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Revisions of the Criminal Code of Japan During the Occupation

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FAR EASTERN SECTION

REVISIONS OF THE CRIMINAL CODE OF JAPAN DURING THE OCCUPATION

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I. THE BACKGROUND

THE FIRST compilation of law in Japan was the *Jushichi Kempo* (the Seventeen Laws) of Shotoko Taishi in 604 A.D.[1] Essentially, this was not law but a statement of social and political ideals. Actually, the first recorded criminal law was the *Dai Horitsu,* codified in the early eighth century and based on Chinese law. Under the shogunate (military regency) of Yoritomo Minamoto, the office of Monjusho, or Office of Inquiry and Decision, was created as a court of justice about 1192. This office was strengthened by Yasutoki Hojo in 1232, when the *Hyojosho* (Supreme Council) was created to consolidate the rule of the Shogun over the local great barons, or *Daimyos,* and to dispense justice by means of provincial judges subordinate to the *Hyojosho.*

Under the Tokugawa Shogunate (1603-1868), the Shogun's officials were stationed only in the areas which were a part of the Tokugawa domain and in certain large and strategically placed cities. The *Daimyos,* both hereditary and nonhereditary vassals of the Tokugawa, exercised a large degree of autonomy in their own fiefs, including maintenance of order through their own courts. Superior to these *Daimyo* courts was the Supreme Council of the Shogunate, which had an original federal jurisdiction for suits involving parties from different provinces, and an appellate jurisdiction for death sentences imposed locally by the *Daimyo* courts. Moreover, the local *Daimyo* courts often consulted the Supreme Council in order to approach some uniformity of the law, particularly as the Shogun had decreed that laws similar to those of *Edo* (Tokyo, the seat of the Shogunate) should be observed throughout all provinces and in all matters. Thus, when the metropolitan judge of Tokyo, Tadasuke Oka, compiled the Regulations of One Hundred Articles (*O Sadame Gaki Hyakkajo*) during the Sho-

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[1] See WIGMORE, PANORAMA OF THE WORLD'S LEGAL SYSTEMS 463 (1936 ed.).

gunate of Yoshimune Tokugawa (1716-1745), this codification of criminal law was applied throughout Japan with some degree of uniformity. There could not be any real uniformity of application, however, since each article of this code contained one clause stating the act which was prohibited and another clause stating the penalty for such act—and while the prohibitions were published orally and on public placards at the various crossroads, the clauses stating the degree of discretion which might be exercised by the judges in applying the penalties were not published. Apparently it was the theory of the rulers that the common people should obey the regulations imposed on them (for their own good, of course) without inquiring what were the penalties for disobedience. The punishments for disobedience were specified both as to the crime and the social class of the individual committing the crime. Decapitation, drawing and quartering, burial alive, sawing with bamboo saws, burning (this one for arson) were among the penalties, and torture was a part of examination of prisoners. The samurai was punished differently than persons of low degree, and one official collection of Tokugawa laws stated that offenses were to be punished in accordance with social status. This normally reacted in favor of the samurai, who usually would receive a lighter punishment for the same offense for which a tradesman might be given the death sentence.[2]

The lack of uniform laws, the employment of torture in investigation and punishment of offenses, the meting out of unusual punishments for crimes regarded as minor by Western standards—all these were utilized as excuses for the imposition and retention of extraterritorial rights by the Treaty Powers in the period between 1855 and 1859.[3] In an effort to remove this alleged cause for the retention of consular jurisdiction over foreign nationals, the *Shinritsu Koryo* (Outline of the New Criminal Law) was promulgated and enforced in 1870, amounting to not much more than a codification of the previous codes and a slight borrowing from the Chinese. This was added to by the *Kaitei Ritsurei* (Amended Criminal Regulations) of 1873, but the requirements of modernization were still not adequately complied with and the new government employed a French legal scholar, Boissonade, to direct a complete revision. In July 1880, after seven years of investi-

[2] See SANSOM, JAPAN: A SHORT CULTURAL HISTORY 457-463 (1943 rev. ed.); WIGMORE, *op. cit. supra*, 475-483; Preface, SEABALD, THE CRIMINAL CODE OF JAPAN (Japan: The Japan Chronicle Press, 1936); NORMAN, JAPAN'S EMERGENCE AS A MODERN STATE 12 (1946).

[3] TREAT, THE FAR EAST 271 (1935 rev. ed.).

gation and preparation, a Penal Code based largely on French models was promulgated, taking effect on January 1, 1882. This Code, which classified crimes in three classes—felonies, misdemeanors, and police offenses—abolished the power of the judges to give arbitrary punishments, but it was regarded as extremely complicated and because of the difficulty of understanding it was replaced by the present Criminal Code on October 1, 1908.[4]

Viewed in the arbitrary light of hindsight, the Criminal Code is an adequate document, adapted to the needs of Japan and in line with standard criminal laws of the civilized world. There is no differentiation between misdemeanors and felonies, all unlawful acts being designated crimes if falling within the provisions of this basic law. The grimly feudalistic methods applied formerly for capital punishment are abolished in favor of hanging. Torture is strictly forbidden, and the punishments for violation of the Code, in addition to the death penalty, are penal servitude (confinement in prison and performance of prescribed labor), imprisonment (confinement in prison only) fine (twenty yen or more), detention (confinement in a house of detention for less than thirty days) and minor fine (less than twenty yen). Great discretionary power is placed in the courts, through provisions for mitigation of penalties or remission of punishment in view of the circumstances surrounding the commission of the crimes. One odd feature indicating the adaptability of the Code to the specific social situation in Japan is the increase of penalties when certain crimes (usually those of force, such as batteries or attempted physical injury) are committed against members of the immediate family, and the waiver or decrease of penalties when a crime results from attempts to protect a member of the family of the offender.

A measure of the solid legal construction of the Criminal Code is the fact that the only revisions made until the present ones were those of May 11, 1941, which were promulgated during the war years to enhance the operation of a police state. Penalties were added or increased for damaging seals or marks of attachment of members of the public services, the criminals being punished with penal servitude up to two years. The same penalty was applied to persons who tried to conceal, damage, or fictitiously transfer property to avoid execution of judgments. Penalties for allowing prisoners to escape, or forging official documents, or for crimes of official corruption were applied

[4] TREAT, *op. cit. supra* note 2, 272-276; SEABALD, *op. cit. supra* note 2 at IV preface.

when these offenses were committed outside of the Japanese Empire, in the course of Japan's march of conquest. A new series of "Offenses Against Peace and Order," partaking of much of the nature of the infamous Peace Preservation Law, was added to make it a crime to disseminate false information with the objective of "confusing human mind," to cause runs on banks or to disturb the administration of the national economy. But, with the exception of these 1941 amendments, basically little remained to be revised in the postsurrender era. Most of the excesses which led Japan to war, and which were given sanction by law, were aided by statutes other than the Criminal Code, such as the Peace Preservation Law, and Police Offenses Ordinance, the Law for Execution of Administration and other similar laws, now abolished or revised, which stated offenses in such vague and general terms that anyone was at the mercy of the law-enforcement authorities, who were in turn tools of the aggressionist groups in power.

II. The Revisions Under the Occupation

With the coming into force of the new Constitution of Japan on May 3, 1947, the Criminal Code had to be revised to excise those provisions which were contrary to the Constitution, since Article 98 of that document declared that such provisions had no legal force or validity. A Legislative Investigation Committee was appointed by the Japanese government, composed of leading judges, law professors, procurators, and officials of the Ministry of Justice.[5] The writer worked with members of this group, as the representative of SCAP (Supreme Commander for the Allied Powers). The first and principal Code revision was submitted in order to comply with the terms of Article 98 of the Constitution, but was not regarded as the final one, for there remained many problems of criminology and modernization which were not part of the constitutional question, and which could be pursued at a later date without thought of the pressure of time. For one matter, the question of parole was studied subsequently and revised

[5] In July, 1946, a "Provisional Legislation Investigating Committee" was appointed by the government. It was a Cabinet level committee, with the Prime Minister as chairman, and officials of the Ministry of Justice, Cabinet Legislative Bureau, lawyers, and legal scholars as the working members. There were four divisions, concerned with revision of the Imperial Household and Cabinet, the Diet, the Judiciary and the Codes, and Finance. On July 19, 1946, the Minister of Justice appointed the "Judicial System Investigation Committee," composed of Ministry of Justice officials, attorneys, law professors, and procurators. This Committee was to assist the Provisional Legislation Investigating Committee. This Ministry of Justice Committee actually did the work of preparing revisions of the basic codes, and by September, 1946, the two committees were identical.

in the light of modern methods of rehabilitation and correction.[6] The problem of the adequacy of fines was partially remedied by a law designed to raise the level of criminal fines to keep pace with the inflation by multiplying all fines referred to in the Criminal Code by fifty times the maximum for each offense.[7] The right of the courts to establish conditions to be observed by a criminal when suspending execution of the sentence, and to place him under supervision, was proposed as another Criminal Code amendment to the fifth session of the National Diet in May, 1949, was tabled by the House of Representatives Judicial Affairs Committee, but will be considered again in the next session.

The rest of this article is concerned with the first and most basic of the revisions: the Law for the Partial Amendment of the Criminal Code (Law No. 124 of 1947), promulgated in the first session of the National Diet on October 26, 1947, and taking effect the fifteenth day of November. Besides being the most extensive of the Criminal Code revisions, this law infused into the stream of Continental law, which is the major factor in the pattern of Japanese jurisprudence, a number of Anglo-American legal concepts. For purposes of discussion, the revisions made by this law are divided into two groups: (A) those amendments which are most radical in their divergence from the old Code provisions, making basic changes; (B) those amendments primarily technical in scope, affecting the application of the law rather than changing essential principles.

A. *Major Substantive Changes*

Crimes Against the Imperial House. The revision undoubtedly regarded by the Japanese as the most momentous of all those made in the Criminal Code is the one which denies to the Imperial House the special protections heretofore afforded it by the provisions of Articles 73 to 76 of the old Code. Formerly every person who committed or attempted to commit a "dangerous or injurious" act against the person of the Emperor, his grandmother, wife, son or grandson, or the heir to the throne was condemned to death. Every person who committed a disrespectful act against these named individuals or against the Great Shrine of Ise (the chief Shinto Shrine at which the imperial ancestors were worshiped) or an Emperor's mausoleum was to be

[6] See OFFENDERS PREVENTION AND REHABILITATION LAW (No. 142 of 1949, effective July 1 this year).

[7] See LAW FOR TEMPORARY MEASURES CONCERNING FINES (BAKKIN), Law No. 258 of 1948.

punished with penal servitude (i.e., imprisonment at hard labor) ranging from three months to five years. Every person who had committed a dangerous act against a member of the Imperial House (composed of the individuals named above and many other Imperial Princes and their families) was to be sentenced to death; attempts of this crime were punishable with penal servitude for life. Disrespectful acts against members of the Imperial House were punishable by penal servitude from two months to four years.

The punishments for similar acts taken against common citizens were infinitely milder and, indeed, a "disrespectful act" was not a crime at all.[8] Since the new Constitution requires that no group, because of family origin, should enjoy a favored position under law,[9] Articles 73 through 76 were deleted. Similarly revoked was Article 131, which had provided that every person who trespassed upon the Imperial Palace or gardens, or a place where the Emperor sojourned temporarily, was to receive penal servitude for not less than three months nor more than five years—when ordinary trespass was subject to penalties of a maximum of three years penal servitude or a fifty-yen fine.[10] The result of deleting these articles is to remove the members of the Imperial House and family from their specially protected position under the former law, and to submit them to the same protection as any other Japanese citizen. One consequence of this is the removal of the crime of "disrespectful acts" (*lese majeste*) from the statute books. However, the reputations of members of the Imperial House, as private citizens, are still protected by the provisions of Chapter XXXIV (Crimes Against Reputation). Since Article 232 of Chapter XXIV requires that these crimes against reputation be prosecuted only upon complaint to the Procurator (district attorney), it was necessary to amend this Article by adding the following paragraph:

When a person who may make a complaint is the Emperor, Empress, Grand Empress Dowager, Empress Dowager or the Imperial Heir, the Prime Minister shall make it in his or her behalf, or when he is a Sovereign or President of a foreign power, the representative thereof shall make it in his behalf.

[8] ART. 222 punished by penal servitude not exceeding one year or fine not more than 100 yen the crime of threatening another with injury to life, person, liberty, reputation, or property. ART. 204 provided for penal servitude not more than ten years or fine not over 500 yen for bodily injury. ART. 230 levied a penalty of one year's imprisonment or penal servitude or fine not exceeding 500 yen for libel or slander.

[9] CONSTITUTION OF JAPAN, ART. 14.

[10] CRIMINAL CODE, ART. 130.

These exceptions to the general rule of Article 232 were provided because of the argument that the Emperor being the "symbol of the State and of the unity of the people" (ART. 1, CONSTITUTION), it is manifestly difficult, if not impossible, for him to bring a complaint against one of the citizens of that state for damaging the reputation of the symbol of the state. Consequently it was argued that the Emperor would not make a complaint to the procurators for slanderous or libelous statements, and would in actuality be less protected than the other citizens of Japan. For these reasons, it was agreed that the Prime Minister should be authorized to make the complaint on behalf of the Emperor, and that the Empress, Empress Dowager, Grand Empress Dowager, and Imperial Heir were so close in relation to the Emperor that they partook of this special character in this case and should be protected by the same provisions. Other members of the Imperial House must make a complaint in person to the procurators in order for action to be brought for crimes of this chapter committed against them.

These provisions caused much debate in the press and in committee in the Diet. Opponents of the emperor system argued that the amendment of Article 232 retained *lese majeste* as a crime by means of an indirect method by which the government made the complaint required by law. The proponents of emperorism were shocked by the deletion of Article 74, and declared that *lese majeste* was a crime in such democratic states as the United Kingdom (though conveniently forgetting that the British oppose prosecution for the crime, so that it is on the statute books as a matter of form only);[11] that the Emperor embodies by himself the existence of the Japanese nation, and so any defamation of the Emperor was defamation of Japan.[12] The moderates, who desired deletion of the special crimes against the Imperial House, argued that the Emperor himself had declared that he was not divine, and thus it was advisable to remove from the Criminal Code the provisions which gave him special protection so that he might not again be used as a shield behind which usurpers could take away the power of the people. The Liberal Party delayed presentation of the bill to the plenary session of the House of Representatives from October 4, to October 6, because of its opposition to an act which it believed would

[11] 9 ENCYC. SOC. SCI. 417 (1937) (*Lèse Majesté*).

[12] See Jiji Shimbun, Wednesday, October 8, 1947, editorial: *Problem of the Charge of Lèse Majesté;* Dai Ichi Shimbun, Friday, October 10, 1947, editorial: *Concerning the Problem of the Crime of Lèse Majesté.*

weaken the emperor system,[13] though finally concurring with the other parties represented on the Judicial Affairs Committee of the House in a unanimous approval of the bill.

The alarm of the reactionary elements in Japan was well warranted, for the deletion of these "Crimes Against the Imperial House" removes one of the principal aids by which the militarists and other reactionary and expansionist-minded groups made their way to power and silenced the feeble opposition in the years before the war. These were the provisions which gave the legal basis for the elevated and specially protected position of the Emperor and the Imperial Family, and which silenced the tongues of those who were "disrespectful." There were the provisions which enabled the building up of the Emperor as an absolute idol—to the advantage of a fairly small group who used his position and prestige to advance their own, and to send Japan on the paths of conquest. With the deletion of these articles, it will be far more difficult to utilize the Emperor as a tool of great value for accomplishing ends contrary to the wishes of most of the Japanese people. Moreover, the way has been cleared for full discussion of the emperor system, and what that may bring is beyond prediction at the moment, though its ultimate possibility is the abolition of this institution—a possibility which the writer feels is most doubtful.

Crimes Relating to War. Previously Articles 81 through 89 had levied penalties ranging from penal servitude for one year to the death sentence for the following acts: conspiring with a foreign power and causing hostilities to commence against the Japanese Empire, or joining with an enemy power in hostile action against the empire; delivering to an enemy power any place or structure for military or naval use, or any arms, munitions, or other goods for military or naval use; or

[13] See Yomiuri Shimbun, Sunday, October 5, 1947. The history of the struggle waged by the Liberal Party against deletion of these articles is worth brief mention. When this party was in power during the course of preliminary studies on the Code revision, Prime Minister Shigeru Yoshida sent a letter to General MacArthur on December 27, 1947. In this letter, he protested against the proposed deletions because the Emperor was, ethically, the center of national veneration; therefore, an act against the Emperor was a subversive act against the state, deserving of more severe punishment than acts against individuals; the same was true of similar actions against all members of the Imperial Family. General MacArthur replied to this letter on February 25, 1947, completely rejecting Mr. Yoshida's arguments on both constitutional and general legal grounds, and declared that all articles of the Criminal Code relating to special crimes against the Imperial House were surplusage and should be eliminated. Despite this exchange of letters, when the bill came up for passage in the Social-Democratic Party Katayama Cabinet, the Liberal Party unsuccessfully attempted to block the bill unless it was amended to restore those provisions specially protecting the Imperial House. The Liberal Party later was reorganized as the Democratic-Liberal Party, and is now in power with Mr. Yoshida as Prime Minister once more.

for the purpose of benefiting an enemy power, damaging items used for military or naval purposes, or items which might be used for operations of war, even though indirectly; acting as a spy for an enemy power, aiding an enemy spy and disclosing military secrets; giving an enemy power any advantage or injuring the interests of the empire in any way or by any method; attempting, conspiring, or making preparations to do any of the above acts, or committing any of the above acts against an allied power in time of war.

The preamble of the new Constitution states that the Japanese people are "resolved that never again shall we be visited with the horrors of war through the action of government," and that all laws in conflict with this ideal are rejected and revoked. Article 9 of the Constitution declares: "Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or the use of force as a means of settling international disputes. In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized." In order to conform with this constitutional renunciation, Articles 83 through 89 were revoked, and Articles 81 and 82 were radically changed to read as follows:

ARTICLE 81: Every person who conspired with any foreign state and thereby caused the said state to use force of arms against the state of Japan, shall be condemned to death.

ARTICLE 82: Every person who, when a foreign state used force of arms against the state of Japan, has entered into the military service of the said state siding with it or has benefited it militarily shall be condemned to death or punished with penal servitude for life or not less than two years.

Consequently the crimes which are punishable are those which involve conspiracy causing another state to bring war against Japan, and benefiting in a military way a foreign power after it has levied war against Japan. All references to damaging or destroying Japan's war potential or attempting to do so have been deleted. It is no longer a crime to act as a spy for a foreign power, unless the direct result of such activities was the levying of war against Japan by that power. It is only when a person has materially aided another state which has committed an act of aggressive war against Japan that such person is punished. The amended Articles 81 and 82 are not in conflict with the terms of the Constitution regarding renunciation of war, but are

practical applications of the police power of the state. They are defensive measures which do not run counter to the exceedingly hopeful statements made in the preamble and in Article 9. The punishment is in terms of past action rather than present or future, for it is meted out to persons who *have* conspired with a foreign power and caused such power to levy war against Japan, or who *have* aided a foreign state militarily *after* force of arms has been used against Japan. The fact that the Japanese people have renounced war as a sovereign right, and the threat or use of force as a means of settling international disputes does not mean that the government has thereby declared that it will not protect itself from attempts to overthrow the government by force, and that it will not punish such attempts as a valid exercise of its right to self-protection. Article 77 of the Criminal Code makes it a crime to commit or attempt to commit an insurrectionary or seditious act with the intent of overthrowing the government, seizing the territory of the state, or otherwise subverting the Constitution. The amended Articles 81 and 82 are valid adjuncts of Article 77.

Crimes Concerned With Foreign Relations. Article 90 levied punishment of penal servitude for not less than one year nor more than ten for using violence which did not result in bodily harm (i.e., shoving or pushing) or making threats against the sovereign or president of a foreign power while present in Japan. For insulting the head of a foreign state while he was in Japan, the punishment was a maximum of three years penal servitude. Article 91 punished similar acts against ambassadors, ministers, or representatives dispatched on special missions of friendship or business, by penal servitude up to three years for violence or threats and not more than two years for insult. Somewhat similar reasoning to that which caused the abolition of the special "Crimes Against the Imperial House" prompted the deletion of these two articles from the Code. The argument was that all persons were equal under the law, and that there should not be special protection in the law for a few specified diplomatic envoys, when the protection had never been extended to all diplomats as members of a class for whom there should be special safeguards in order for them to carry out their duties. The argument for deletion of Articles 90 and 91 maintained that the other Code provisions punishing violence, threats, or insult constituted adequate warning and protection without retaining these special categories of crimes.

Since Article 91 had been inserted in the Criminal Code in 1908 largely as a result of the attack on the Russian Crown Prince at Otsu in 1891 by a Japanese policeman,[14] and since Article 98 of the new Constitution states that "established laws of nations shall be faithfully observed," two questions are raised by this revocation: (1) in view of Japan's past history of chauvinistic violence, is it advisable to leave foreign heads of state and envoys to the same protection of law as ordinary residents of Japan; (2) is the deletion contrary to the established laws of nations and, hence, unconstitutional?

With respect to the first question, the revision of the Code has increased substantially the penalties for some of these acts when committed against ordinary persons,[15] so that the use of violence or threats is punished by as much as two years penal servitude, thereby protecting diplomats as well as all others by imposition of penalties only slightly less than levied for such acts under Article 91. Admittedly, the punishment for insult under the ordinary provisions of the Code (Article 231) is only detention for less than thirty days, at the most, but the essential element of this crime in Japanese law is the use of words damaging in themselves, whether written or oral, without alleging facts. Thus "baka" (stupid) and "chikusho" (beast) are the most profane insults in Japanese, a language of extreme politeness. This differs considerably from the Anglo-American concept of slander, in which the crime consists of speaking base and defamatory words which tend to prejudice another in his reputation, office, business, trade, or means of livelihood. Consequently though deletion of Articles 90 and 91 lessens somewhat the penalties for acts against foreign sovereigns or presidents staying within Japan and the punishment for insult against the heads of states and the diplomatic agents of these states, the following points should be taken into consideration: pun-

[14] See Kenzo Takayanagi, *Diplomatic Privileges and the Proposed Criminal Law Revision*, NIPPON TIMES, Tuesday, August 26, 1947, a study to which the writer is much indebted.

[15] ART. 208 formerly provided penal servitude not exceeding one year or fine not more than 50 yen, detention (less than thirty days) or minor fine (less than twenty yen) for use of violence against another without resulting in injury. This has been increased to two years penal servitude or fine of 500 yen. ART. 222 previously punished threatening another with injury to life, person, liberty, reputation or property by penal servitude not exceeding one year or fine not more than 100 yen. This has been increased to two years of 500 yen. ART. 230 in the revision raised the punishment for publicly alleging facts which damage reputation from penal servitude or imprisonment not exceeding one year or fine not more than 500 yen to not exceeding three years and not more than 1000 yen respectively. ART. 231 (Insult) provides that every person who has publicly insulted another, even without alleging facts, shall be punished by detention for less than thirty days or a fine of less than twenty yen. This crime, as well as ART. 230, is prosecuted only on complaint of the injured party.

ishing a person by three years penal servitude for calling the head of a foreign state "stupid" or a "beast," or punishment of two years for the same remarks about diplomatic agents, is an excessive punishment when contrasted with the penalty of detention less than thirty days levied against such acts when committed against an ordinary person; such words are rarely considered harmful by non-Japanese. What we think of as libel and slander is punished by a maximum of three years penal servitude under Article 230, an increase of two years over the former penalty. It is possible that the use of force or threats against the head of a foreign state staying within Japan could be punished under the terms of Article 93, which states that every person who with intent to wage private war upon a foreign power has made preparation or plotted therefor, shall be punished with imprisonment for not less than three months nor more than five years. Finally the use of violence or threats against any person brings a penalty of only one year less penal servitude than in the past for such acts when directed specifically against diplomats.

Therefore, diplomatic representatives, heads of foreign states, and ordinary people are assured of adequate penalties to protect them against the commission of the crimes discussed above. The argument that simply worded and clearly understood laws, with adequate penalties to support them, are sufficient protection for all individuals regardless of rank or position is an argument which has great merit.

As for the second question raised by the deletion of these articles, there is good authority for the proposition that the established laws of nations do not require a nation to enact special crimes to punish acts against representatives of foreign powers present within the borders of a nation. It is a general principle of international law that a diplomat should be afforded complete protection of person in order that he may fulfill his diplomatic functions.[16] Whatever basis may be assigned for the necessity for diplomatic privileges and immunities,[17]

[16] See 2 HYDE, INTERNATIONAL LAW, CHIEFLY AS INTERPRETED BY THE UNITED STATES, § 426 (1945); WILSON, HANDBOOK OF INTERNATIONAL LAW 175-182 (1949); OGDON, JURIDICAL BASES OF DIPLOMATIC IMMUNITY 207 *et. seq.* (1936).

[17] History and custom have provided various reasons for the development and limitation of diplomatic immunities: political expediency, which notes that respect for the nation sending its representative, and preservation of peace and friendship in the international sphere, necessitate protection; Roman civil law, which favors the exercise of jurisdiction over ambassadors in civil cases and in serious criminal matters by the state which receives the ambassadors; the natural law doctrine that diplomatic agents are necessary for the maintenance of relations between states, and therefore should be allowed to perform their duties without interference by the local authorities, in order to promote trade, security and peace among states. See OGDON, *op. cit. supra*, 8-194, for a discussion of the theories and their practice; *Draft Convention and Comments on*

there is general agreement on the duties incumbent on a state in order to protect diplomatic agents of other nations, which is an adjunct of these immunities and privileges.[18] These duties are as follows: (1) the duty of the state itself to abstain from acts harming or interfering with diplomatic agents; (2) the duty of the state to prevent the commission of such acts by private individuals; (3) the duty of the state to punish individuals, whether private persons or officials, who have committed offenses against diplomatic agents. The provisions of the Criminal Code of Japan already cited (see note 15), as well as other articles prohibiting and punishing acts of violence,[19] meet these requirements. There are some authorities who claim that this is not enough, and that especially severe penalties for offenses committed against the persons of diplomats is an integral part of diplomatic immunity.[20] However, a survey of the legislation of twenty-two states conducted by the scholars engaged in research in international law of the Harvard Law School did not reveal the existence of such an obligation.[21] There appears to be no provision in the English law specifically punishing offenses against the person, property, or reputation of a foreign diplomatic agent, since the statute of 7 ANNE, c. 12, is limited to the immunity from civil suit and arrest of the diplomatic agent and his servants.[22] The United States punishes acts against the person of an ambassador or minister, and also forbids in the District of Columbia any public display within five hundred feet of any embassy or mission which is intended to coerce or bring into public odium any foreign government or officers thereof.[23]

Diplomatic Privileges and Immunities, 26 AM. J. INT'L. LAW 26 (1932); HURST, *Les Immunitiés Diplomatiques*, 12 ACADEMIE DE DROIT INTERNATIONAL, RECUEIL DES COURS 122 (1927).

[18] OGDON, *op. cit. supra*, 216; HURST, *op. cit. supra*, 125; Takayamagi, *supra* note 14, August 27, 1947.

[19] ART. 106 declares that persons who by assembling in large numbers have used violence or threats shall be punished for riot by sentences ranging from a fine of fifty yen to penal servitude for ten years. ART. 130 punishes trespass on premises by penal servitude not exceeding three years or fine not more than fifty yen. Art. 199 provides punishment of death, or penal servitude from three years to life for the crime of homicide. Attempts of this crime are punished by penal servitude not exceeding two years, according to ART. 201. ART. 204 punishes the infliction of bodily injury by penal servitude not exceeding ten years or a fine not more than 500 yen. A person who encourages the offender to commit this crime and is present while it is committed is punished by penal servitude not exceeding one year or fine not exceeding fifty yen. ART 235 punishes theft by penal servitude not exceeding ten years, etc.

[20] See authorities cited in *Draft Convention and Comments on Diplomatic Privileges and Immunities, supra* note 17, at 92-94.

[21] *Ibid.*, 94-95.

[22] *Ibid.*, 94; HURST, *op. cit. supra*, 129.

[23] U.S.C.A. §§ 255, 255a, 255b.

The Swiss Penal Code provides exceptionally severe penalties for acts against the heads of missions only.[24] The diversity of national legislation upon this subject was spelled out in a memorandum of the Swiss Federal Council to the League of Nations, in which the following statement was made:

> There appears to be general agreement as to the right of diplomatic agents, implied by this rule (of inviolability) to have complete freedom of movement and to have their persons and personalities respected by the authorities. On the other hand, practice varies as to the special protection to be given to the official against the acts of private persons. The criminal clauses on this point, which are to be found in most legislations, display wide divergencies. In some cases, only attacks upon the honour of the official (slander, defamation and insults) are covered by the law; in others, common assault is also punishable. Here, proceedings are taken by the authorities of their own accord; there, only on a complaint. Such complaints ("requests" or "demands") must come, in some cases, from the head of the state; in others, from the government of the injured official; in others, again, from the official himself. Frequently, also, the demand for proceedings must be accompanied by assurances of reciprocity, or cannot be complied with unless reciprocity—legal or diplomatic—is assured. Certain legislations deal only with public insults, others only with outrages committed upon the diplomatic agent "in his official capacity," and so on. As regards inviolability, therefore, different states interpret their international obligations in very different ways.[25]

An English member of the Permanent International Court of Justice, writing in the French *Journal of the Academy of International Law,* declared that universality has not been reached on this question of punishment of acts against diplomatic agents; that a state runs a grave risk if it fails to promulgate such a law; but that there is no obligation in this respect, provided that care is taken that the normal procedure of the criminal law is sufficient and that it is used to assure the punishment of those who commit offenses against diplomatic agents.[26] He further cites authority for the proposition that the punishment of a crime or an offense depends on the rules of penal law and criminal procedure in force in a country; that the executive power of a country cannot generally intervene in the administration of justice, and consequently that, if there is no other procedure for offenses against international law, the judgment of these offenses must

[24] SWISS PENAL CODE, ART. 43, cited in *Draft Convention and Comments on Diplomatic Privileges and Immunities, supra* note 17, at 95.

[25] MEMORANDUM OF THE SWISS FEDERAL COUNCIL, LEAGUE OF NATIONS, c. 196, M. 70 1927 V, 242, 243, as cited above.

[26] HURST, *op. cit. supra,* 129-130.

be remitted to ordinary tribunals; that the offended state has no right to claim a derogation from the ordinary course of justice, and must hold itself satisfied even if the accused was acquitted or punished by a lesser penalty than that which the offended state deemed just.

Consequently it would appear that there is no requirement of the established laws of nations that special penalties be enacted to punish acts against diplomatic representatives, but that there is a duty to protect such representatives against crime and to employ all means reasonably necessary to bring offenders against them to justice. These conditions are met by the Criminal Code of Japan. However, so far as the writer has been able to ascertain, this is the first time that a modern state has *deleted* provisions making acts against diplomatic agents special crimes, and it has been said that the test of the authoritative character of a rule of international law is the consent of states to such rule.[27] With this in mind, it remains to be seen what will be the reaction of the foreign nations in the future to the abrogation of Articles 90 and 91.

4. *Protection of Freedom of Expression.* Apart from the abolition of the special crimes for acts against the Imperial House, two major revisions of the Criminal Code have direct bearing on implementation of the guarantee of freedom of speech, press, and all other forms of expression, contained in Article 21 of the new Constitution.

First is the revocation of Articles 105 a, b, and c—"Offenses Against Peace And Order." These articles had been inserted in the Code in 1941, obviously as wartime restrictive measures. The essence of these provisions was that any person who had "disseminated falsehoods with the object of confusing human minds" (whatever that might mean) was to be punished by penal servitude or imprisonment up to five years or a fine up to five thousand yen. In addition, more specific provisions levied penalties ranging from one to seven years penal servitude and one hundred thousand yen fine for dissemination of falsehoods with the intent of causing a run on a bank or economic confusion in time of war, disaster, or other similar emergency; or hindering the production or distribution of important goods, or other acts which enabled one to make an exorbitant and unreasonable profit. In spite of the obvious dangers resulting from retention of such provisions in the Criminal Code, some Japanese legal opinion

[27] OGDON, *op. cit. supra*, 205 n. 29, citing Kelsen, *The Legal Process and International Order* (London; The New Commonwealth Institute, Sec. 467 (1872). Monographs, Series A, No. 1, 1935) at p. 14.

insisted that in time of emergency, such as the present, it was advisable to protect the people against malicious and false statements, broadcast surreptitiously as rumors, and which might create panic and uncertainty. An attempt was made to draft provisions punishing the dissemination of rumors. However, it was found impossible to draft satisfactory legislation, and so it was decided to completely eliminate these provisions from the Code. This decision was a sensible one, in view of the danger of providing severe criminal penalties in language which would be of necessity somewhat loose in form or vague in meaning and which would deal with a concept as ephemeral as a rumor which would disturb the public—particularly in view of the past history in Japan of such restrictive legislation as the Peace Preservation Law, and other acts intended to enforce "thought control." There is a long history in Japan of officials utilizing any laws which restrict freedom in order to accomplish their own ends. The deletion of Articles 105 a, b, and c removed potent weapons against free speech and expression.

The second of the revisions which implement the Constitutional guarantee of freedom of expression is the change made in Chapter XXXIV, "Crimes Against Reputation." There are two articles concerned:

(1) Article 230 formerly provided a punishment of penal servitude or imprisonment not exceeding one year or fine not more than five hundred yen for injury to the reputation of another person by publicly alleging facts, regardless of whether or not such facts were true or false. In the case of injury to the reputation of a dead person, however, the facts alleged had to be false in order for the act to constitute a crime. In Japanese law, no distinction is drawn between libel and slander, and the offense of Article 230 may be committed by either oral or written expression. The Anglo-American common law view was followed in Japan, without the changes made in that attitude by the state codes. This view is that the essence of criminal libel is its tendency to cause a breach of the peace; therefore evidence of the truth of the alleged criminal statement is inadmissible.[28] In addition to consideration of the Anglo-American common law concept, the im-

[28] This has been changed in most American jurisdictions by means of constitutional or statutory provisions which make the truth of a statement a defense along the following lines: (1) if the statement is made with good motives and to justifiable ends; (2) complete defense, regardless of motives or intent, if the statement is truthful; (3) a defense when made about a public official and in the public interest; (4) it only mitigates the punishment. See *Libel and Slander*, 33 AM. JUR., § 300.

portance of reputation or "face" in Japan was considered in drafting the Code revision. In a small country such as Japan, where the crowded population lives in such close contact with each other that the noises and problems of the neighbors are as familiar as one's own, the maintenance of a good reputation is even more important than in Occidental countries. Consequently the amendment of Article 230 took the following form: punishment for the crime was increased to a maximum of three years penal servitude or imprisonment or a fine not more than one thousand yen, and Article 230(a) was added as follows:

> When the act of paragraph 1 of the preceding article is deemed to have been committed in allegation of facts having relation to the public interest and primarily for the public benefit, if, in inquiry into the facts, the truth thereof be established, the said act is not punishable.
>
> In applying the provisions of the previous paragraph, facts concerning a criminal act committed by a person who has not yet been prosecuted in relation thereto shall be deemed facts having relation to the public interest.
>
> When the act of paragraph 1 of the preceding article has been committed in allegation of facts concerning a public official or a candidate for elective public office, if in inquiry into the facts the truth thereof be established, the said act is not punishable.

This enables anyone to make statements which damage the reputation of a private citizen, if (1) the statements are true, (2) the facts alleged are such that they reveal matters which are of public interest, and (3) the statements are made primarily for the public benefit rather than for reasons of spite or for private interests. However, if such true statement is made about a criminal act committed by an individual who was not prosecuted therefor, such statement is regarded as having direct relation with the public interest as a conclusive presumption, though the statement must be made primarily for the public benefit in order for punishment to be avoided—i.e., if made primarily for malice or for private interest, it is punishable. Finally, any true statement made about a public official or a candidate for elective public office is privileged completely and not punishable, on the basis that such facts have material relation to the public interest and will be deemed made primarily for the public benefit.

(2) Article 231 (Insult) originally was deleted in the draft presented to the Diet. This had provided that publicly insulting another, even without alleging facts, was punishable by detention for less than thirty days or a fine of less than twenty yen on the basis that the use

of words such as "beast" or "stupid" are regarded as extreme insults by the Japanese, even though there is no allegation of facts which injure one's business or ridicule his office. However, the House of Representatives and House of Councillors Judicial Affairs Committees restored this crime to the Code, declaring that the weight of public opinion and of customary regard for the sanctity of reputation in Japan required retention of this crime.

These two vital revisions of the Criminal Code—the revocation of the "Offenses Against Peace And Order," and the sweeping amendments to the "Crimes Against Reputation"—place Anglo-American concepts of freedom of expression within Japanese frames of reference. The result is to give the people of Japan a liberty in their speech and media of information which they have never possessed before. It is a liberty which can allow the searching wind of truthful comment to blow upon hitherto sacrosanct institutions, to strip bare the contemptuous practices of powerful bureaucrats, to clear the air of parliamentary double-talk. It is still too early to make an accurate appraisal of the effects of these changes, and that is not the province of this article. However, reading the daily press shows clearly that it is not muzzled by Japanese thought-control laws, and indeed displays an amazing frankness in approaching many subjects which our own newspapers treat with care. As for criminal actions for libel, the writer knows of only a few which have been brought since the Criminal Code revision, though this seems to be mostly because of a reluctance on the part of the Japanese to air in court matters involving reputation. The place where these amendments show most clearly their effect is in the fact that the government cannot bring criminal actions for "offenses against peace and order," because of the abrogation of Articles 105a, b, and c.

5. *Adultery*. Not even the revocation of the "Crimes Against The Imperial House" aroused more controversy or was debated more widely than the deletion of the criminal penalties for adultery. The House of Representatives and House of Councillors Judicial Affairs Committees held public hearings on the proposal. The newspapers ran public-opinion polls on the subject and radio stations made it the spot-question for "man-in-the-street" programs. Indignant citizens wrote long letters to leading journals opposing the revocation, and dignified law professors wrote learned articles tracing the history of the subject in the field of comparative law. In Japan, as elsewhere, the

problems of politics make way for the perplexities of sex in public interest.

Previously Article 183 of the Criminal Code stated that a married woman who had committed adultery was subject to penal servitude not to exceed two years; that the same punishment applied to her paramour; and that the aggrieved husband must make complaint to the procurators in order for there to be prosecution. Furthermore, Article 264 of the Code of Criminal Procedure required that the husband first divorce his wife or bring action for divorce in order to be able to make the complaint, demanding punishment for her adulterous acts. No similar right of complaint to the procurators was allowed a wife for adultery committed by her husband—a development from the logic of the cultural scene in Japan, in which the wife has been regarded as child-bearer and housekeeper, while the geisha and the prostitude have provided social companionship and the refinements of sex.

Article 14 of the new Constitution states that all of the people are equal under the law and that there shall be no discrimination in political, economic, or social relations because of sex, so that Article 183 of the Criminal Code had to be revised. There were two alternatives: to give the injured wife an equal right to make a complaint and have the husband and his mistress prosecuted, or to delete the crime completely. A substantial body of public opinion argued that to adopt the latter course would "adversely affect the social morality," besides being inconsistent with the increased penalties for offenses against public decency.[29] However, a majority of legal, legislative, and popular opinion held that adultery was a matter far more satisfactorily handled by the provisions of the Civil Code for divorce[30] and by agreement within the family; that this was one offense which was not prevented by a criminal punishment as much as by elevation of the idea of matrimonial morality and the invocation of social sanctions. The former chief of the Criminal Division of the old Supreme Court pointed out that the statistical average of criminal prosecution for adultery in all the courts of Japan averaged about fifty a year, and that in practically all cases the complaint was withdrawn because of family pressure or

[29] See *Minutes of the Proceedings In the House of Representatives*, OFFICIAL GAZETTE EXTRA, No. 41, Tuesday, October 7, 1947, report of Mr. Yoshio Matsunaga.

[30] Under ART. 813 of the old CIVIL CODE, either spouse could bring action for divorce if the other had committed bigamy, but only the husband could secure a divorce for adulterous acts on the part of his wife. Now, however, ART. 770 of the amended CIVIL CODE enables either husband or wife to obtain a divorce for adultery by the other.

change of mind.[31] His conclusion was that the criminal penalty in the past had not proved effective and that it would not be any more effective if the wife were given the same right of complaint for adultery on the part of the husband. The House of Representatives was overwhelmingly of this opinion, and only in the House of Councillors was there some slight opposition, so that the government's proposal to delete the crime was carried in short order and the provisions of Article 183 were removed from the Code. This decision undoubtedly was made primarily because the men who drafted the bill, and the almost completely male legislature which passed it, felt that the extramarital liaisons of the Japanese men were a fixed pattern in Japanese society. Therefore, it would be better to eliminate the crime, rather than create the opportunity for their wives to initiate criminal prosecutions for such acts. This may seem an Oriental cutting of the Gordian knot of discrimination in law because of sex. It is also an honest recognition of existing mores, as well as a means of keeping family problems within the family for their solution instead of attempting to solve the issues in the forum of a criminal court.

6. *Changes in Special Provisions Regarding Members of a House.* In the Orient, the family is the center of society.[32] Its position, and that of the members of a family when acting for their house, is protected in law in ways often quite astounding to lawyers trained in the Anglo-American tradition. Under the old Civil Code, most property was held in the name of the head of a house and he was required to handle the property in ways which nurtured the sense of separateness as a family rather than as individuals.[33] In the Criminal Code, a number of provisions gave special protection or consideration because of the relation of the family to the crime. In view of the admonitions of the new Constitution about equality under the law, this relationship had to be re-examined, particularly because in Japanese law the family is much more extensive than in Occidental concepts and includes blood relatives through the sixth degree and relatives by marriage through the third degree. Membership in a "house," moreover, may and often does extend beyond such relationships, for this membership depends upon registration with the proper authorities, and includes all members who descend both lineally and collaterally from a common ancestor, as well

[31] Judge Masataro Miyake, NIPPON TIMES, Tuesday, September 30, 1947.
[32] See LANG, CHINESE FAMILY AND SOCIETY (1946); SANSOM, JAPAN: A SHORT CULTURAL HISTORY (1943), Sections on the Family System.
[33] See CIVIL CODE, ARTS. 72, 732.

as persons who enter a house through adoption. Extensive changes in the house system in civil law were already under discussion and later enacted into laws which favored individuals at the expense of the house in family registration, in rights in property and in other civil relationships.[84] In examining the Criminal Code provisions which recognized the special position of the house, three positions were taken:

(1) In certain crimes where the penalty was remitted (cancelled by law) because committed by a member of a house against other members, this favoritism by law was limited to more immediate members of the family. Thus Article 244 had stated that punishment was to be remitted for the crime of theft when the thief was a lineal blood relative, spouse, relative, or member of the house living together with the victim, and that prosecution could take place only if the victim made complaint (whereas, in most crimes, the desire of the person wronged has no legal effect on the prosecution). This article was amended to limit its protection to spouses, lineal blood relatives, and relatives by marriage, omitting other members of the house. In addition, Article 257 had provided that punishment would be remitted for knowingly receiving stolen goods, or for their transmission, brokerage, or purchase, if the thief was a lineal blood relative, spouse, relative, or member of a house living with the receiver, broker, or purchaser. Here, too, the members of the house outside the charmed circle of lineal blood relatives, spouses, and relatives by marriage were removed by the revision of the Code from this special protection which is so solicitous of maintaining the solidarity of the family against the rest of society. The basis of this astounding protection is precisely because the sense of the Japanese community is that an individual should not be punished for acting on behalf of or for aiding another member of his family. Or, conversely, that the law should not step in and prosecute a criminal because of theft from a relative unless that injured relative made complaint, because to do otherwise would strike at the Japanese feeling that trouble must be kept within the family and away

[84] See Oppler, *The Reform of Japan's Legal and Judicial System Under Allied Occupation*, 24 WASH. L. REV. 317 (1949). The Civil Code revision made such important changes in the "Family System" as depriving the head of a house of his power to prevent a marriage if the member of the family is of age; cancelling his right to determine where members of the house should reside, allowing his wife to hold property in her own name (LAW FOR PARTIAL AMENDMENTS TO THE CIVIL CODE, No. 222 of 1947). The Family Registration Law revision changed the registration system radically to strike at the sense of membership in a large house. Now, each husband and wife open a new house in the Registry upon marriage, instead of the wife joining the register of the husband's house (LAW FOR AMENDMENT OF THE FAMILY REGISTRATION LAW, No. 224 of 1947).

from the rest of the world. The revisers of the Code agreed that the limits of this protection must be drawn more strictly to omit members of the house other than immediate relatives, but the consensus was that the position of the family merited retention of these unusual provisions so far as the rest of the family was concerned. As a matter of practicality, it has been the experience of law-enforcement officials that such crimes are rarely prosecuted against a member of a house on the complaint of one of his relatives.

(2) In the case where the interest of the state in prosecuting a crime and that of the family in protecting its members came into direct conflict, the issue could be resolved by the court. Thus Article 105 had provided that the harboring of criminals or the suppression, forgery, or falsification of evidence in a criminal case was not punishable when committed by a relative of the criminal or fugitive for the benefit of the criminal. The terms of this article declared that punishment *must* be remitted because of the familial relation. This was changed by the revision of the Code to provide that punishment *may* be remitted, thereby enabling the court to take cognizance of the circumstances and to remit punishment as the circumstances warrant. This is another case of an implementation by law of the new Constitution which strikes at certain aspects of the family system because those aspects have specially protected the family, as a unit, against the interests of society as a whole and the state in particular in securing conviction for an act committed against society.

(3) In those cases where a member of a family committed a crime of violence against or deserted a lineal *ascendant* in his family, the provisions of the Code would remain unchanged in their application of more severe penalties than those inflicted for committing similar acts against younger members of the family or strangers. As illustration of this principle, Article 200 provides either the death penalty or penal servitude for life for killing the lineal ascendants of the criminal or of his wife. Punishment for such acts committed against anyone else may be as little as three years penal servitude, though death and penal servitude up to life are also possibilities, but not mandatory. Again, Article 205 levies penal servitude for life or for not less than three years for inflicting wounds which cause the death of lineal ascendants. When the crime has been committed against persons other than elder members of the family, punishment is penal servitude from two to fifteen years. A further illustration is Article 218, which provides that desert-

ing one's own or one's wife's lineal ascendant, when such deserted person is either elderly or sick or deformed, is punishable by penal servitude for not less than six months nor more than seven years. Such crime, when committed against persons other than lineal ascendants, is punished by imprisonment at hard labor for not less than three months nor more than five years. In Japan, respect for family elders is so strong that committing crimes of violence against them or grossly neglecting them strikes at the basic moral fibers of the Japanese people to such a degree that Japanese society demands more severe punishment than if the same crimes are committed against others. Consequently the revision of the Code left the provisions regarding such crimes untouched.

Thus in the Criminal Code, as in the Civil Code and the Family Registration Law, important changes have been made to redefine the relationship between the family and the rest of society. These changes have weakened somewhat the sense that the family has interests superior to those of the community, and has redrawn the lines in favor of an application of like principles and like punishments to all regardless of their family relation to the injured party or to the criminal. However, it is clear that the criminal law still pays respect to the position of the family as the cultural and social base of society in Japan, and that the tendency of both Continental and Anglo-American law to look at criminals as individuals has not affected in any great degree the Japanese regard for the individual *as member of a family.*

7. Extraterritorial Application of Japanese Law to Aliens. Previously, by the terms of Paragraph 2 of Article 3, most of the major crimes of the Criminal Code were declared applied to aliens who committed acts against Japanese nationals outside the territorial limits of the Japanese Empire.[35] This was contrary to the general rule of both Anglo-American and International Law that jurisdiction in criminal matters rests in the courts of the state or country in which the crime is committed; that the exceptions to this general rule which permit prosecution of aliens for acts outside the national territory are for acts rendered internationally illegal (such as piracy) or for acts regarded as directed against the safety of the state.[36] The provisions of the

[35] The crimes included: arson, setting a fire through negligence, causing inundation and flood, forgery, counterfeit seals, sexual crimes, homicide, wounding, abortion, desertion, illegal arrest, kidnapping and abduction, damage to reputation, theft and robbery, fraud and blackmail, fraudulent appropriation (embezzlement), stolen goods.

[36] 1 HYDE, *op. cit. supra,* 802-809; *International Law,* 30 AM. JUR., §§ 24-38; *Criminal Law,* 14 AM. JUR., §§ 221-231.

Criminal Code extending domestic law to acts committed in a foreign country were designed to perpetuate the idea that Japanese nationals were, by virtue of their race, in a superior category so that major crimes committed against them outside of Japan were to be punished because the injured party was a Japanese, rather than because the acts were crimes. This conception was strengthened by the terms of Article 5, which stated that, even though an irrevocable judgment had been rendered by a court of competent jurisdiction in a foreign country, punishment could be had in Japan for the same act. However, if the offender had received punishment and had served his sentence in whole or part in the foreign jurisdiction, then execution of the punishment in Japan might be mitigated or remitted. Consequently, if an individual in a foreign country had been charged with committing one of the crimes covered under Article 3 against a Japanese national, and had been acquitted after trial in the country in which the offense took place, this alleged offender was subject to trial and punishment in Japan for that offense without consideration of the fact of the past trial or even of the judgment. Even if he had been convicted for the offense and has served the full sentence, he could be tried again should he ever be unwise enough to set foot in Japan, and the court did not have to take account of the prior sentence, though it was permitted to do so.

Paragraph 2 of Article 3 was deleted by the Code revision, so that non-Japanese who carry out criminal acts against Japanese citizens outside Japan will be tried only by the courts and under the law of the country where the acts were committed. Moreover, Article 5 was amended to declare that when a Japanese national commits any of these crimes against any person, and has served a whole or part of his sentence for such criminal act which took place outside of Japan, then such part of the sentence so served *must* be considered by the courts in Japan, and execution of punishment for this act in Japan must be mitigated or remitted. This applies to those cases when a crime committed outside of Japan is equally a criminal act within Japan. A judgment of the foreign jurisdiction acquitting the Japanese national is not necessarily final, however. These two revisions strike at the sense of racial superiority and apartness from the institutions of other countries, which was, and is, so much a part of the Japanese character. By law, at least, the Japanese must fully recognize the administration of justice in other countries when non-Japanese are involved, and must

partially recognize this judicial administration when Japanese are the criminals.

B. *Revisions of a Technical Nature*

The revisions which have been discussed in the preceding part of this article are those in which far-reaching changes have been made in former concepts of the criminal law. The remaining amendments, though important to the Japanese people, are not of as much interest to the student of comparative law. These amendments affect the application of existing law, for the most part, rather than change basic principles. The greater number of these revisions seek to modernize the law in order to meet existing needs. Provision is made for restoring civil rights to criminals; penalties are increased where needed; judges are given greater discretion to suspend execution of sentences; and the concept of double jeopardy is applied more broadly. These revisions do not have the impact on the law which the matters discussed in the previous section of this article have, but they are worth examining briefly.

1. *Extinction of Punishment.* Prior to the new Constitution, persons convicted of crimes could have their civil rights restored only through an occasional and rather arbitrary grant of rehabilitation, issued by the Emperor at the request of the Cabinet, under the terms of the Imperial Amnesty Ordinance (No. 23 of 1912). This was accomplished by a general grant to criminals as a class or by special grants individually. Somewhat similar procedures were continued by the Amnesty Law, No. 20 of 1947, effective May 3 of that year, though the system was improved and the procurators and prison wardens were made to act as channels for the petitions, rather than the initiators, as in the past. However, the Diet Judicial Affairs Committees felt that this was not enough, and that the Criminal Code should provide for automatically extinguishing the effects of sentences, after a period of time had passed without a serious offense being committed by the criminal. To carry out their intent, Article 34-A was added, setting up categories of punishment to which are applied different time periods for extinguishing the effect of the sentence.[87] The result of these provisions is that a

[87] If the original sentence was imprisonment or more severe punishment and the penalty term has been served or execution of the penalty has been remitted (by operation of law, prescription, or amnesty), then ten years must elapse without sentence of fine or graver punishment in order for the sentence to lose its effect. If the punishment pronounced was a fine or detention for less than thirty days, and the fine has been paid or remitted, then only five years must elapse without the criminal

criminal record can be deleted from the books by operation of law, if the criminal shows he can lead a normal and, especially these days in Japan, an exceptionally honest life. This removal of the criminal record carries with it important consequences: it restores the right to vote or to hold public office, and it removes a hindrance to employment. This should be a factor in cutting down the number of recidivists.

2. *Increased Penalties.* In an effort to bring the Code into line with the changing ideas of the community, certain of its provisions were amended to increase their penalties. The crimes for which more severe punishment was deemed necessary involved obscenity, abuse of official power, and the use of force or intimidation.

With the cessation of hostilities, a rash of pornographic and salacious magazines made their appearance, and places of public entertainment began to feature the strip-tease or the nude tableau. Moreover, one postwar phenomenon was an increase in sodomy. Popular demand that the punishments for these acts be increased caused revision of Article 174, which deals with committing "obscene acts" in public, by augmenting its penalties, from fine less than twenty yen to penal servitude up to six months or fine not over five hundred yen.

To deal with the great increase in distributing, selling, or publicly displaying obscene books, pictures, and movies, Article 175 was amended by raising the penalties for such acts, from merely a fine not more than five hundred yen to penal servitude not exceeding two years or fine up to five thousand yen. With this amendment to back them, the police have been carrying out a drive against salacious publications.

The next important revisions were directed at public officials, which prevents them from abusing their powers or employing brutal methods in their work. Article 193's penal provision was raised from six months' imprisonment with or without hard labor to two years, for public officials who forced people to perform acts which they were not bound

receiving a sentence of fine or heavier punishment in order for the sentence to lose its effect. In the case of a person whose punishment was remitted by the provisions of law—so that he did not serve any part of the sentence—the sentence loses its effect if two years go by after sentence has become final without a conviction of fine or more severe punishment. The differences in the time limits are based not only upon the type of crime committed but also on the difference between remission of execution of a sentence and remission of the sentence. Remission of execution is actually a form of amnesty in which the balance of a sentence may be wiped out after the judgment is rendered and a part of the sentence has been served. Remission of a sentence is incorporated in the judgment and wipes out the judgment. The criminal who receives remission of sentence retains his civil rights and may vote or hold public office. Consequently remission of execution of a sentence is regarded as more onerous and a longer time is required to wipe out the sentence, whereas only two years is required to excise remission of sentence.

to perform or obstructed them in exercising their rights. Article 194 had provided penal servitude or imprisonment not less than six months nor more than seven years when officers exercising or assisting in judicial, prosecuting, or police functions arrested or imprisoned persons in abuse of their powers. This penalty was increased from seven to ten years. Police, procurators, judges, and their assistants who commit violent or cruel acts in the course of their duties were subjected by Article 195 to penal servitude or imprisonment not exceeding three years, and the Code amendment raised this to seven years. When the changes made in these three articles to stiffen the penalties are considered in conjunction with other revised criminal laws, such as the requirement for issuance of warrants by the courts as prerequisite for arrests, the time limits set requiring that a warrant of detention be issued after arrest, the right to counsel at any stage in the proceedings, and the prohibition against conviction upon confession alone,[38] it will be seen that the individual is better protected by law now against the abuses of power than at any other time in Japan's history.

In view of the increase in crimes of violence, Article 208 was revised to punish brawlers more severely. The penalty for deliberate and violent pushing, jostling, or shoving was raised to a maximum of two years at hard labor or fine not more than five hundred yen from that of penal servitude not over one year, detention less than thirty days, or fine less than fifty yen. Moreover, while in the past the crime could not be prosecuted unless the injured party made complaint, now indictment can be made without this requirement. Because there had been no broadly inclusive language covering such offenses by provisions for "breach of the peace,"[39] a gap had existed in Japanese law by which

[38] See LAW FOR THE TEMPORARY ADJUSTMENT OF THE CODE OF CRIMINAL PROCEDURE (No. 76 of 1947) and NEW CODE OF CRIMINAL PROCEDURE (No. 131 of 1948). Previously, the police could apprehend without warrant and hold a person indefinitely. Now, except for the cases of *flagrante delicto* or commission of a major crime when unusual circumstances make it impossible to obtain a warrant beforehand, all arrests must be made on judicial warrants issued for cause. Further, the police may hold a person apprehended for a maximum of forty-eight hours, the procurators for a maximum of twenty-four hours before requesting a warrant of detention. The New Code of Criminal Procedure is a complete revision which blends continental and Anglo-American Procedures. See Appleton, *Reforms in Japanese Criminal Procedure under Allied Occupation*, 24 WASH. L. REV. 401 (1949).

[39] THE MINOR OFFENSE LAW (No. 39 of 1948), which deals generally with those offenses thought of as "misdemeanors" in Anglo-American law, does not adequately cover the cause of battery which causes no injury. Thus such matters as forcing subscriptions to or advertisements in newspapers, disturbing attendants at places of public amusement, increasing congestion, and standing in the way of others to prevent free passage, are provided for. But, these provisions still do not fully cover the situation envisaged in ART. 208 of the CRIMINAL CODE.

such assaults could not be properly punished, particularly since the injured parties rarely made complaint to the police. There is in Japanese history a tradition of violence and of exercising force to accomplish any objective. Stern punishment for acts of violence strikes hard at this tradition.

For the same reason, the penalties for violating the terms of Article 222 were increased. Formerly, threatening another person or his relatives with injury to their life, person, liberty, reputation, or property brought penal servitude not more than one year or fine not exceeding one hundred yen. The revision increased the prison term to two years and the fine to five hundred yen.

3. *Suspended Sentence.* Article 25 is concerned with repeated offenders who had previously (1) committed only a minor crime, punished by fine or detention for less than thirty days, or (2) been sentenced to imprisonment or penal servitude but had completed serving their sentences at least seven years previously. Formerly, if such an offender was convicted for a subsequent offense and was sentenced for this latest crime to penal servitude or imprisonment for not more than two years, then execution of his sentence might be suspended from one to five years.

The Code revision allows the courts even more discretion to suspend execution of sentences involving crimes of a serious nature, by enabling such action when the sentence for the latest crime is imprisonment or penal servitude not exceeding three years or fine not more than five thousand yen. With the vastly expanded number of crimes punishable by heavy fine, mostly for violating the complex economic control regulations, this amendment is important for that fact alone, apart from the greater flexibility imparted to Japanese criminal law through placing more discretionary power in the courts.

On the other hand, to require the criminal whose sentence has been suspended to live in strict conformity with the law, Article 26 was amended to give the courts power, if they so desired, to revoke the suspension of execution and invoke the original sentence if another crime is committed during the suspension period and a fine levied. This article had established a number of situations in which the suspended sentence was revoked automatically by law.[40] The amendment giving

[40] These situations are: when the criminal violates other laws while execution of his sentence is suspended and is sentenced to imprisonment; when he receives a sentence of imprisonment for an act which occurred before the suspension of execution of sentence; when it is learned that the criminal had actually, prior to suspension of

discretionary power to the courts to revoke the sentence suspending execution in case a criminal fine was incurred during the time of suspension should act as a powerful lever to force a criminal who has benefited by such suspension to lead an unusually honest life. Particularly, because the terms of Article 27 of the Criminal Code state that if the period during which the sentence is suspended passes without revocation of the suspension, the original sentence loses its effect, and so the criminal need never serve the sentence. Some members of the Japanese Diet expressed concern about this amendment of Article 26, because they felt it was difficult, in these days of innumerable economic controls, to lead a life so blameless that it is not punished with a fine of twenty yen or more (now raised to 1,000 yen by the 1948 Code amendment). However, general opinion in the Diet was that it was necessary to intensify the threat hanging over the head of the criminal whose sentence had been suspended, because so many more categories of crimes had been created which may be punished by fine, and because the courts would take cognizance of the factual situation and revoke the suspension only when the circumstances demanded it.

4. *Repeated Crimes.* The last of the revisions of a technical nature to be discussed[41] is the deletion of Article 58 of the Code. Formerly, even though judgment had been rendered and sentence pronounced, the judgment could be opened and punishment augmented if it were discovered that the criminal was a repeated offender and had committed other crimes previously. This enabled doubling the maximum term of punishment.[42] The Judicial Investigation Committee of the Ministry of Justice held that this was very much alike, in its operation, to a second trial for the same offense, since the judgment had already been pronounced when the discovery was made that the offender was a second offender, the judgment opened and the penalty increased. Thus Article 58 appeared to contravene the prohibition against double jeopardy declared in Article 39 of the new Constitution, and it was deleted by the Criminal Code revision.

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execution of his sentence, been given a prison term of imprisonment or more severe penalty for another crime.

[41] There were two more amendments, both minor and of little interest to students of comparative law. ART. 55 was deleted, it having provided that consecutive acts which constituted crimes of the same category were to be treated as one crime. A number of court decisions had interpreted this to hold criminal acts committed at intervals of as much as a year apart as a single crime, and the deletion was intended to correct this interpretation. ART. 211 was amended to provide severe penalties for persons who caused death or injury through gross negligence.

[42] CRIMINAL CODE, ART. 57.

III. Conclusion

For the most part, the changes made in the Criminal Code implement the "Bill of Rights" of the new Japanese Constitution. The old Meiji Constitution stated that "Japanese subjects shall, *within the limits of law,* enjoy liberty of speech, writing, publication, public meetings, and associations."[43] The new Constitution provides unqualified guarantees of what we call "civil liberties," as matters of law. Respect of the people as individuals; prohibition of discrimination in political, economic, or social relations because of race, creed, sex, social status, or family origin; freedom of thought and conscience; freedom of assembly, of speech, press—all these and many more fundamental rights cannot be abridged by law.[44] Those articles of the Criminal Code which were revised conflicted with these and other provisions of the Constitution—provisions which were greatly influenced by Anglo-American political and legal ideals. The changes made in the Code represent an attempt to transpose these ideals in the light of the Japanese cultural and social world in which they must operate, and which they must affect in no small degree. To what extent these revisions will last beyond the period of the Occupation is difficult to predict, for a law does not have social force merely through being promulgated and put into legal effect. The element which gives this force to law, fundamentally, is acceptance of the law by enough of the people to make it factually enforceable.[45] On this basis, there may be doubts as to the survival value of those reforms which go beyond the nature of technical improvement. There are tremendous political and social implications in the deletion of the special crimes against the Imperial House, the changes made in the chapter on crimes against reputation, and the revisions to protect freedom of expression. The past history of Japan shows that the emperor institution has been used as a convenient tool to enable small groups of expansionist-minded men to seize control of the state. The articles of the Code which had been concerned with the specially protected position of the Imperial Family, with *lese majeste,* and with restricting liberty to speak or write had enhanced the sacrosanct position of the Emperor and the actions of the cliques in power, at the expense of the people. As the result of the deletion or

[43] Meiji Constitution, Art. 29.
[44] Constitution of Japan, Arts. 11, 13, 14, 20, and 21.
[45] This concept is my interpretation of the basic philosophy of Professor Thomas Reed Powell of Harvard Law School, as I learned it in his course in Constitutional Law.

radical revision of these articles, the groups which used this sacred position as a shield for their own cold-blooded activities will not find it so easy to do this any more—a political factor of some significance. However, the fact that certain political forces tried to pose as the defenders of the old emperorism during the debates on the revision of the Code, as a partial effort to utilize the residue of power in this position, indicates that the issue is not dead by any means and may be raised in the future.

There is always the possibility, of course, that the Japanese will take cue from the past and leave these laws on the books as dead in spirit and operation, as they have done before with other laws. Only time has the answer to this. But there are contrary arguments which cannot be dismissed lightly. These revisions represent the consensus of the best legal minds in Japan, men both in and outside of the government. They implement provisions of the Constitution which protect so many people and so many groups that it will be difficult to force these persons and groups to surrender easily their rights. The changes are on the books as law, and hence have the helping hand of that natural inertia and resistance to change which is common to any people; it will be difficult to delete or revise this law. And, finally, the amendments will be guarded from illegal infringement by a court system jealous of its new and strong prerogatives. For these reasons, it seems a fair assumption that the major substantive revision of the Criminal Code will have force and validity for the years to come. Thus some of the finest ideals of Anglo-American law will become a part of the Japanese legal system, bringing to an Oriental milieu their concepts of the rule of law and the relationship between individual and state.