TRENDS OF THE REVISION OF THE
PENAL CODE IN JAPAN

By TADASHI UEMATSU

Professor of Criminal Law and Criminology

I. Developments of the Penal Code in Force from
Its Enactment to the Present Time

The Penal Code of Japan now in force was promulgated in 1907, put in force on October 1 the next year, and has been in force ever since. The first Penal Code in the Western pattern legislated in this country was that of 1880—now called “the Old Penal Code”—and was written out about a quarter of a century prior to the one now in force. In legislating this Old Code, the government of Japan engaged Professor Boissonade of Paris University as its chief drafter, and naturally it was largely modeled on the French Penal Code. Whereas, the Penal Code now in force which was enacted later, when the jurisprudence of Germany had its sway over our academic world, notably reflects the influence of the theory of German criminal law and of the German Penal Code. The Penal Code now in force which we usually call by the simple appellation of “Penal Code” can be said to resemble the Penal Code of Germany more than that of any other country. However, while the Penal Code of Germany has as many as 730 articles that of Japan has only 264. Therefore, you can see our Penal Code is more concise and succinct than the Penal Code of Germany, or of any other foreign country for that matter. When you learn this you might suppose that there are a great many cases where such acts as are punishable in foreign countries go unpunished in Japan. But such is not the fact; in this respect not much difference exists, because each of the articles of our Penal Code has, as it should do because it is so concise, more comprehensive contents than its counterpart in the codes of other countries.

This Penal Code of Japan was partially amended in 1941 to meet the wartime defense needs, was largely amended in 1947 to make it accord with the postwar Constitution, has undergone several minor amendments since then. However, aside from these amendments, a project for overall revision has been in progress since 1921, and two important drafts have been made public during the half century since its enactment.

The first undertaking for the amendment of the Penal Code since its enforcement got under way in 1921, or 14 years after its enactment. That year the government referred a question to the Extraordinary Legislative Council of the Ministry of Justice as to whether or not it was necessary to amend the Code. The Council, after five years’ deliberation worked out “The Main Principles of the Amendment of the Penal Code” which comprised 40 items. With the Main Principles as the basic line to follow, the Drafting Committee organized within the Ministry of Justice made assiduous efforts for codification, and completed “A Provisional Draft of the Revised Penal Code” in 1922. The draft was submitted to the deliberation of the Penal Code and Prison Law Investigation Committee, which was made up of representative scholars and practitioners in those days. However, as the years went by, the continuance
of deliberation became difficult under the diplomatic and political conditions brought about by the China Affair and other things, and it was as late as 1940 that “The Tentative Draft of the Revised Penal Code” was drawn up. This was one of the two important drafts we had in the past. But this was in the year prior to the outbreak of the Pacific War, when the domestic and foreign situations were so pressing that such work as the revision of the Penal Code could not be a major concern for the government. Furthermore, as a great change was taking place in the national thought forming the background of the Penal Code, the work of revising the Penal Code could not be done in disregard of it. What was this change? It was the heavy brake applied on the progress of democracy and liberalism which were on a fair way to development. In those days, the “national defence structure” of despotic nature was espoused by men who wielded power, as if it were the best thing. As a matter of fact, the aforesaid Principles of 1926, upon which the Tentative Draft of the Revised Penal Code was based, held that “the morals and good customs and manners proper to our nation” should be respected as the basic principle of the new legislation. And needless to say, the Tentative Draft followed the principles faithfully. In providing heavier punishments for the offences against one’s lineal ascendants than those against other persons, for instance, the old Confucian ethics was as strongly emphasized as never before done in the Penal Code of our country. Notwithstanding this, as the internal situations at that time were making by far a sharper swing toward the right, it appeared that the Draft, with its marked respect to the customs and manners proper to the Japanese, was still too liberalistic and democratic to be approved by the government. Thus, the Tentative Draft did not come to be presented to the Diet; instead it was “withheld for the time being,” and forever lost the chance of becoming a code.

After the termination of World War II, various reforms which were unparalleled in the history of Japan were enforced by the Occupation Forces. In the legal system, the Constitution, which is the basic law of the state, had to be completely reformed, and, in accordance with it, the Penal Code too had to be changed. The great change in the national thought accompanying the change in the form and systems of the state had to be reflected in the Penal Code. To meet this need, several partial amendments have been made since 1947. The result is, firstly, the existing Penal Code has come to have an unshapely appearance, with clearly seen deletions and additions here and there. Secondly, while the Japanese language used for the law writing has generally come to approach new, colloquial style, the Code still retains the old style, very peculiar and formal. And thirdly, it has become necessary that the progress in the theory of criminal law and criminal policy in the last half century should now be adopted in the Code. For these reasons, the drafting of a new Code by overall revision has come to be desired.

In 1956, the Preparatory Commission for the Revision of the Penal Code of Japan was established in the Ministry of Justice, which started its work in October of the same year, under the chairmanship of Professor Seiichiro Ono, Special advisor to the Minister of Justice, and with university professors, judges, public prosecutors, practicing lawyers, etc. as members of the Commission, 14 in all (including the chairman). The Commission decided to take care not to throw away the achievements of their predecessors, respecting those results of their deliberation shown in the Tentative Draft of the Revised Penal Code, and adopting them as far as possible. Since then, 121 meetings were held, and a draft worked out by the Commission was published in April, 1960 as “A Preparatory Draft for the Revised Penal
The publication of the draft enabled the Commission to hear the comments and criticisms on it from the academic and practicing circles. So after a short while it resumed its work, and in April, 1961, finished deliberation after holding 20 more meetings, completing the final draft titled “A Preparatory Draft for the Revised Penal Code.” The proposed Code consists of 42 chapters comprising 375 articles, which means that it has a remarkably greater number of chapters and articles than the one now in force. An explanatory statement has also been published.

The Minister of Justice, who is the competent Minister, submitted the draft to the Special Committee for Criminal Law of the Legislative Council in July, 1963, after having left it for the public to criticize for over two years. As the Preparatory Commission for the Revision of the Penal Code of Japan was dissolved with the publication of the final draft, the Special Committee for Criminal Law was newly organized in its place to carry on deliberation on the matters of revising the Penal Code. While the Preparatory Commission for the Revision of the Penal Code of Japan was by nature a small committee for preparing an original draft, the Special Committee for Criminal Law is really a large one made up of fifty committee members and nearly the same number of managerial secretaries, and as such it has come to carry on deliberation with the Preparatory Draft as the main reference draft. Formally, the Preparatory Draft has not that much meaning as the so-called original draft. But, as a matter of fact, discussions are being practically carried on with the Draft as their exclusive basis. It is expected that the Committee will have to continue its discussions for years and it will be in the summer of 1966 at the earliest that their deliberation will be completed. The present writer was a member of the Preparatory Commission for the Revision of the Penal Code of Japan and is currently on the Special Committee for Criminal Law participating in this work of revision. In the following parts, the writer will write about the various features of the Preparatory Draft for the Revision of the Penal Code of Japan which, as a matter of fact, is providing the basis for the work of the revision of the Penal Code. In so doing he will point out main differences of the Revised Code to-be from the Penal Code now in force, and will clarify the points which are now at issue.

II. Features of the Preparatory Draft for the Revision of the Penal Code of Japan

In reference to the principles on which the Draft was written, Professor Ono gives his statement in his official capacity as Chairman of the Preparatory Commission, in the explanatory statement forewording the Preparatory Draft. If I am to expatiate the features of the Draft in my own way, taking proper consideration of the chairman’s statement, I may say as follows.

1. Principle of legality (principe de la légalité de délits et des peins) is adhered to as it has always been done so in our Penal Code. One might reasonably say that it is only right and natural. But as there have been instances of its breach made by the Nazi and USSR on the one hand, and as there are some people who argue in favour of its breach in certain application of the principle of social defence on the other, it may be necessary that this should be pointed out. This is an essential principle which has been maintained ever since we received the criminal law of the West at the close of the 18th century, but it has not
always been stated explicitly in the code. The Old Penal Code had an explicit provision but in neither the Penal Code in force nor the Preparatory Draft this has been expressly written out. No matter whether it is expressly stated or not, the principle does lie at the basis of the legislation as an unquestionably fundamental principle.

2. While the Draft makes objectivism and culpability principle its keynote, it shows that secondary attention has been paid for the individualization of punishments for the sake of effecting purposive punishment (Zweckstrafe), the same as ever. But the Draft, in some respects, places greater stress than before on culpability principle. Stress having been laid on the culpability of each act, no attitude of attaching too much importance to what is ambiguous as the offender's character detached from the act itself has been taken. The Penal Code in force has no provision for security measures. But they have been adopted in the Draft, as being theoretically right in the light of the so-called double-tracking (Zweispurigkeit). In this respect there is an accord with the basic principle which the Federal Republic of Germany held in its recent revision of its Penal Code.

3. In the Part of Specific Crimes, provisions have been made more detailed. That is to say, the Code in force has 188 articles in this part, but these have been increased to 247 in the Draft. The brevity of provisions and the comprehensiveness of their contents in this part of the Penal Code in force have hitherto afforded to judges ample room for exercising their discretion and, on that account, ours has been considered a progressive legislation helpful for the individualization of punishment. However, the results of its enforcement have not always been utterly satisfactory. On the contrary, the sentences meted out have tended toward the minimum of prescribed punishment, and the penal assessment of acts that should be punished heavily has very often been improper. Thus, sometimes it is felt necessary to set forth provisions for differentiating prescribed punishments according to the modes of act. Attempts for correcting these matters have been made in the Draft. The newly installed distinction between heavy bodily injury and light bodily injury is a case in point. With the appearance of new modes of social life, new provisions for them have become necessary, and such have been added, bringing the provisions in the Part of Specific Crimes to such great number.

These are three basic points, and now the writer will write about individual provisions which are worthy of note. The parenthesized numbers of articles are those of the Draft.

A. Problems in the General Provisions

(1) A provision has been made for crimes committed by omission. The idea that “A person under a legal obligation to prevent the occurrence of facts constituting a crime who intentionally fails to prevent their occurrence when he could have done so shall be dealt with as if he had caused such facts to occur through his own action” (Art. 11), has generally been acknowledged as theoretically proper, and the court has also subscribed to it. However, strictly speaking, it is better in the light of the princeipe de la légalité to write this out expressly, in some form or other, so that there may be no room for doubt. This provision has been set forth for that reason. Paragraph 2 of the said Article has also been laid down to declare the culpability of the person who has created by his preceding act the danger of the occurrence of such facts to prevent their occurrence.

(2) With respect to acts exceeding the limit of self-defence, special provisions for exempting the punishment have been set forth. I mean the provision that, even in the case where
the act of defence gets beyond the limits of defence, “such acts are not punishable when committed by one to whom blame cannot be imputed because he acted in a state of extreme shock or excitement” (Art. 13, para. 2). Such an act is not a justifiable act of defence but, in principle, a punishable offence. However, in sympathy with the defender in his defending position, the reason for exemption of punishment for the act caused by mental shock or excitement has been acknowledged. This provision makes defence activities easier. The exceptional rule of this kind is at present prescribed by a special law only for the act against a thief or a robber, but the Draft has extended it to the act against persons other than thieves and robbers.

(3) Provisions for actio libera in causa have newly been set forth. The provisions for non-punishment or reduction of punishment of an act done by persons lacking capacity to discriminate as to the propriety of their conduct or to act according to such discrimination, have been stipulated not to apply to “a person who, with intent to commit a crime, induces in himself a state of mental disorder and thereby commits acts constituting such crime” (Art. 16, para. 1). Also a provision has been made to hold negligence culpable in the case where a person induces in himself a state of mental disorder and thereby negligently commits acts constituting such crime (Art. 16, para. 2). Recently, serious damages are frequently inflicted in our country through acts done under the influence of liquor, and especially frequent are the cases of death caused by drunken driving. In view of this state of things, the punishment of such acts is loudly called for, and it is thought that there will be many cases where provisions concerning negligence (Art. 16, para. 2) will be practically applied. Although such cases are often dealt with even under the Code in force, on the theory of actio libera in causa, the court cannot do its business satisfactorily on theories alone. After all, principles of law are more easily applied where there are express provisions. In this sense I hold the prescription to be most opportune.

(4) For the crime aggravated by results, a provision for restricting its constitution (Tatbestand) has been set forth. Judicial precedents we have had hitherto have imposed aggravated punishment wherever there are results which can be the circumstances for the aggravation of punishment. But it is the leading opinion among the learned circles that the aggravation of punishment should be imposed only where the results ensued from the offender’s recklessness. And it is held that such a view is more in line with the culpability principle, so the Draft has laid down the provision reading: “...if it was impossible to foresee such results, such aggravated punishment cannot be imposed” (Art. 21). Against this I hear that the prosecutors have implicitly shown an opposing stand, disliking the troublesomeness in proving guilty. Contrary to the majority opinion of the academic circles, I give my support to the above-mentioned judicial precedents which hold that the aggravated punishment can be imposed wherever the results are produced, regardless of whether or not they were foreseeable. This interpretation should not necessarily be inconsistent with the culpability principle. For the offender has sufficient intent to perform the basic act. This does not mean that a person is held culpable for an act which he has done with neither intent nor negligence. It is true that in such a case the results are not foreseeable, but it is not unreasonable to hold that so long as the offender commits a criminal act with intent, he should be held culpable to the degree of the gravity of the results. The fact that the mode of crime which is aggravated by results is admitted means no more or less than that the possibility of aggravating results ensuing from the basic intentional act is admitted. Again, even if the
provision is not expressly laid down, as far as the theory of adequate causality is adhered to, as it is by me, there exists no danger of the objectively unforeseeable results being attributed to the offender. Although such is my view, I did not personally object to the setting forth of the provision at the Committee, for legislation is not a matter in which one should adhere to one’s personal opinion. According to the majority opinion, the laying down of this new provision is said to be an illustration of the committee’s consistency in upholding the so-called culpability principle.

(5) A provision has been set forth for impossible offence. What are theoretically taken for granted have been summarized into: “An act which cannot possibly by its nature produce results intended is not punishable as an attempt” (Art. 23).

(6) A provision for expanding the scope of offences interrupted by the offender’s own will has been laid down. Hitherto, it has been provided merely to the effect that an offence is admitted to be interrupted by the offender where he stops his act “voluntarily,” but the Draft has further prescribed the reduction or remission of punishment when the offender has earnestly made sufficient efforts to prevent the results from taking effect, the same as in the case of voluntary interruption even in cases “where the results are not produced because of external circumstances” (Art. 24, para. 2).

(7) The co-principal by conspiracy has been newly provided for, and while making it clear that such is also a kind of co-principal in the light of law, a certain qualification has been given to the idea of co-principal by conspiracy, which has hitherto been apt to be arbitrary and too much enlarged. The provision reads: “Where two or more persons who join in the commission of a crime and any conspirator commits the crime pursuant to their common design, the other conspirators are also principals” (Art. 26, para. 2). The existing common opinion asserts that such conspirators cannot be principals because they do not personally carry out the crime by their own physical action. However, judicial precedents of the Supreme Court and a small number of experts of criminal law, including myself, have asserted that conspirators should primarily be held culpable because the role of conspirators in the joint mode of crime is often of greater importance than that of the mere perpetrator amongst them. The former opinion holds that the mere conspirator who does not use his own physical action should only be held culpable as instigator or accessory; this it does attaching undue importance to the actual behaviours of individuals. The latter opinion opposes the former, holding that, when attention is given to numerous criminal phenomena which are actually presenting themselves, it is noted that even where it is not on the suggestion of his conspirators that the perpetrator makes up his mind to commit the crime, very frequently the leading part is played by the conspirators. In such mode of action, if solution is sought on the former theory, the conspirator comes to lack the requirements for being an instigator and remains to be no more than an accessory, and as such his punishment is then reduced to something undeserving the important role which he played in the joint mode of crime. The latter opinion rejects, before everything, the interpretation which takes the constitution of “perpetration” in the joint mode of crime as the physical movement of each member of the group, and instead regards “perpetration” as that of the group as one body. Accordingly, it is interpreted from this stand that even where there is an individual who has not so much as moved his body, if any of the conspirators has started action to pursue the conspiracy which they have agreed upon among themselves, there has been “perpetration” by the whole, and the mere conspirator in the case is one of the perpetrating principals.
It is highly problematic whether it is right to put a period to a question over which theories are so utterly divided by laying down an explicit provision. Naturally, although the Preparatory Commission arrived at what has been made out in the final draft, thinking it might do as it does not go to any extremes, arguments for and against this provision are still being continued in the academic world and among criminal practitioners.

(8) As to capital punishment, only a small number of people in general and of lawyers support its abolition, so it is definitely certain that the punishment will be retained. However, in the Part of Specific Crimes, alterations have been made so that capital punishment cannot be imposed for the so-called crimes aggravated by results; and the cases in which capital punishment can be imposed have been reduced in number, by, for instance, excluding it from the alternative choice of punishments for arson. The Penal Code now in force contains a provision for a crime for which no choice of punishment other than the prescribed capital punishment is allowed (Article 81: Inducement of Foreign Aggression). But the Draft has the choice possible between capital punishment and life imprisonment even for this crime (Art. 134). These things show to a certain degree a mark of respect to the arguments for the abolition of capital punishment.

(9) As to the punishments which deprive the offender’s liberty, there is the problem of their unification. At present this form of punishment is of three kinds, imprisonment, confinement and penal detention: in imprisonment the inmates are forced to hard labour, while both in confinement and in penal detention they are not forced to it, and the difference between the last two lies merely in their terms. In drafting the Preparatory Draft the opinions of the members of the Commission were divided evenly, seven to seven, as to whether or not the distinction between imprisonment and confinement should be abolished. The result was that finally two drafts were retained side by side, one for the abolition and the other for the retention of the distinction. As there is no one at the present moment who strongly asserts the unification of all the three kinds of punishment including detention, our question of the moment concerns only the matter whether the distinction between imprisonment and confinement should be retained or abolished. I am one of those who are for its abolition, and my reason for it is as follows.

a. The principle to impose imprisonment for infamous offences and confinement for non-infamous offences (or “the honourable offences”), treating the offender of the latter favourably, is itself useless and should be done away with. The punishment, no matter which one it is, is to be imposed on those who violate the law of the state, and it is self-contradictory for the state to show respects to a certain kind of offence.

b. Granted that it be necessary to treat prisoners punished with confinement better than those punished with imprisonment, it is wrong to consider that the better treatment should be in not imposing the prescribed prison labour. This is based on an erroneous notion of those days when labour was despised, which now is anachronistic and cannot be supported.

c. The actual practice of prison administration is such that nearly all the inmates imprisoned without forced labour feel their life painfully monotonous for lack of work, and as a matter of fact nearly all such prisoners choose to make special application for work and get employed in the so-called “prison labour permitted on application,” so there is actually no difference whatever between imprisonment and confinement. The abolition of the legal distinction, therefore, will only bring much benefit and convenience to prison administration.
The system of imposing relatively indeterminate sentence on habitual recidivists has been adopted into the Draft. The prerequisites to the imposition of indeterminate sentence is firstly that the offender must be one who has been already sentenced as a recidivist to imprisonment for six months or more and is to be punished again with a limited term of imprisonment; and secondly that the court finds the fact of his being a habitual criminal (Art. 61). However, even where such prerequisites are fulfilled, it is left to the free discretion of the court whether an indeterminate sentence or a determinate sentence is passed (Art. 62). Accordingly, cases where the indeterminate sentence is given are extremely limited. Anyhow, deliberation is now being continued as to whether it is better to adopt indeterminate sentence for habitual recidivists or to give them determinate sentence accompanied with security measures.

A new measure of ordering the offender to make restitution for the damage caused by his crime, as an additional measure, when the court suspends the execution of sentence, has been established (Art. 79, item 2).

Besides having retained the existing system of suspending the execution of sentence as it is, we have further established a new system of the suspension of pronouncement of sentence. However, as this is a new attempt, its application has been limited to a small scope and provisions have been laid down to the effect that only in the case where "a person who has never previously been sentenced to confinement or a heavier punishment is to be sentenced by the court to imprisonment or confinement for not more than six months, to fine not exceeding 300,000 yen or to penal detention or minor fine," and that the period for which the pronouncement of sentence is suspended shall be "not less than six months nor more than two years" (Art. 84). There are pros and cons for the newly established system of suspension of pronouncement of sentence. As for me, because we already have the system of suspension of execution of sentence, I simply don't see the necessity or usefulness of introducing the new system of suspending pronouncement of sentence into the Code, which is like putting a fifth wheel to a coach. Besides, there will be lots of procedural difficulties when suspension of pronouncement of sentence is revoked afterwards. Therefore, I am against the provision for suspension of pronouncement made in the Draft. In case of the revocation of suspension, if the judge who previously declared the suspension should be the judge who pronounces the sentence, he knows the circumstances well enough and finds little difficulty in giving sentence, but such can seldom be expected. If another judge is to pronounce the sentence, he has either to start examination all over again and give sentence according to his own conviction or has to become a mere figurehead who reads aloud the sentence prepared by the judge who previously declared the suspension of its pronouncement. Thus thinking, I cannot but doubt the practical value of introducing the system of suspension of pronouncement of sentence.

The system of security measures has been newly introduced. Although half a century has passed since our Penal Code was enforced, it has a far shorter history than French or German Code which was modeled upon in the legislation of those countries ruled by the law of the Continental type, so it is clear that our Code is not yet past its use. But if it has a phase deserving criticism, it is the very fact that the Code has not provided for security measures. In this sense, what gives the greatest amount of freshness to the Draft can be said to be the introduction of security measures. However, their adoption into the Draft is limited to a very small scope. Those which are prescribed in the Draft are only
"curative measures" and "abstinence measures."

The curative measures are ordered by the court at its discretion to a person suffering from a mental disorder who has committed acts punishable with confinement or a heavier punishment, to whom the court has applied the provisions concerning lack of capacity to discriminate as to the propriety of his conduct or to act according to such discrimination and who has not been punished or whose punishment has been reduced, when "the court finds that he is likely in the future to commit similar punishable acts and such measures are necessary to protect the safety of the public" (Art 100). As for the abstinence measures, there is a provision saying, "A person who commits acts punishable by confinement or a heavier punishment because of his habitual addiction to excessive use of alcoholic beverage or to narcotics or nerve stimulants may by order be subjected to abstinence measures if he is likely to commit similarly punishable acts in the future unless his addiction is cured" (Art. 115). This also is a kind of measures for curing diseases in their broad sense.

Accordingly, both security measures planned in the Draft belong alike to the "therapeutic measures" in a broad sense. They represent but a small part of the wide range covered by security measures. The Draft has tried to take in what is of minimum necessity, as an initial step. Why such a timid attitude? It was for the reason that, as the security measures do restrict the human rights though they are not called "punishments," it was feared that they might be disapproved from the thought of inviolableness of human rights. Besides these, there are "measures for commitment to the work house" for those who hate to work and "preventive detention" for habitual recidivists of malicious crimes such as homicide, arson, robbery, etc., which were adopted in the Tentative Draft, which are deemed to be of great necessity under the present criminal condition. But the Draft has not prescribed them for the same reason. Many specialists in criminal policy regret their omission. I myself wish to have had at least these two measures last mentioned, which were adopted by the Tentative Draft, introduced in the present Draft, but the general trends seem to be toward having no more than the two kinds of therapeutic measures which the Draft has prescribed. The public will not disapprove the newly established system of security measures, if they are employed merely to the extent of committing persons for purposes of therapeutic treatment. The majority opinion seems to be counting on the public showing no resistance in such cases. In our country after the War, there has been a tendency for all decisive measures to be shelved, for fear that people may mistrue their purpose and that the worst may occur from their application—or, with the song and dance about infringing on human rights. This may sometimes prove of use, but the folly of "a burnt child dreading the fire" is too often repeated. It is highly necessary to have the courage to put in force the best measures whilst taking care to avoid their mistaken application. No great harm may be done to society, if we leave alone lazy bones and sluggards pure and simple, as their number is at present limited. But to cope with the present conditions of our city streets athrong with malicious recidivists, the system of preventive detention of such recidivists must be one of the most useful. However, for the present, the prospects of these measures being enforced are very slim.

Now it must be noted that both of the two kinds of security measures adopted by the Draft have a common prerequisite to their enforcement; there must have been an actual performance of an act which when committed by an ordinary person should be considered guilty. In this light it is clear that the restraint upon the freedom of persons is not intended simply because of the apprehension of their committing illegal acts. They are definitely
measures to the enforcement of which the existence of the fact of illegal acts is an indispensible prerequisite.

As to the duration of commitment, we have problems which we must study further, but for the present the Draft has prescribed for curative measures five years in principle, which can be renewed every three years (Art. 112), and for abstinence measures one year in principle, which can be renewed once only (Art. 117). In the enforcement of either of these measures, when commitment has become unnecessary the person in the commitment must immediately be released (Art. 113, Art. 118), besides a provisional release may also be made as a trial (Art. 114, Art. 119). In abstinence measures, a method of subjecting a person to administrative supervision, instead of committing him to a security institution from the beginning, has also been admitted (Art. 116, para. 2). In short, highly elastic and diverse measures have been prepared.

A mention is here made on the relationship between security measures and punishment. In the case where no punishment is imposed, it is possible to enforce security measures only, but both can be combined, too. In the last case, the Draft provides to the effect that in principle the punishment should be enforced prior to the measures (Art. 120). However, I have doubt about the rightness of this principle. If the security measures employed are preventive detention or educational labour, the necessary duration of their enforcement can only be clearly determined after the enforcement of punishment. But as the two kinds of security measures which the Draft has prepared are of therapeutic nature, it is rational to let their enforcement precede the enforcement of punishment. With regard to the enforcement of punishment, we have to lay stress on the effects of the impression it gives on the person subjected to it, therefore, it should be said that the right method is to shift over to the enforcement of punishment after bringing the mental and physical condition of the subject person near to the normal by administering curative measures. In this sense, I must comment that while the Draft provides that the punishment must precede the measures in principle and allows the security measures to precede the punishment only in exceptional cases, it would be more rational to reverse the order, or to make the exceptions the general rule and vice versa.

B. Problems in the Part of Specific Crimes

(1) A provision concerning the crime of ferreting out or communicating the secrets of the state has been laid down. It says, "A person who, for the purpose of communicating to a foreign country, unlawfully ferrets out or collects important diplomatic or defence secrets, the divulsion of which may seriously endanger the security of Japan, shall be punished by imprisonment for two years or more" (Art. 136, para. 1); and that "the same shall apply to a person who communicates such diplomatic or defence secrets to a foreign country for the purpose of benefiting such government or impairing the interests of Japan" (Art. 136, para. 2). These provisions have met with a strong opposition of the press. Prior to and during the War, their writing activities were extremely restrained, and since they had the bitter experience of having their unlawful intentions assumed despite having no malice at all, they declare that they fear the new provision may be abused for suppressing the freedom of public opinion. However, there is no country but has its diplomatic or defence secrets. Granting that we are under our Constitution by which we have renounced war and have no armaments, the right of self-defence is admitted on all hands both at home and abroad, and
so one can say that it should be allowed for us, too, to think of our "defence secrets." Aside from the defence question, none can definitely deny the existence of diplomatic secrets. If so, there is no reason why we should not have provisions of this sort. It is a temporary phenomenon caused by our unconditional surrender that the Penal Code in force lacks these provisions. 

(2) The provision, "A person who by a forcible or fraudulent means obstructs a public official in the performance of his official duties shall be punished by imprisonment or confinement for three years or less" (Art. 165) has been newly set forth. Hitherto we have had provisions concerning the crime of obstructing the performance of official duties, and the Draft has inherited them, but the prescription of the Penal Code requires the use of physical violence or coercion by the obstructor in order to constitute the said crime. Under the new provision, the obstruction by fraudulent or forcible means are also punishable though less heavily than that perpetrated by physical violence or coercion (imprisonment or confinement for five years or less). Some take the view that even though the Penal Code in force has no provision of such sort, this kind of acts can be punished under the provision for "obstruction of business" (Art. 233, Art. 234), and I myself share this view. Some entertain an opposite view which is quite powerful, but according to it the protection of official business becomes weaker than that of private business. The provision of the Draft will serve for the correction of the defect. 

Under the provisions, the choice between imprisonment and confinement can be made; the Draft contains a considerable number or prescriptions which admit the choice of this sort and this is one example. However, this will cause the confusion of the distinction between imprisonment and confinement, and for that account, those of us, including myself, who are for unifying the two punishments believe it all the more meaningless to retain the two punishments, distinguishing the one from the other. As has already been said, we have two drafts that have equal weight, and in one of them in which the two punishments are unified, there is of course only one punishment, which is called by the name of "penal detention."

(3) The prescription, "a person who stages an indecent performance for purposes of gain shall be punished by imprisonment for not more than two years or a fine not exceeding 500,000 yen," has been newly laid down (Art. 261, para. 2). We have new modes of crime accompanying the postwar sex liberation and the interpretation and application of the Code in force are not sufficient to cope with them. Under the present Penal Code it is doubtful which provision should be applied to persons who put indecent acts on show. The maximum punishment prescribed by the Code for persons who publicly perform indecent acts is imprisonment for six months (Art. 174), while the maximum penalty for persons who publicly display indecent objects is imprisonment for two years (Art. 175). Thus, a question arises as to which of these provisions should be applied to persons who put on show indecent performances. Putting on show the body of a human being is nothing but treating it as an object, therefore the crime should be dealt as that of displaying indecent objects. If such view is taken, it can be punished under the provision of Article 175. If we interpret the provision in this way, there is no fear of the equilibrium of weight of the punishments being lost, and I claim that it should be thus interpreted. Some scholars agree with me, but many others are against this interpretation, on the ground that the human body is by no means an object. However, if we follow this interpretation, we will have lots of unreasonable things.
For instance, while displaying indecent acts painted in pictures will be an offence punishable by imprisonment for two years, the act of showing indecent performances done by living persons will be punished only by a lighter punishment, imprisonment for six months or less.

It was with a view to correcting such a remarkable unbalance that the Draft has set forth this provision. According to this prescription, acts of this kind are to be regulated by punishments of equal severity as those for the acts of displaying indecent objects.

(4) The minimum of prescribed punishment for intentional homicide is at present imprisonment for "three years," which has been raised to "five years" in the Draft. The maximum punishment for this crime is death, and no change has been made in this. But it is a known fact that the actual imposition of punishment by the court has in recent years tended toward the lenient side for the intentional homicide which is in a sense the most representative of crimes. The Draft hopes to suppress this tendency and, at the same time, intends to respond to the remarkable rise among our people of the thought of respect for human life.

(5) The provisions for specially heavy punishments for crimes of killing or physically injuring one's lineal ascendants have been abolished by the Draft, and the general provisions for killing and injuring have been made applicable to them. The Code in force provides for especially heavy punishments for killing, injuring or abandoning one's lineal ascendants, showing the influence of Confucian morals. For instance, while the homicide of a person other than the ascendant is punishable by imprisonment for a minimum of three years under the present law, a person who kills his ascendant is punished by death or imprisonment for life. Differences prescribed for the same purport exist for injury causing death and for abandonment, too. With regard to this difference, some assert that the present provisions of the Penal Code contradict with the principle of equality of people, etc. guaranteed by the Constitution. The criminological investigation not infrequently reveals that victimized ascendants to have been decidedly to blame, and the especially heavy punishment provided for the crime by the Code is often felt to be too heavy. On the other hand, the abolition of these special provisions does not mean that the way for punishing really unpardonable criminals with the heaviest of punishments is closed. Sufficiently reasonable disposition of such criminals still remains possible.

(6) The Draft has classified several types of bodily injury and subdivided the provisions for each. Excluding those for injury causing death, the Penal Code in force has but one basic provision for punishing bodily injury. Accordingly, the punishments range from ten years' imprisonment down to a minor fine of five yen. However, as has already been said, on account of the unduely lenient tendency of the court in its imposition of punishment, this wide range of punishments prescribed in the provision does not seem to be made rational use of. The new subdivision in the Draft will serve to rectify this. The acts for which the Code in force has only one provision have been divided by the Draft into three, and provisions have been laid down separately for ordinary bodily injury (Art. 273), bodily injury inflicted by a habitual offender (Art. 277) and that by a number of persons (Art. 278). For physical violence, also, distinction has been made among the said three types, of which the Code in force makes no distinction; the Draft has so stipulated that physical violence by a habitual offender and by a number of persons acting in consort should be dealt with along the same lines as physical injury inflicted by the same sort of offender or offenders.

(7) The crimes of kidnapping (including abduction, as the term will always be used in
for ransom has been newly prescribed. Neither the Old Penal Code nor the Penal Code in force has ever had any special provision for these crimes. Despite the lack of provisions, fortunately we never had so malicious an offender as would make us feel acutely the incompleteness of our Codes. However, after World War II, cases of malicious offence of this sort that startled the public began to break out one after another, and since then the preparing of adequate penal provisions has come to be loudly called for. There is some unreasonableness in punishing kidnapping for ransom as a kind of kidnapping for gain. For, according to the received interpretation of the criminal law of countries which have special provisions for the said crime, the phrase “for gain” here means for the purpose of profiting by putting the kidnapped person to work, and therefore, the act of taking the kidnapped person as hostage to demand ransom from his or her guardian is not included in this category. However, under our Penal Code which has no such special provision, it may be permitted to take the phrase “for gain” in its broad sense and let it cover all the cases where a ransom is demanded. Judicial precedents have interpreted the phrase in such way and have applied the provisions for the crime of kidnapping for gain to the crime of kidnapping for ransom. Nevertheless, as there is some unreasonableness as we have said above, the Draft has set forth special provisions that “Any person who kidnaps or abducts a person with intent to extort a ransom for the release of such person shall be punished by imprisonment for two years or more,” (Art. 302, para. 1) and that “The same shall apply to anyone who demands a ransom for the release of a kidnapped or abducted person” (Art. 302, para. 2). In case the offender kills or injures the kidnapped person, the acts constitute either the crime of homicide or bodily injury and, he may be punished, say, with death. Still, as this kind of offence has broken out one after another since the Draft was published, the voice that this much punishment is too light is getting louder. Under the circumstances, it is likely that new provisions for the crime of kidnapping for ransom may be set forth by means of partial amendment of the Penal Code in force, before its overall revision. The partial amendment is supposed to provide for heavier punishments than are provided in the Draft, and the results of the amendment will be incorporated, so far as no special difficulties arise, into the revised Penal Code.

The crimes concerning illicit sexual intercourse have been newly categorized into three types, which are shown in the following provisions: (a) “A male who by fraud or duress has sexual intercourse with a female minor shall be punished by imprisonment for seven years or less (Art. 316, para. 1), (b) “The same shall apply to a male who takes advantage of impaired capacity of a woman and has sexual intercourse with her” (Art. 316, para. 2) and (c) “A male who by fraud or duress has sexual intercourse with a woman who is under his protection or supervision by virtue of business, employment, family or other relationship shall be punished by imprisonment for seven years or less. The same shall apply to a person who has sexual intercourse with a woman detained or kept in custody pursuant to law or order when it is his duty to guard and protect such woman” (Art. 317). Crimes mentioned here include some which could be dealt with by interpreting the existing provisions for the crime of rape as being applicable to them, but most others which come under the prescription of these new provisions of the Draft have never been taken up as criminal acts. And by this new prescription the protection of women is to be greatly strengthened.

Clauses for the aggravated crime of intruding upon another’s habitation have been newly laid down, which provide for a person who without good reason intrudes upon another's
14 HITOTSUBASHI JOURNAL OF LAW AND POLITICS [April

habituation, etc., “by the use of physical violence or intimidation or while carrying a weapon or other dangerous instrument,” who is to be punished by imprisonment for five years or less (Art. 325).

(10) With respect to the crime of injuring reputation, the prerequisite necessary for the non-punishability of defamation has been strengthened or made more rigid. Under both the Code in force and the Draft, the act of defamation constitutes a crime in principle, regardless of whether the facts asserted for defamation are true or false, but, as an exception, the act is not punishable, when the asserted fact is proved true, in cases where the assertion relates to a matter of public interest and was made for the sole purpose of promoting such interest (Article 328 of the Draft, which is the same in substance with the provision of the Penal Code in force). With regard to the case of this exception, the Code in force has further provisions deeming the criminal act of a person who has not yet been charged with a crime to be a matter of public interest, and deeming the assertion of the facts concerning public servants or candidates for an elective public office to be an act done for the benefit of the public. Such provisions “deeming......” have been deleted in the Draft. The reason is chiefly that the impropriety of the provisions in the Code in force concerning public servants and candidates for elective public office has been noticed. Even persons in public service should not be allowed, on account of their being in public service, to become victims of other persons who maliciously divulge their purely private matters. If such an act is allowed, the result will be to encourage speeches and writings. Such is the reason for the deletion. However, this deletion has met with considerably strong opposition from the press. Although some influential newspapers write strongly against the deletion, it can hardly be expected that they will write unfairly about the matters of private life of a specific person, and thus feel the inconveniences caused by the rigid control resulting from the deletion.

Those who might receive serious inconvenience from the deletion of the provision must be those newshounds on “yellow sheets” who would divulge others’ private affairs as a means of extorting money.

(11) Provisions for the aggravated theft have been laid down. Both in the case of theft (Art. 338) and in that of robbery (Art. 341) where a person who at night intrudes upon another’s habitation, etc. commits the crime while carrying a weapon or dangerous instrument or while acting in concert with more than one other persons, his punishment is aggravated and is made worse than that for ordinary theft or robbery. Habitual robbery or theft is also dealt with aggravated punishments. The provisions of this sort do not exist in the Penal Code in force, but there is a special law commonly called by a shortened appellation of “Theft Prevention Law,” by which things of the same kind are provided for; and the provisions of this special law have been incorporated into the Draft, the abolition of the same being under contemplation. In this sense, substantially this is not a new legislation.

(12) For constructive extortion a new provision has been laid down reading: “A person who by subjecting another to embarrassment obtains any property or wrongfully acquires or enables a third person to acquire any economic benefit shall be punished by imprisonment for seven years or less” (Art. 357).

(13) A provision for the crime concerning stolen property through negligence in the course of business has been set forth. The text reads: “A person who in the course of business keeps in custody, acquires for value or acts as a broker in the disposal of any property which has been stolen or otherwise obtained in the commission of crimes against
property, but who negligently failed to realize the character of such property shall be punished by a fine not exceeding 300,000 yen” (Art. 367). However, under the system now in force where only the intentional commission of crimes concerning stolen property is punishable, the suspects are, in many cases, liable to go punished under a spacious plea of his “having been unaware of the unlawful character of the property.” Under such circumstances the new provision was considered necessary. However, the opposition against it on the side of dealers in second-hand goods is very strong. It seems that the opposition comes from their fear engendered by their poor understanding of what negligence is. Even after this prescription is enforced, when second-hand goods dealers have obtained stolen property in the course of their business, in spite of having expended sufficient care required by laws and ordinances, they are not to be held culpable. Therefore, it does not seem that their opposition has much ground to it.

(14) Crimes such as those concerning public elections and referendum (Arts. 158 to 163 inclusive), concerning explosives (Arts. 186 to 188-2 inclusive), of duelling (Arts. 285 to 287 inclusive), etc. which should, by nature, be provided for by the Penal Code but have been dispersedly prescribed in other laws, have been incorporated into the Draft. Of these crimes, I think the crimes of duelling had better be governed by the provisions for crimes of ordinary homicide and physical injury than by the prescription of special provisions for them, and I see no need of particularly setting forth the provisions for crimes of duelling in the Penal Code. In European and American countries, where duelling is thought as a matter of honour for men, it may be worth being dealt with more sympathetically than the perpetration of ordinary homicide or physical injury. In our country, too, the custom had the same sort of meaning in the olden days of samurai. But nowadays it has died out, and generally is seen only in the private fights and assaults of hoodlums and gangsters. Therefore, there is no reason why they should be dealt with leniently and sympathetically under the penal code. It is on this account that I cannot support the inclusion of these provisions prescribing for the crimes concerning duelling special punishments which are more lenient than those for physical violence and physical injury in general.