THE CRIMINAL JUSTICE SYSTEM IN JAPAN: PROSECUTION

I. PUBLIC PROSECUTORS

A. Qualification

In Japan, a private attorney, a judge and a public prosecutor have quite the same qualifications. There are other different qualifications[1], but they are so exceptional and rare that only the important ones will be focused upon.

To become a Japanese legal practitioner, one must pass the National Bar Examination, which is one of the most difficult examinations. About 700 candidates (about three percent those who take the examination) pass each year. The average age of successful candidates is about 28 years old. Since most candidates graduate from a university at the age of 22 or so, most of the candidates study under the financial support by their parents for several years.

After passing the Examination, they must take a two-year training course as legal trainees at the Legal Research and Training Institute of the Supreme Court. Legal trainees are government officials paid by the Supreme Court. The training period consists of two phases:

(1) academic training at the Institute for the first four months and the last four months; and

(2) sixteen months of practical training. Each trainee is dispatched to a certain prefectural district court, public prosecutors office and private law office.

This practical training enables the trainees to choose their future careers based on a comparison of each role.

[1] See, e.g., the Court Organization Law, Articles 41, 42 and 44 (CJLJ p. 23), and the Public Prosecutors Office Law (hereinafter PPOL), Article 18.

B. Recruitment

After completing such training, trainees can become a private attorney, a judge or a public prosecutor. Roughly speaking, more than 500 trainees become private attorneys, about 100 trainees become judges and about 40 to 80 trainees become public prosecutors annually. The possible reasons for the smallest number include the toughness of the work and frequent transfers. If a judge or a public prosecutor quits his job, he can become a private attorney, and most of them do so. At present, there are about 2,100 judges, 1,100 public prosecutors and 16,000 private attorneys in Japan. Similarly, a private attorney also can become a judge or a public prosecutor. However the number of such judges or public prosecutors is quite small[2].

C. Organization and Training

In Japan, the prosecution system comprises the Supreme Public Prosecutors Office (headed by the Prosecutor-General), 8 High Public Prosecutors Offices (headed by a Superintending Prosecutor), 50 District Public Prosecutors Offices (headed by a Chief Prosecutor) and 203 branches, and 438 Local Public Prosecutors Offices (consisting mainly of Assistant Public Prosecutors[3]).

Regarding the size of district public prosecutors offices, the average office has 10 public prosecutors. The smallest one has only 5 public prosecutors, and the largest one has more than 200 public prosecutors. Each office has a Chief and a

[2] In the last eight years, only 30 private lawyers have become subsequently judges. Only six professors or assistant professors in legal science in universities have become judges since 1969 other than Supreme Court Justices.

Deputy Chief Prosecutor, who do not investigate and handle trials, but rather, focus on supervisory and administrative matters. Thus, for example, in the smallest office, only three public prosecutors actually investigate and prosecute cases. In small offices, the public prosecutor who investigates and indicts a suspect, is the same person who handles the trial. In contrast, in large offices, two different public prosecutors carry out these duties, working in either the Investigation Department (usually called "Criminal Affairs Department") or the Trial Department.

First-year public prosecutors used to work at one of the largest offices such as Tokyo, Osaka or Sapporo for only one year. Since two years ago, they undergo a two-month training all together at the Research and Training Institute of the Ministry of Justice. Afterwards, they are assigned to a relatively large-sized public prosecutors office, other than the Tokyo office, for 10 months. Then they are transferred every two or three years. In their first ten years as public prosecutors, most of them work at various sized offices.

During their career, public prosecutors receive three kinds of job-related training at the Research and Training Institute of the Ministry of Justice, in addition to the first-year training described above.

[3] The number of assistant public prosecutors is about 900. Their qualification is different from public prosecutors'. They have to pass a special examination conducted by the Ministry of Justice after working in a criminal justice agency for a certain period. See PPOL Article 18, paragraph 2. They deal with mainly misdemeanors like theft and traffic offenses.

1. Course for Third- and Fourth-Year Public Prosecutors

The number of participants is limited to approximately 40 at one time. It is conducted twice a year for a duration of seven days each time. The purpose of this course is to develop the expertise of public prosecutors who deal with general criminal cases. It consists of lectures and discussions. The lectures are given by experts in various fields, including senior public prosecutors, on fundamental knowledge and skills necessary to perform better as a public prosecutor, including bookkeeping and accounting. Discussions are based on real cases to find out how they should deal with them for better disposition.

2. Course for Eighth- and Ninth-Year Public Prosecutors

The number of participants is limited to approximately 40 at one time. It is conducted twice a year for a duration of two weeks each time. The purpose of this course is to provide special expertise in the investigation and disposition of cases of tax evasion, bribery, crimes related to public security, and various other complex economic crimes. It also consists of lectures by experts and senior public prosecutors, and discussions based on relevant cases.

3. Course for Twelfth- and Thirteenth-Year Public Prosecutors

The number of participants is limited approximately 15 at one time. It is conducted once a year for a duration of one week. The purpose of the course is different from the other courses. Considering that the participants are relatively senior and experienced, and that they are expected to occupy a status in the hierarchical structure of public prosecutors offices in which they will be required to give advice to junior staff members, the purposes of the course are limited to administrative ones,

such as developing knowledge and skills about personnel management and the administration of the organization. It consists of lectures by various individuals and discussions based on practical cases involving personnel or administrative matters.

D. Status (Independence and Impartiality)

Public prosecutors have a status equivalent to that of judges. They receive equal salaries according to the length of the term in office. Their independence and impartiality are also protected by law. They are thought to be impartial representatives of the public interest. Aside from disciplinary proceedings, they cannot be dismissed from office, suspended from the performance of their duties or suffer a reduction in salary against their will, with some exceptions.[4]

Prosecutorial functions are part of the executive power vested in the Cabinet[5], and the Cabinet is responsible to the Diet in their exercise.[6] The Minister of Justice should have the power to supervise public prosecutors to complete his responsibility as a member of the Cabinet. However, prosecutorial functions have a quasi-judicial nature, inevitably exerting an important influence on all sectors of criminal justice, including the judiciary and the police. If the functions were controlled by political influence, then the whole criminal justice system would be jeopardized. To harmonize these requirements, Article 14 of the Public Prosecutors Office Law provides that "[the] Minister of Justice may control and supervise public prosecutors generally[7] in regard to their functions.... However, in regard to the investigation and disposition of individual cases, he may control only the Prosecutor-General.[8]" The Minister of Justice cannot control an individual public prosecutor directly.

In addition, many public prosecutors are assigned to key positions in the Ministry of Justice, for example, as Vice-Minister of Justice and Director-General of the Criminal Affairs Bureau.

E. Functions and Jurisdiction

The different levels of public prosecutors offices correspond to a comparable level in the courts. Consequently public prosecutors exercise such functions such as investigation, instituting prosecution, requesting the proper application of law by courts, supervising the execution of judgement and others which fall under their jurisdiction (PPOL articles 4 to 6). When it is necessary for the purpose of investigation, they can carry out their duties outside their jurisdiction (CCP article 195).

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4 See PPOL Article 25. Exceptions are stipulated in Articles 22 (retirement), 23 (physical or mental disability, etc.) and 24 (supernumerary official). The age of retirement is 63, except the Prosecutor-General who retires at 65.

5 The Cabinet consists of the Prime Minister and the Ministers of State. Not less than half of the Ministers must be chosen from among the members of the Diet (Constitution, Articles 66 and 68).

6 See Articles 65, 66 and 73 of the Constitution.

7 "Generally" means, for example, to set up general guidance for crime prevention, the administrative interpretation of laws and how to dispose of affairs related to prosecution to maintain their uniformity.

8 This control was practiced only once in 1954. When public prosecutors investigated a big bribery case involving several high-ranking politicians and tried to arrest the Secretary-General of the majority party, the Minister of Justice, who belonged to the same party, ordered the Prosecutor-General to avoid the arrest, effectively terminating the investigation. However, since it produced severe criticism from the public through the mass media, the Minister of Justice had to resign quickly.

II. SURVEY OF CHARACTERISTICS OF THE JAPANESE CRIMINAL JUSTICE SYSTEM

A. Characteristics

Before explaining the Japanese prosecution system, I would like to point out some characteristics of the Japanese criminal justice system in order to avoid any confusion.

(1) Public prosecutors have the authority to investigate cases referred by the police and to initiate investigation without the police, which, in practice, they often do.

(2) Only public prosecutors may request a judge to detain suspects, and prosecute suspects. Japan does not have private prosecution or police prosecution.

(3) Japan conducts virtually no undercover operations or electronic surveillance.

(4) Public prosecutors have the discretionary power not to prosecute even though the evidence is sufficient to secure a conviction. Many factors are considered, especially the possibility of the suspect's rehabilitation without formal punishment.

(5) Japan has no jury or assessor system. All cases are handled by competent judges.

(6) Even if a suspect admits his guilt, the case is brought to trial. Moreover, plea bargaining is unavailable.

(7) Japan has the hearsay rule. However, a judge could admit a written statement, especially taken by a prosecutor, as evidence under certain conditions. Therefore prosecutors often produce written statements based on an interview with a suspect or a witness.

(8) Public prosecutors recommend a specific sentence (e.g., specific term of imprisonment, specific amount of fine, etc.) at the closing statement. If they are not satisfied with a judge's decision, whether conviction or acquittal, they can appeal to a higher court.

(9) Japan implements the theory of "presumed innocent" until proven guilty. However, since the aquittal rate is extremely low (below 1 percent)[9], if a suspect is indicted, he/she is likely to be regarded as "guilty" by people in the society.

(10) As mentioned below, the evolution of the Japanese criminal justice system is quite unique. It was influenced by the United States system (especially in trial; namely, an adversarial system) after World War II, but still retains the influence of the civil law countries.

B. Historical Background

Japan had been strongly influenced by the Chinese legal system since the seventh century. In 1890, Japan enacted the Meiji Constitution under the influence of the civil law countries, especially Germany. After its defeat in World War II, Japan has implemented the present Constitution influenced by United States law since 1947 without any change. A number of provisions regarding human rights on criminal matters were introduced to or strengthened in the Constitution, specifically, Articles 31 to 40. In short, no person shall be arrested or searched or seized without a warrant issued by a competent judge except in the case of a flagrant offence; be compelled to testify

[9] It might be attributable to several elements, including the discretionary power of public prosecutors, and the high probability of a confession by defendants.

against himself; and be convicted in cases where the only proof against him is his own confession. An accused[10] has the right to retain his own counsel.

The Code of Criminal Procedure (hereinafter CCP) was also changed in 1949. The CCP was greatly influenced by the adversarial system, especially in trial, and adopted the restrictive use of evidence and the need for a warrant for all kinds of compulsory measures.

III. INVESTIGATION

A. Investigative Agencies

Since public prosecutors as well as the police are authorized to conduct investigations (CCP articles 189 and 191), I will explain the Japanese investigation procedure as part of prosecutorial functions. Of course, the police have the first and primary responsibility for criminal investigation. Actually most criminal cases (over 99 percent) are initially investigated by the police and other judicial police officers. Once the police investigate a case, they must refer it to a public prosecutor together with documents and evidence, even when the police believe evidence is insufficient. The police have no power to finalize cases, except for two minor types of disposition (see Figure 1).

Public prosecutors may investigate cases themselves and often do so supplementarily; that is, they interview victims and main witnesses directly, and instruct the police to further collect evidence, if necessary. Moreover, public prosecutors may initiate and complete investigation without the police, and often do so in complicated cases such as bribery or large scale financial crimes involving politicians, high-ranking government officials or executives of big enterprises. In three major cities (Tokyo, Osaka and Nagoya[11]), the public prosecutors offices established a Special Investigation Department, where a considerable number of well-trained and qualified public prosecutors and assistant officers are assigned to initiate investigations. Since April 1996, several districts have a Special Criminal Affairs Department dealing with white collar crimes. If necessary, an *ad hoc* investigation unit composed of prosecutors and assistant officers can be organized. However, in practice, it may be quite difficult in many small-scaled offices because of staff shortages.

B. Investigation Process

1. Outline

Figures 1 and 2 show the outline of the process of investigation, prosecution etc., for adults.

Since the Japanese system is unlike some countries where an arrest is a prerequisite for prosecution, the police and public prosecutors conduct investigation and prosecution on a voluntary basis as much as possible. Although investigators arrest suspects in serious cases, even in such cases, they collect as much information as possible before arresting them and carefully examine the necessity of arrest, considering the suspect's age and surroundings, the probability of flight and destruction of evidence.

[10] The Constitution provides the right to retain a defence counsel for the accused, meaning a defendant after indictment, and the Code of Criminal Procedure provides the same right for a suspect. However, if he cannot hire a defence counsel, the state will assign a defence counsel only to an accused, not to a suspect (CCP articles 30 and 36).

[11] The Special Investigations Departments in the Tokyo and Osaka offices have a long history and have investigated a number of cases relating to bribery, breach of trust, tax evasion, etc. However, Nagoya's department was just established in April 1996.

The procedure after arrest is as follows:

(1) When the police arrest a suspect, they must refer the suspect with documents and evidence to a public prosecutor within 48 hours otherwise they must release him (CCP article 203).

(2) Unless the public prosecutor releases the suspect or prosecutes the suspect, the public prosecutor must ask a judge for a pre-indictment detention order within 24 hours after receiving him. (CCP article 205).

(3) The pre-indictment detention period is 10 days. The public prosecutor may ask a judge for an extension of the detention for up to 10 days, if necessary (CCP article 208).

(4) The public prosecutor must release the suspect by the termination of the detention period unless prosecution is initiated.

2. Arrest

In principle, no one may be arrested without a warrant issued by a judge. Enough probable cause must exist to believe that the suspect committed the alleged offence.

Police officers designated by law[12] as well as public prosecutors are authorized to directly ask a judge to issue an arrest warrant. Japan does not recognize the so-called "cognizable offence" that permits the arrest of a suspect without warrant. However CCP provides two exceptions as follows:

(1) Flagrant Offence (CCP articles 212 to 214):
Any person may arrest, without a warrant, an offender who is committing or has just committed an offence; or

(2) Emergency Arrest (CCP article 210):
"When there are sufficient grounds to suspect the commission of an offence punishable by the death penalty, or imprisonment for life or for a maximum period of three years or more, and if, in addition, because of great urgency a warrant of arrest cannot be obtained beforehand from a judge, a public prosecutor, a public prosecutor's assistant officer or a judicial police official may, upon statement of the reasons therefore, apprehend the suspect." In this case, the procedure for obtaining an arrest warrant from a judge shall be taken immediately thereafter. If the warrant is not issued, the suspect must be released at once.

After receiving the suspect, the public prosecutor must immediately inform him of the alleged offence and the right to hire a defence counsel, as well as give the suspect an opportunity for explanation. This is a public prosecutor's first and most important interview with a suspect because he learns the suspect's viewpoint. The interview is also important for a suspect because he can observe how much the public prosecutor knows about the facts or how confident he is in proving the case through his words and attitude. If the suspect presumes the public prosecutor has poor knowledge about the case, the suspect is not likely to confess.

3. Pre-indictment Detention

The public prosecutor must proceed to the next step as above-mentioned in section B. 1. b. If a public prosecutor arrests a suspect, the same procedure must be

[12] These police officers are designated by the National or Prefectural Public Safety Commission and are ranked at or above Police Inspector, which is the third rank from the bottom (CCP article 199. 2).

followed within 48 hours after the arrest (CCP article 204).

The power to ask a judge for a detention order is vested only in a public prosecutor.

The judge asked for the detention order reviews all documents and evidence, and interviews the suspect to afford him the opportunity to explain the alleged case. The judge may order the suspect's detention for 10 days if there are reasonable grounds to believe that the suspect has committed the offence, and

(1) the suspect has no fixed dwelling;
(2) there are reasonable grounds to believe that the suspect may destroy evidence;
or
(3) there are reasonable grounds to believe that he may attempt to escape.

Otherwise, the judge must dismiss the application. (CCP articles 60, 207 and 208). In practice, it is granted for the most part since the police and public prosecutors carefully screen suspects to be arrested or detained (see Table 1).

When an extension of detention is requested, a judge examines all the documents and evidence without interviewing the suspect. Then the detention can be extended up to 10 days, including weekends and national holidays. A suspect's maximum term of custody before indictment is consequently 23 days[13]. By the termination of the detention term, a public prosecutor should decide whether to prosecute or release the suspect. The power to prosecute is vested only in a public prosecutor with one exception[14]. During the detention period, no suspect is entitled to bail, but he may be bailable after indictment (CCP article 88).

Furthermore, a suspect is usually detained in a police jail substituted for a detention house[15] during the above-mentioned period even after referral to a public prosecutor. CCP Article 198 is interpreted that a suspect under arrest/ detention is obligated to appear before an investigation official to be questioned when requested. In the Japanese system, the police and public prosecutors are expected to find truth by interrogating a suspect, showing him parts of evidence, etc. Detention houses in Japan are located in the suburbs and insufficient to facilitate such needs. Accordingly, a judge permits a suspect to be detained in a police jail during a detention period.

4. Relation between the Police and Public Prosecutors

Investigation is defined as the whole process of identifying an offender and collecting evidence in order to prosecute him when a crime is deemed to have occurred. Since prosecution does not terminate until the case is finalized at the trial stage, investigation may be needed until then. Accordingly, the police continue investigating even after referring a case to the public prosecutors office. Since the police and public prosecutors are respectively independent organizations, the relationship between both is basically cooperative. Public prosecutors may instruct the police and let the police assist in their investigation, and the police are required to follow the instructions by law (CCP article 193). Some police officers do not want to admit that public prosecutors have such power, especially in investigations initiated by the police. Rather they interpret such instructions are requests which the police kindly accept.

[13] CCP Article 208-2 provides a further 5-day extension for the crimes related to insurrection. However its use is extremely exceptional and rare.

[14] See section IV. 2, Exception to the Monopolization of Prosecution: Quasi-Prosecution.

[15] Prison Law Article 1, paragraph 3.

Regardless of the different interpretations of Article 193, public prosecutors monopolize the power to request a detention order from a judge and to prosecute. The police, nonetheless, follow public prosecutors' instructions to successfully complete their work.

In some difficult and complicated cases, the detention term is not enough to collect sufficient evidence to decide whether to indict, since the criteria for indictment is actually the same as "beyond a reasonable doubt" of a trial. Thus, the police and public prosecutors should work together quickly and efficiently. Accordingly, in a murder case, the police immediately inform a public prosecutor. Then the prosecutor to be assigned to the case usually goes to the crime site and the place where the corpse is located, and observes the autopsy by a designated doctor. The prosecutor can directly discuss with the police how to investigate the case, what problems exist, and what kinds of evidence are at the crime site.

5. Collection of Evidence

Unlike the U.S. and some other countries, undercover operations are not allowed in Japan. Although it is said that undercover operations can be used in the investigation of crimes related to drug and gun trafficking, it is still unpopular, because Japanese society perceives such methods as unfair and deceitful. Typical investigative measures include scientific investigations, such as examination of blood, fingerprints, hair, voice and handwriting, which are fully utilized for identifying the suspect.

Unlike the common law countries, "evidence" in Japan sometimes means not only real evidence but written statements taken by investigators unless the differences between both are intentionally stressed. Although investigators collect as much real evidence as possible, it is indispensable to collect witness statements explaining the meaning of such real evidence in order to find the truth. Written statements are made in the following way: Investigators interview a witness or a suspect, then they prepare a written statement based on what he said. After the investigators precisely read the statement to him and he agrees with the content, he is requested to sign on the line after the last sentence to guarantee the voluntariness and veracity of the statement.

Public prosecutors often take such written statements of the main witnesses. Of course, any statement untested by cross-examination is inadmissible as evidence in trial. However, CCP Article 321.1.2 provides that a written statement taken by a public prosecutor is admissible as evidence when:

(1) the witness does not appear or testify on the date for public trial because of death, unsoundness of mental condition, is missing or staying outside Japan; or

(2) the witness, appearing on the date, testifies contrarily to or materially different from his previous statement contained in the document.

In the latter case, this shall apply when the court finds that special circumstances exist in which the previous statement is more credible than the present testimony[16]. There is stronger likelihood that it will be admissible as evidence as compared to a statement taken by the police (Id. section 3). That is why public prosecutors often make such written statements. Even when the written statements made by both the police and public prosecutors may inadmissible as evidence, they might be used for determining the credibility of the testimony (CCP article 328).

[16] For example, rape victims, or both victims and witnesses of an offence committed by an organized crime group.

Regarding a suspect's written statement made in the same way as above-mentioned, if it, regardless of the source, contains a confession or an admission of facts adverse to his interest, it is admissible as long as made voluntarily (CCP article 322). The suspect does not have the right to be with his lawyer during interrogation. Of course, he has the right to remain silent and to see and consult his counsel at any time.

6. Reasons of Public Prosecutors' Investigative Authority

Some participants, especially those from the common law countries where the police have the power of both investigation and prosecution, might not understand the wide power granted to Japanese public prosecutors. However, each criminal justice system is rooted in its society and history. Possible reasons are as follows:

a) Theoretical Reason

Public prosecutors should know how to investigate because they have to know how to prove cases beyond a reasonable doubt in trial. The main reason for the investigative authority of public prosecutors is to lead them to correct decisions and check on police investigations. If public prosecutors could not interview witnesses or collect evidence independently, they would have to rely on the police investigation (which is a sort of hearsay for public prosecutors) entirely and could not overcome any problems which may arise during by the police investigation. In the Japanese system, the police investigation is strictly and carefully checked by public prosecutors, who have the same qualifications as judges. The check is expected to be almost the same as that by judges. This is a significant safeguard for protecting the rights of a suspect since the Japanese police cannot prosecute, and it would be difficult for them to realize fully what would happen in trial and what evidence should be collected for conviction. Thus, the Japanese system avoids subjecting a suspect, who is likely to be acquitted, to a long detention and trial by releasing him at an earlier stage. Consequently, this system deeply respects a suspect's human rights.

b) Historical and Practical Reason

Although public prosecutors offices were established in 1872, public prosecutors did not originally have the power to investigate crimes independently. Since a preliminary inquiry proceeding[17] was available at that time, public prosecutors either directly brought a case to trial or asked for a preliminary inquiry proceeding. A court precedent in those days denied the admissibility of a suspect's written statement taken by a public prosecutor regarding a case where the police arrested a suspect based on an arrest warrant. Under such system, in 1896, the ratios of prosecution, dismissal rate[18] and acquittal rate were 80 percent, 44 percent and 7 percent respectively. Gradually the investigative practice was established since the people wanted to avoid prosecuting a suspect without sufficient evidence to support his conviction. The effort was successful, and in 1921 the ratios of prosecution, dismissal rate and acquittal rate lowered to 31 percent, 5 percent and

[17] In this system, an examining judge investigated a case to decide whether a particular suspect under the jurisdiction of the District Court should be formally tried.

[18] Under the previous system, if an examining judge found in the course of preliminary inquiry proceeding that the suspect should not be formally tried, he would finalize the case by "dismissal". Since the system of preliminary inquiry proceedings no longer exists in Japan, the word "dismissal" now means the dismissal of a case after brought to trial.

[19] These statistics are quoted from "Textbook of Prosecution" issued by the Ministry of Justice (Japanese version), p. 7.

1.6 percent respectively[19]. Subsequently, public prosecutors' investigative authority was codified by law. Thus, this practice continues to the present, with public prosecutors, as well as the police and other law enforcement agencies, conducting full investigations and strict screening of cases, thereby receiving strong public support.

Good or bad, Japanese society has a tendency to regard a person as an actual offender even if only arrested, and much more so if prosecuted. Therefore, from a rehabilitative viewpoint, such investigations are highly encouraged. Additionally, the decrease the caseload of the courts and the entire criminal justice system.

IV. DISPOSITION OF CASES

A. Initiation of Prosecution

There are two main forms of prosecution: formal and summary. If the case is serious and the suspect deserves a penalty of imprisonment or death, the prosecutor indicts the suspect for formal trial even if he admits his guilt. The prosecutor utilizes summary procedure when the suspect deserves a fine not exceeding ¥500,000, admits his guilt and accepts a monetary sentence. In general, minor offenses, such as traffic violations or bodily injury through professional negligence, are dealt with through this system. However, in cases where a suspect accused of assault or bodily injury confesses and compensates the victims' damage, summary procedure is also utilized.

To indict, a public prosecutor must submit a bill of indictment to the court, identifying the defendant (usually by showing the permanent domicile and present address, his name and date of birth), showing the offence charged and the facts constituting such offence (CCP article 256). [See an example bill of indictment (translated into English) in Appendix.] An arrest warrant, a pre-indictment detention order and a document signed by the suspect identifying his defense counsel are attached to a bill of indictment to make clear the past procedure. The submission of documentary or real evidence is prohibited at this stage, unlike the Chinese system.

If the suspect had been detained already when indicted, the pre-indictment detention automatically becomes an after-indictment detention limited to two months. After these two months, the detention term may be extended every month, as required.

After indictment, the suspect's situation changes due to adopting the adversary concept. The suspect should be detained in a detention house and interrogation regarding the indicted fact is prohibited in principle. He may now be bailable.

B. Monopolization of Prosecution

1. Principle

As stated previously, public prosecutors have the exclusive power to decide whether to prosecute (CCP article 247). Japan does not have a system of private or police prosecution; nor a grand jury or preliminary hearing system conducted by judges. In other words, the court cannot recognize any crime unless public prosecutors prosecute. This system is called "monopolization of prosecution," which is supported by the public because of the successful efforts by public prosecutors mentioned in section III. B. 6.

2. Exception to the Monopolization of Prosecution

The sole exception is called the system of "Analogical Institution of Prosecution through Judicial Action" or "Quasi-Prosecution" (CCP articles 262 to 269). This system purports to protect the parties injured by crimes involving abuse of authority by public officials. A person, who has made a complaint or accusation and is

not satisfied with the public prosecutor's decision not to prosecute, may apply to the court to order the case to be tried. The court, after conducting hearings, must either dismiss the application, or order the case to be tried if well-founded. If the application is granted, then a practicing lawyer is appointed by the court to exercise the functions of the public prosecutor.

C. Non-prosecution

1. Insufficiency of Evidence

It is natural for public prosecutors not to prosecute a suspect without sufficient evidence. The standard for whether to prosecute based on "probable cause", "beyond a reasonable doubt" or other standards, differs from country to country. Japanese laws do not clearly mention it. However, there exists a burden of proof to be met by public prosecutors, and one of the public prosecutors' functions is to request the proper application of the law by the court. To abide by the laws sincerely, the standard should be the same as that of the court, that is, "beyond a reasonable doubt." In practice, public prosecutors decide non-prosecution based on insufficiency of the evidence under this criterion.

2. Suspension of Prosecution

One of the most unique characteristics of Japanese criminal procedure is that public prosecutors can drop cases even when there is enough evidence to secure a conviction. This is called "Suspension of Prosecution." Thus, this wide discretionary power granted to public prosecutors has a significant role in encouraging suspects' rehabilitation.

The concept of discretionary prosecution contrasts with that of compulsory prosecution. The latter concept requires that prosecution always be instituted if there are some objective grounds for belief that the crime has been committed by the suspect and if the prerequisites for prosecution exist. This prevents arbitrary decisions by public prosecutors and vagaries in the administration of criminal justice. On the other hand, the system of discretionary prosecution is advantageous in disposing of cases flexibly according to the seriousness of individual offenses and the criminal tendency of each suspect and in giving them the chance to rehabilitate themselves in the society.

a) Application of suspension of prosecution

Needless to say, in practicing discretionary prosecution, arbitrariness should be avoided above all. Adhering to CCP Article 248, public prosecutors must consider the following factors concerning the suspect and the crime:

(1) The offender's character, age, situation, etc. Generally, youths or the aged, having no or little previous criminal record, or having had difficult a childhood may be advantageous factors for offenders;
(2) The gravity of the offence;
(3) The circumstances under which the offence was committed. For example, the motivation for the offence, and whether or not and to what extent the victim had fault in provoking the offence; and
(4) Conditions subsequent to the commission of the offence. For example, whether or not and to what extent compensation for damages is made; the victim's feelings are remedied; settlements between both parties; the influence to the society; and whether or not the offender repents commission of the offence.

The most important factors for suspension of prosecution are compensation and the remedy of the victim's feelings. Thus, a suspect's family, employer and private attorney always try

to compensate as much as possible to avoid indictment.

Table 2 breaks down non-prosecution by justification. The most common reason is "suspension of prosecution", constituting nearly 80 percent, followed by "lack or insufficiency of evidence," ranging from 14 to 15 percent. Table 3 reflects that around one-third of all offenses (excluding road traffic violations) are disposed of by suspension of prosecution: 32.7 percent in 1993, 34.6 percent in 1994, and 37.0 percent in 1995. Of course, in major offenses such as homicide, robbery, rape or arson, the ratio is much lower than less serious offenses.

b) Historical perspective

Reviewing the historical development of the system, there is little doubt that originally the impetus for this practice derived from the overburdening of the criminal justice system attributable to the confusion after the Meiji Restoration. Although this system started around 1884, the practice was not endorsed legislatively until 1922. Originally, the practice was commenced mainly for the purpose of reducing criminal cases, particularly trivial ones, for being brought before courts and thereby saving the costs of trial proceedings as well as housing prisoners, including those awaiting trial. Indeed the careful use of time and expense at the trial stage was regarded as an important factor in the efficient functioning of the criminal courts and other institutions, including the public prosecutors offices.

However, had it not been for the underlying policy oriented to the rehabilitation of offenders rather than the necessity of satisfying such needs as administrative efficiency and economy, the practice could have hardly survived the professional criticism and the public fear prevailing then. The government justified the practice by asserting that the purpose of punishment was not only to deter the public by showing the authority of law, but also to make the offender repent his criminal conduct and recognize that he should refrain from committing another offence. Therefore, prosecution should be instituted only when such purposes could not be attained without resorting to criminal sanctions. The practice of suspension of prosecution was considered an effective measure not only of expediting the processing of criminal cases, but also of facilitating the rehabilitation offenders.

In addition, the amended "Offenders Rehabilitation Law[20]" provides that a person who has not been prosecuted because of lack of its necessity could, if he applied in an emergency case, get rehabilitation aid services such as accommodations and food at rehabilitation hostels during the six months after release from arrest or detention. Public prosecutors are expected to inspire a suspect to utilize this service for his smooth rehabilitation.

B. Restraints on the Prosecution System

Any use of discretion by a prosecutor is accompanied by a risk of abuse. In order to prevent an erroneous or arbitrary exercise of discretion, there are several systems of checks in Japan. The first works as a self-check system. If the prosecutor still makes an arbitrary decision, there are two additional restrictions: (1) inquest of prosecution and (2) analogical (or quasi) institution of prosecution.

1. Internal Restrictions

In Japan, each public prosecutor is fully competent to perform his prosecutorial duties. It can be said that each prosecutor

[20] The effective date of the amended Law is April 1, 1996. However, the same provision was stipulated in the "Law for Aftercare of Discharged Offenders", which was abolished on the same day.

constitutes a single administrative agency. On the other hand, being subject to the control and supervision of senior public prosecutors, their approval is required in making prosecutorial decisions. It is evident that prosecutors themselves are aware that they may easily fall into self-righteousness, leading to arbitrary dispositions, whether intentionally or unintentionally. It is sometimes very useful, for especially young and inexperienced prosecutors, to consult a senior to discuss the best disposition of a case. Accordingly, the public prosecutors offices have developed some procedures for making their decisions more objective:

(1) a prosecutor, whenever refraining from instituting a prosecution, must show his reasons in writing; and
(2) a prosecutor must obtain approval from his senior, who in turn is careful to examine whether his decision is well grounded.

2. Inquest of Prosecution (Prosecution Review Commission)

This system's purpose is to maintain the proper exercise of the public prosecutors' power by subjecting it to popular review. The Inquest Committee consists of 11 members selected from among persons eligible to vote for members of the House of Representatives of the Diet. It is empowered to examine the propriety of decisions by public prosecutors not to institute prosecution. The Inquest Committee must conduct an investigation whenever it receives an investigation request from an injured party or a person authorized to make a complaint or accusation. In some instances, the Committee can carry out investigations on its own initiative, and is competent to examine witnesses in the course of the investigation.

The Committee then notifies the Chief Prosecutor of the District Public Prosecutors Office of its conclusion. If the non-prosecution is concluded improper by the Committee, the Chief Prosecutor orders a public prosecutor of the office to further investigate of the case and to re-examine the original disposition. After the re-investigation and re-examination, the public prosecutor in charge must ask for the approval of the Superintendent Prosecutor before making the final disposition.

Although the Committee's verdict is not binding upon the prosecutor, it is highly respected in the re-investigation process. Since Japan does not have a jury system and private prosecution system, "inquest of prosecution" allows the public to participate in criminal justice administration. There is a Committee in each district court.

3. "Analogical Institution of Prosecution through Judicial Action" or "Quasi-Prosecution"

(supra VI. B. 2.)

V. PUBLIC PROSECUTORS AT THE TRIAL STAGE

A. Outline of a Japanese Trial

Japan does not have a jury trial[21] and guilty plea system. All the cases prosecuted are examined by competent judges. Even cases where the suspects or defendants have confessed and admitted their guilt are brought to trial, if they are deemed to deserve imprisonment. A "trial" in Japan encompasses both the determination of guilt stage and the sentencing phase.

[21] The Jury Trial Law was enforced from 1923 to 1943. Under the Law, a defendant had the right to choose either a jury trial or a trial handled by competent judges. However, defendants seldom chose a jury trial. Possible reasons considered are that defendants bore the cost, an appeal was prohibited and the poor credibility of the jury trial. The law has been suspended since 1943.

Public prosecutors bear the burden of proving the defendant guilty "beyond a reasonable doubt" in all cases. They must establish the existence of an offence, the offender's identify, his sanity, criminal intent or negligence, the voluntariness of his confession at the investigative stage, etc. Although a Japanese trial is held infrequently, for instance once or twice a month, the defendants who admit their guilt usually consent to the use of documents (such as written statements) as evidence, which simplifies and accelerates the trial process. Thus approximately 90 percent of all the cases brought to trial are completed within six months in the first instance. There are only some specific cases which have been on trial for several years. However, generally speaking, Japan does not suffer from serious delays in the courts.

B. Preparation for Trial

After indictment, public prosecutors in charge of a trial have to plan how to prove the case by selecting documentary or real evidence to prove it beyond a reasonable doubt. In large public prosecutors offices, since public prosecutors in charge of trial are separated from the public prosecutor who indited the case, the former have to carefully read and examine all the documents and evidence. If they feel the necessity to further collect evidence, they do it themselves or request the public prosecutor or the police officers who investigated the case to do it.

To facilitate speedy trial, public prosecutors are likely to select the best documentary or real evidence. Then they must give the defense counsel an opportunity to inspect the selected documentary or real evidence prior to the trial (CCP article 299). Discovery is limited to the documentary or real evidence that the public prosecutor intends to use in trial. If the defense counsel wants to inspect other documents or evidence, he may make a request before the court to get an order for discovery under certain conditions.

In complicated cases or serious cases, defence counsels, judges and public prosecutors have a preparatory meeting in order for the trial to proceed smoothly. Since the judges are fact-finders, unlike a jury system, they have only the indictment sheet, the arrest warrant and the detention order before the start of trial. They must not be informed of the contents of documentary or real evidence on any occasion other than the trial. Accordingly, in such a preparatory meeting, they discuss only court proceedings like the estimated number and duration of testimonies, not the content of evidence.

C. Trial Activities: Testimony

Usually written statements of witnesses are made by police officers and/or public prosecutors at the investigation stage. If not, the public prosecutor in charge of trial interviews the witnesses and takes their written statements before requesting the testimony of the witnesses. The public prosecutor usually requests the court to admit the written statements as evidence. Since most documentary evidence constitutes hearsay and cannot be admitted, only items of evidence whose introduction the defense accepts can be examined. When the defense disagrees to the introduction of documentary evidence, the public prosecutor may request the court to examine witnesses and/or the defendant(s) instead. If such request is granted, the court then determines who will be examined.

A few days before the testimony, the public prosecutor again interviews the witnesses to ensure their appearance on the trial date and how they are going to testify. Since Japanese trials are held infrequently, witnesses are sometimes required to appear before the court several times in seriously contested cases.

Consequently, in cases where many witnesses are required to testify, the trial may continue for several years. If the witnesses do not appear before the court after several requests, they are detained in order to testify at trial. If they refuse to testify, their written statements may be examined at trial (CCP article 321). Moreover, if the witnesses' testimony contradicts a prior statement, the written statement can also be used to reduce the credibility of their testimony, that is, impeachment (CCP article 328).

After completing the examination of evidence and witnesses for fact-finding, the defendant is usually questioned by his counsel, the public prosecutor and judges at trial. The defendant may rebut the prosecution's evidence or show how repentant he is and how he will rehabilitate in the future. At this stage, the evidence relating to his environmental surroundings (such as criminal records, background, personality, etc.) is examined for determining sentence.

D. Closing Statement at the Trial

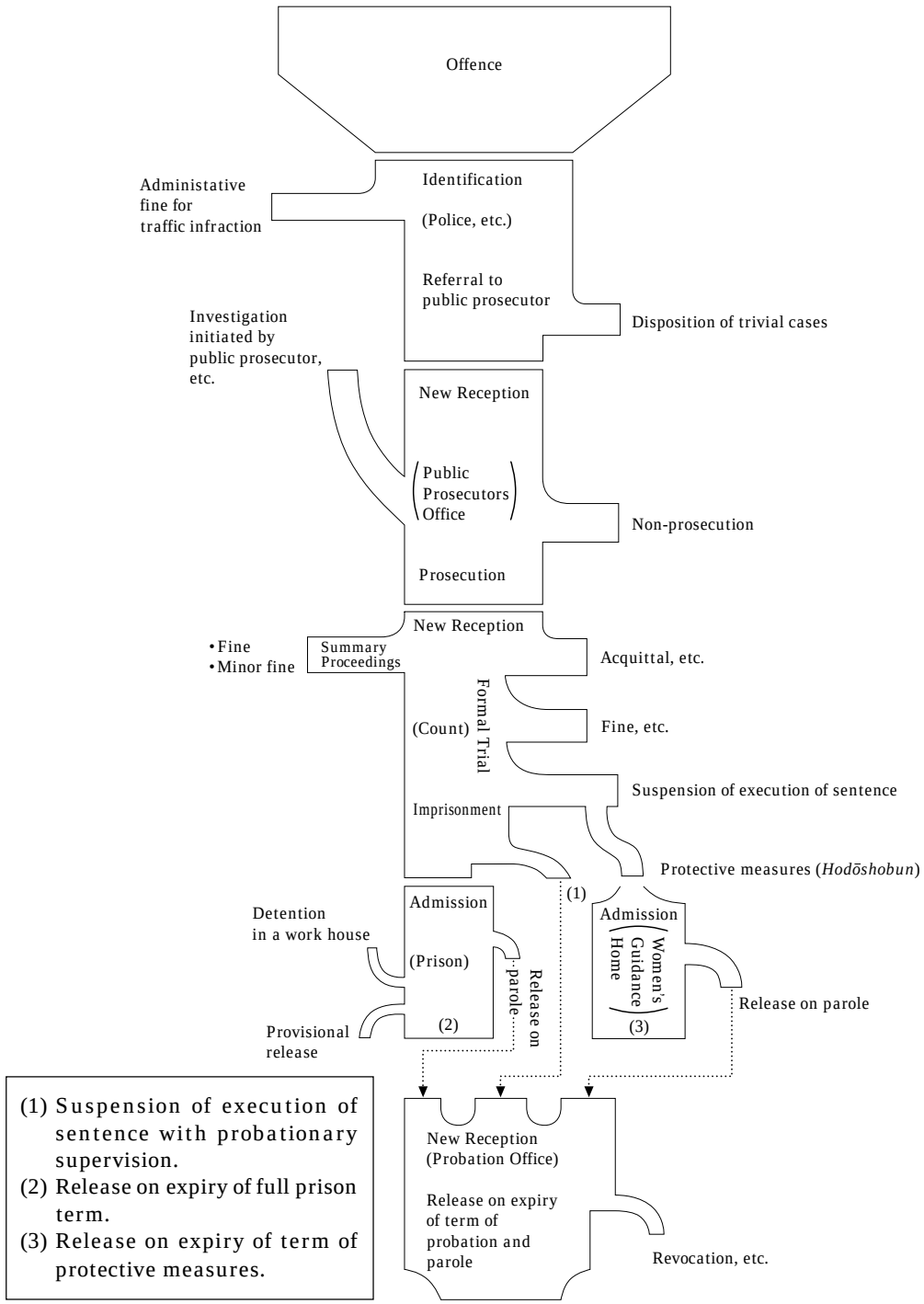
CCP Article 293 provides that "after the examination of evidence has been completed, the public prosecutor shall state the opinion regarding the facts and the application of the law." Also it has been a long-standing practice in Japan, as well as in some European countries, for the public prosecutor at that time to express his opinion as to the appropriate specific penalty to be imposed upon the defendant.

The public prosecutor has discretionary power in selecting from among a variety of sanctions provided by law. Nevertheless, recommendations tend to be uniform because of the public prosecutor's subordination to the general direction of the Prosecutor-General, who is mindful of public opinion and issues directives from time to time. Throughout the country, a similar recommendation is suggested for similar cases. This recommendation of a specific penalty is initially determined by the public prosecutor who indicted the case. Of course, it can be changed according to the different situation after indictment by a public prosecutor in charge of the trial. Although such a recommendation does not bind judges, they give serious consideration to the recommended penalty. If the public prosecutor feels that the sentence is inadequate, he can appeal the sentence. As a result, disparities in sentencing are prevented.

Whether to recommend a suspension of execution of sentence is occasionally discussed among prosecutors, especially in cases where even prosecutors presume that the defendant can rehabilitate himself in the community. One opinion favors public prosecutors making such recommendations because they are representatives of the public interest, which includes the interest of the defendant. The opposing opinion is that such duties should be assumed by a defendant's counsel or the judges. In fact, most prosecutors do not recommend a suspension of execution of sentence. Moreover, they sometimes stress that the execution of sentence should not be suspended when they strongly believe that a defendant should be imprisoned.

Figure 1

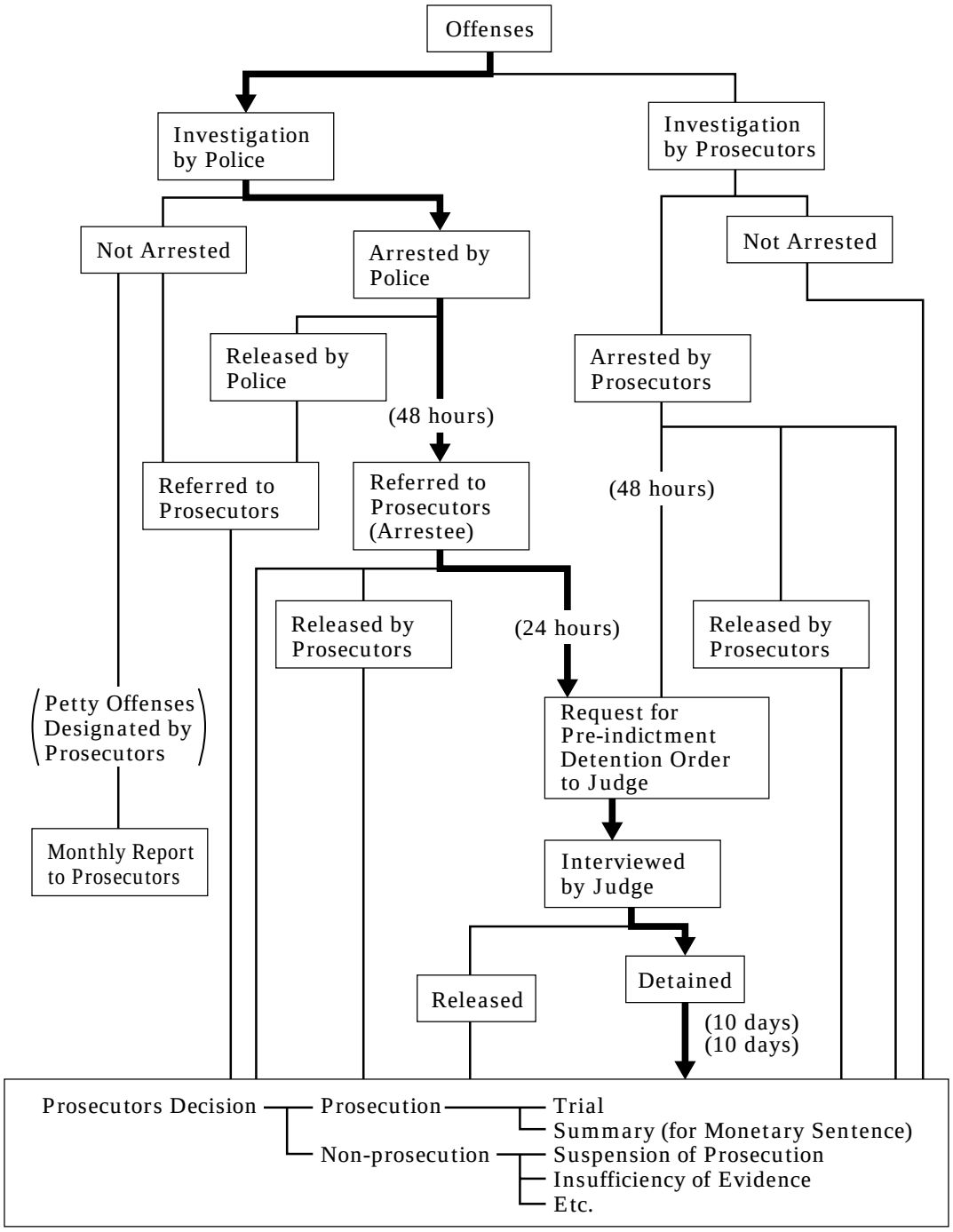
CRIMINAL PROCEEDINGS FOR ADULT OFFENDERS



Source: Summary of the White Paper on Crime 1996, Research and Training Institute, Ministry of Justice, Government of Japan, p. 56. *(Slight modifications)*

Figure 2

INVESTIGATION PROCEDURE



Note: The dark line indicates the most common procedure.

Table 1

ARRESTEES AND DETAINEES AMONG SUSPECTS WHOSE CASES WERE DISPOSED OF BY THE PUBLIC PROSECUTORS OFFICERS, BY OFFENCE (1995)

Offence	Number of Suspects Arrested/Not Arrested						Request for Detention		
	Total (A)	Arrested and referred by police (B)	Arrested by public prosecutor (C)	Arrested and released by police	Not arrested	(B+C)/A (%)	Granted (D)	Denied (E)	D+E/B+C (%)
Total	335,554	95,310	350	5,978	233,916	28.5	87,058	98	91.1
Penal Code offences	243,266	62,628	225	4,717	175,696	25.8	57,088	65	90.9
Homicide	1,875	946	4	11	914	50.7	948	-	99.8
Robbery	2,156	1,512	-	22	622	70.1	1,427	-	94.4
Bodily injury	24,163	10,719	19	666	12,759	44.4	9,361	9	87.3
Extortion	9,197	4,151	7	87	4,952	45.2	3,796	2	91.3
Larceny	126,357	24,533	38	1,712	100,074	19.4	22,524	18	91.7
Rape	1,428	1,063	1	5	359	74.5	1,039	-	97.7
Others	78,090	19,704	156	2,214	56,016	25.4	17,993	36	90.8
Special Law offences	92,288	32,682	125	1,261	58,220	35.5	29,970	33	91.5
Firearms and swords	4,170	2,028	5	222	1,920	48.6	1,525	5	75.4
Stimulant drugs	24,102	16,206	19	77	7,800	67.3	16,067	5	99.1
Others	64,016	14,453	101	962	48,500	22.7	12,378	23	85.2

Notes: 1. Traffic Professional Negligence and Road Traffic violations are not included.
2. Cases such as those resumed after suspension of the period of limitaiton, transferred to another public prosecutors offices, or involving juridical persons are not included.
3. The number of suspects not arrested includes those arrested for other offences.

Source: Annual Report of Statistics on Prosecution. Quoted in Summary of the White Paper on Crime 1996, Research and Training Institute, Ministry of Justice, Government of Japan, p. 58.

Table 2

SUSPECTS NOT PROSECUTED, BY REASON (1991-1995)

Year	Total	Suspension of Prosecution		Lack or Insufficiency of Evidence		Non-existence of Valid Complaint		Lack of Mental Capacity		Others	
		Number	%	Number	%	Number	%	Number	%	Number	%
1991	74,012	58,250	78.7	10,658	14.4	1,826	2.5	430	0.6	2,848	3.8
1992	71,404	56,531	79.2	10,161	14.2	1,746	2.4	404	0.6	2,562	3.6
1993	79,755	63,082	79.1	11,631	14.6	1,854	2.3	494	0.6	2,694	3.4
1994	77,302	60,523	78.3	11,787	15.2	1,921	2.5	436	0.6	2,635	3.4
1995	78,862	62,041	78.7	11,329	14.4	2,164	2.7	457	0.6	2,871	3.6

Note: Traffic Professional Negligence and Road Traffic violations are not included.

Source: Annual Report of Statistics on Prosecution. Quoted in Summary of the White Paper on Crime 1996, Research and Training Institute, Ministry of Justice, Government of Japan, p. 60.

Table 3

RATE OF PROSECUTION AND SUSPENDED PROSECUTION, BY OFFENCE (1993-1995)

Offence	1993		1994		1995	
	Prosecution Rate	Suspension Rate	Prosecution Rate	Suspension Rate	Prosecution Rate	Suspension Rate
Total	66.0	32.7	64.1	34.6	61.7	37.0
Penal Code offences (excluding traffic professional regigence)	54.3	38.5	55.0	38.3	55.3	37.9
Homicide	35.4	6.7	39.3	5.1	43.8	4.3
Robbery	80.1	6.0	81.0	5.4	80.6	6.5
Bodily Injury	71.0	26.0	70.5	26.4	72.8	24.1
Extortion	55.4	36.6	55.2	36.6	59.5	33.8
Larceny	54.4	41.9	54.9	41.4	54.9	41.3
Fraud	59.6	32.0	62.0	29.5	62.2	29.6
Embezzlement	18.2	80.1	16.5	82.1	13.9	85.0
Rape	66.6	12.7	66.7	12.9	67.3	13.7
Indecent Assault	48.2	16.8	48.0	16.0	47.5	14.3
Arson	59.4	13.2	62.3	15.2	60.6	14.2
Bribery	73.2	22.4	71.7	22.6	67.0	22.9
Gambling	52.8	46.6	58.2	40.7	64.0	35.5
Violent acts	70.1	25.7	69.4	26.3	71.3	24.9
Traffic Professional Negligence	16.4	83.2	15.7	83.8	15.0	84.6
Special Law offences (excluding road traffic violations)	68.6	28.1	70.7	25.8	70.6	26.4
Public Offices Election Law	45.0	54.2	43.2	49.8	48.7	50.6
Firearms and Swords	65.7	28.8	63.8	31.1	62.5	32.3
Stimulant Drugs	85.2	7.9	85.8	7.3	87.5	6.6
Poisonous Agents	91.8	6.8	91.6	6.8	92.9	6.3
Road Traffic Violations	95.0	4.6	93.7	5.9	93.7	5.9

Note: Suspension rate = $\frac{\text{number of suspects granted suspension}}{\text{number of suspects prosecuted and granted suspension}} \times 100$

Source: Annual Report of Statistics on Prosecution. Quoted in Summary of the White Paper on Crime 1996, Research and Training Institute, Ministry of Justice, Government of Japan, p. 59.

APPENDIX

SAMPLE OF INDICTMENT

Bill of Indictment

March 15, 1993

To: Tokyo District Court

A public action is hereby instituted in the following case.

Tokyo District Public Prosecutors Office
Public Prosecutor, KONO Ichiro *(his seal)*

Defendant

Permanent Domicile:	Yoshida 823, Mizumaki-cho, Onga-gun, Fukuoka Prefecture
Present Address:	Room Number 303 of the dormitory of the Pachinko Parlor named “New Metro”, Ebisu 2-4-7, Shibuya-ku, Tokyo
Occupation:	None
Name:	YAMADA, Taro
Date of Birth:	April 6, 1947
Status:	Under detention

Fact Constituting the Offense Charged

At around 11 p.m., on February 22, 1993, the defendant stuck a knife (its edge is about 10 centimeters long) into the chest (left side) of Akio Mori (24 years of age) with the intent to murder on a street located in Ebisu 2-4-7, Shibuya-ku, Tokyo. The victim’s death resulted from blood loss attributable to the stab wound in the chest at around 11:58 on the same day at YAMADA Hospital located in Komaba 3-1-23, Meguro-ku, Tokyo.

Charge and Applicable Law

Murder Penal Code Article 199