punish those responsible for the acts in question and the almost exclusive use of prosecutors in investigating, arresting, and indicting the defendants.

The Ministry of Health/HIV scandal also provides a good example of how review of prosecutorial decision-making operates in practice. As indicated above, some Ministry officials, as well as some officers in pharmaceutical companies, were indicted for professional negligence for allowing HIV-tainted blood to be distributed throughout Japan, while others were not. In such a large industry there were obviously many people who were involved in one way or another with the decision to allow tainted blood to be distributed, so the problem facing prosecutors was who should be indicted. Two individuals were not indicted: Kobayashi Yoshinori, formerly in charge of the Ministry's Pharmaceutical Affairs Bureau, and Konishi Jinuemon, president of Nihon Zoki Seiyaku (Japan Hormone Pharmaceuticals), a company that distributed the blood products.²³¹ The decision not to indict these two senior figures was appealed to a Tokyo *kensatsu shinsakai*, or Prosecution Review Commission, by the family of a hemophiliac who died of AIDS contracted from the tainted blood. The Commission recommended that the two be prosecuted for professional negligence (rather than murder, which was asked for by the family),²³² but the Tokyo District Public Prosecutors Office stuck with its original decision not to indict, leaving the family little recourse in the criminal process.²³³

IX. CONCLUSION: JAPAN AND THE U.S. COMPARED

The role played by prosecutors in corruption cases in Japan is difficult to compare directly to the role of prosecutors in similar cases in the U.S., as prosecution is centralized in Japan but highly decentralized in the U.S. If the corruption cases described above occurred in the U.S., they would be investigated by federal law enforcement agencies, primarily the FBI, or by a regulatory agency, and then either handed over to a U.S. attorney for possible indictment or dealt with solely within the regulatory agency, usually as a civil rather than criminal matter. Direct comparisons are very difficult, although there are similarities between the savings and loan scandal in the U.S. and the *jusen* scandal in Japan.

231. See *HIV-Infected Woman Sues Gov't, Green Cross*, DAILY YOMIURI (Sept. 4, 1996) <<http://www.yomiuri.co.jp/newsj/0904dy09.htm>>.

232. *Judicial Watchdog Requests Indictments in HIV Scandal*, MAINICHI DAILY NEWS, (Dec. 12, 1996) <<http://www.mainichi.co.jp/mdn/dom2.html>>.

233. *Id.*

What is perhaps most striking about the manner in which Japanese prosecutors handle corruption cases, whether official corruption or corruption in the business world, is the almost total control they have over the entire process, from investigation to arrest to prosecution. Virtually nothing is done by the police or any other agency unless it has been approved by the prosecutor's office. Cases may be referred to the prosecutor's office by official agencies, such as the police or the Internal Revenue Service, or the media may lead prosecutors to alleged wrongdoers. Referred cases may undergo anywhere from very preliminary to rather thorough investigation, and media reports in particular generally require extensive work by prosecutors before indictments can be issued. Investigations usually commence with the seizure of evidence, pursuant to a judicially issued search warrant. That evidence can amount to hundreds of boxes of documents, and it is the prosecutors who seize these documents, read them, determine whether there is sufficient evidence of illegality to issue an indictment, and make the arrests.

The issue of political considerations in prosecution is very difficult to analyze, as there is insufficient empirical data on which to base an analysis. Prosecutors absolutely deny that politics plays any role in decisions to prosecute, and most of the cases discussed above would tend to support that argument, with the case of Kanemaru Shin being an exception. Given the statutory and historical independence of prosecutors in Japan, as well as their clearly defined career paths, there would seem to be no incentive to back off prosecuting powerful politicians.

At the same time, this independence allows prosecutors in Japan to exercise more leniency in some cases than would be acceptable in the U.S. In both cases, it is clear that the Japanese prosecutor has great power. It is not clear that Americans want a system of prosecution such as is found in Japan, and even if they did, it is highly unlikely that this type of system could exist in a federal government with a powerful executive branch. But it is interesting to speculate what the United States would be like were it possible.