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BASIC CONCEPTS IN AND TEMPORAL AND TERRITORIAL LIMITS ON THE APPLICABILITY OF THE PENAL LAW OF JAPAN

SHIGEMITSU DANDO*

Translated by B.J. GEORGE, JR. **

Translator's Introduction

Japan is endowed with a sophisticated body of penal law which is entirely statutory.¹ Regrettably, there is relatively little available in English or other Western languages on Japan's penal law.² Consequently, the translator commenced in 1987 a translation into English of Dr. Dando's seminal treatise on the *General Part of the Penal Law*³ of Japan, of which the following constitutes Chapters 2 and 4.⁴ Dr. Dando, whose fluency in Western languages is exemplary, has approved the translation.⁵

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1. The core of legislative coverage is the KEIHŌ (Penal Code), Law No. 45, 1907 (in effect from Jan. 1, 1908) [hereinafter Penal Code]. The statute, with many amendments, remains in current force. There is, however, a large body of criminal statutes scattered throughout the *Roppō zensho* (Compiled Codes), although they are governed by the general part of the Penal Code unless they specifically provide to the contrary. Penal Code, *supra*, art. 8.

2. See G. KOSHI, JAPANESE LEGAL ADVISOR: CRIMES AND PUNISHMENTS (1970); HIRANO, *Some Aspects of Criminal Law*, in LAW IN JAPAN: THE LEGAL ORDER IN A CHANGING SOCIETY 274 (A. Von Mehren ed. 1963). A sprinkling of substantive law-related arts. may be found in the various volumes of LAW IN JAPAN: AN ANNUAL.

3. S. DANDŌ, KEIHŌ KŌYŌ SŌRON (Rev. ed. 1988).

4. Publication is envisioned, probably in late 1990, as a volume in the comparative criminal law series edited by Professor Edward M. Wise of Wayne State University and published by Fred B. Rothman Company, Colorado Springs, Colorado.

5. With Dr. Dando's approval, some portions of the original text have been adapted for the purpose of meeting the needs and interests of foreign readers, and some references to foreign resources on Japanese law have been added. The Penal Code of Japan is available in English translation in Japan Ministry of Justice editions (undated); the Eibun-Horeisha edition of Japanese statutes in English translation is another useful resource.

I. THE PRINCIPLE OF LEGALITY

Article 31 of the Constitution of Japan establishes the principle that punishment cannot be imposed other than through "procedures established by law," but that, of course, can rest only on the premise that crimes and criminal punishments must be established through legislation. That, in turn, means that the term "legislation," as used here, is restricted to statutes enacted by the Diet. In other words, both definitions of crime and the limits of punishments must be laid down in statutes couched in appropriately narrow terms.

The Meiji Constitution⁶ allowed rather broadly the promulgation of administrative orders authorizing the imposition of criminal punishment.⁷ Under the current Showa Constitution,⁸ however, although the Cabinet may issue orders to execute the provisions of the Constitution and laws, "it cannot include penal provisions in such cabinet orders unless authorized by the law" in question.⁹ Therefore, in the future there can never be any comprehensive administrative authorization to impose punishments, but only specific legislative mandates.¹⁰ Obvi-

6. MEIJI KENPŌ (Meiji Constitution) arts. 9, 23 (1890) (Article 9 states: "The Emperor issues or causes to be issued, the Ordinances necessary for carrying out of the laws, or for the maintenance of the public peace and order, and for the promotion of the welfare of the subjects" MEIJI KENPŌ art. 9. Article 23 states: "No Japanese subject shall be arrested, detained, tried or punished, unless according to law.").

7. Law No. 84, 1890 was entitled "Law Concerning the Punishment of Violations of the Provisions of Administrative Orders," and set forth a general authorization that administrative orders might provide for criminal penalties of a fine of not more than 200 yen or penal detention not to exceed one year. Beginning with the Police Infraction Order (Ministry of Interior Order No. 16, 1909), a large number of penal regulations were issued on the strength of that provision.

8. KENPŌ (Constitution) art. 73(6) [hereinafter Const.].

9. *Id.*

10. Concrete limitations must be set forth in the basic statute. 6 Keishū 1346 (Sup. Ct., G.B., Dec. 12, 1952). Local Autonomy Law art. 14(5) states that criminal penalties can be imposed for violations of local ordinances enacted by ordinary local public bodies, although that provision may present some constitutional difficulties. Because appropriate restrictions govern this provision, however, and because an administrative order or regulation must be based on an ordinance or by-law adopted by a district assembly, it may pass constitutional muster. Indeed, the constitutionality of the provision has been sustained by the Supreme Court on that premise. 16 Keishū 577 (Sup. Ct., G.B., May 30, 1962).

Compare the Order for the Punishment of Acts Prejudicial to Occupation Objectives (Cabinet Order No. 325, 1950), which could not be considered valid unless somehow it were viewed as having a super-constitutional basis. 7 Keishū 1562 (Sup. Ct., G.B., July 22, 1953). Penalties that exceed those authorized in a statute obviously are invalid. 359 Hanreijihō 63 (Sup. Ct., 3d P.B., Dec. 24, 1963).

If a statute prescribes only a penalty, but the elements of the substantive crime are delineated through an administrative order authorized by the Cabinet, it should be con-

ously, this establishes much more strictly than under the Meiji Constitution the principle that crimes must be defined by statute.

Based on the principle that the source of penal law must be legislation, customary law can never be a direct source of penal provisions,¹¹ although it nonetheless may exert a wide array of indirect influences on penal law. To illustrate the distinction, the term "acts according to laws and ordinances" in Penal Code, Article 35¹² may include acts based on customary law. In the same way, the property which is the object of theft and related property crimes must be that "of another"; customary law, as one might expect, casts light on whether given property in fact is that of another. These examples illustrate that not infrequently customary law plays an important role in the determination of the illegality of certain acts, or in the interpretation of the contents of

stitutional as long as there is an adequate reason for the order and it is limited to special circumstances. Penal Code, *supra* note 1, art. 94 is an example: It imposes punishments for violations of ordinances relating to neutrality in a war between foreign states. This sort of legislative approach, which German scholars call *Blankettstrafgesetze*, in effect incorporates ordinances in the Penal Code by reference. See A. SCHÖNKE & H. SCHRÖDER, STRAFGESETZBUCH KOMMENTAR 7-8 (22d ed. 1985) [hereinafter SCHÖNKE-SCHRÖDER]. [Throughout this Article, counterpart terminology from Roman law systems is included to facilitate a comparative law search into western concepts that have had significant impact on the formation of Japanese penal law. — Trans.]

In that context, National Public Service Law, arts. 102(1), 110(1) and 110(19) punish public employees who violate the prohibition against political activity on their part, and define "political activity" according to rules of the National Personnel Authority. This creates a problem if one contrasts the consequences of such activity in the form of criminal penalties with disciplinary measures. In the Sarufutsu case, 28 Keishū 393 (Sup. Ct., G.B., Nov. 6, 1974), a majority of the Court sustained the constitutionality of the statute, over a dissent by Justices Nobuo Ogawa, Kenichiro Osumi, Yoshikitsu Sakamoto and Kosato Sekine.

Provided this underlying principle is honored, regulations of lower-ranking agencies as well as Cabinet orders may be utilized for the purpose. See 4 Keishū 73 (Sup. Ct., G.B., Feb. 1, 1950) (interpreting the Foodstuff Control Law (Law No. 40, 1942) arts. 9, 10, 31); 12 Keishū 1272 (Sup. Ct., 1st P.B., May 1, 1958) (interpreting National Personnel Authority rules).

[The citation style followed in this translation is that in *Form of Citation of Japanese Legal Materials*, 42 WASH. L. REV. 591, 593-95 (1967). The attribution "Keishū" refers to the collection of either the prewar Daishin'in (Great Court of Cassation) or the present Supreme Court reports of criminal decisions (Keiji Hanreishu). Officially unreported decisions are cited to commercial publications, e.g., Hanreijiho. "G.B." refers to the Grand Bench, or all 15 Justices sitting en banc, while "P.B." indicates a holding by a petty bench consisting of five Justices. — Trans.]

11. Under what German scholars call the *derogierende Funktion*, however, penal provisions can lose their effect on the basis of customary law. [On custom as a source of law in the Roman law tradition, see J. MERRYMAN, *THE CIVIL LAW TRADITION* 24-25 (1969). — Trans.]

12. Penal Code, *supra* note 1, art. 35 provides: "An act done in accordance with laws or ordinances [*hōrei*] or in the pursuit of lawful business is not punishable."

the constituent elements of a crime.

The use of judicial precedents as a source of criminal law poses a problem in this context. One might naturally assume, on the basis of the preceding discussion, that it is impermissible to view judicial decisions as a source of law. Nevertheless, more broadly considered, precedent exerts a rather powerful effect in the field of criminal law. Thus, the mission of precedent surely is to fix the outer limits of the literal text of a statute, by establishing through interpretation, for example, the constituent elements of a crime, and therefore its actual coverage, within the ultimate limits set by the statutory text.

In the contrast to the field of civil (noncriminal, nonpublic) law, in which judicial interpretations need not adhere strictly to the literal text of code provisions, it is not necessarily erroneous to say that, in the sphere of criminal law, interpreting decisions not only should honor statutory language quite strictly, but that such a process appears to promote the legal stability of judicial precedents. The principle of *nullum crimen sine lege* demands that the elements of criminal offenses remain firmly fixed.

Nevertheless, statutory provisions themselves, no matter how strict their terms and how great an accumulation of the stated elements of offenses, can express but an abstract stereotype of a crime. Only as courts hand down adjudications in a number of specific cases do their cumulative precedents for the first time begin to shape the concrete content of the elements of a given crime. If one recognizes that sort of formative function in legal precedents, then not only does this not run counter to the principle of *nullum crimen, nulla poena sine lege*, but must be viewed as in truth mandated or impelled by that principle. Even if some precedents deviate in the direction of delineating the elements of or authorizing punishment for a crime, that does not contradict the above principle. The author's position is that, within the limited meaning expressed above, judicial precedent, even though arguably it ought not be placed in the same rank as legislation, still should be viewed as one form of a source of law.¹³

It is essential under the principle of legality that the contents of

13. See Dando, *Das Legalitätsprinzip und die Rolle der Rechtsprechung und der Theorien: Zugleich zur Methodik der Strafgesetzgebung*, in Festschrift für Ernst Heintz 37 (H. Lüttger, H. Blei & P. Hanau eds. 1972). Though precedent can be recognized as a source of law compatible with stability in legal principles, a certain measure of prudence must be exercised in making changes in existing precedents. In the Supreme Court's United Agricultural and Forestry Ministry Employee's Union case, 27 Keishū 547 (Sup. Ct., G.B., March 25, 1973), five Justices, including Justice Jiro Tanaka, as a minority group, urged the exercise of a certain measure of caution in altering precedents. *Id.* at 597ff.

the constituent elements of crimes, and particularly the scope of penalties, be fixed clearly in legislation. If this should not be accomplished definitively, it invites the arbitrary exercise of official powers and sharply restricts the free activities of the people. One should consider in that regard the precedents in the United States that invalidate legislation on void-for-vagueness grounds.¹⁴ It is especially important to give careful attention to the doctrine that strikes down on vagueness grounds legislation exerting a limiting or chilling effect on the freedom of expression guaranteed in the Constitution.¹⁵ That doctrine, at any rate, ought to be recognized in the course of construing the provisions of Article 31.¹⁶

Punishments¹⁷ as well as definitions of crime must be fixed by law also. A problem in that regard, however, is whether or not absolute

14. See, e.g., the doctrinal discussions in *Boos v. Barry*, 108 S. Ct. 57 (1988); *Kolender v. Lawson*, 461 U.S. 352 (1983); *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982).

15. Const., *supra* note 8, art. 31: "No person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, except according to procedure established by law."

16. This was a particular problem in the Tokushima Municipal Ordinance case, 29 Keishū 489 (Sup. Ct., G.B., Sept. 10, 1975). In 1952, Tokushima City enacted Ordinance No. 3, which provided that the City Public Safety Commission, in issuing a permit for a mass parade, could impose conditions broadly concerning the matter of maintaining orderly traffic, and authorized the imposition of penalties for violations of those conditions. The language in which the ordinance was couched had to be viewed as extremely inappropriate. According to the Court's judgment, however, "the issue of whether a criminal provision should be considered void for vagueness under article 31 should be determined according to a criterion of whether ordinary citizens might have the ability to understand whether specific actions they have in mind are proper or not under its terms." In the instant case, based on that criterion, the Court held that there was insufficient danger that the commission might abuse its discretion and hence ruled that the ordinance was not unacceptably vague. *Id.* Compare with, however, the author's supplementary opinion. *Id.* at 514-17.

Other judgments sustaining the constitutionality of statutory provisions in the face of void-for-vagueness attacks include 24 Keishū 153 (Sup. Ct., 2d P.B., Apr. 24, 1970) (the provisions of the Law Controlling the Counterfeiting of Currency and Securities art. 1: "having an outward appearance likely to obscure [mislead]"); 24 Keishū 280 (Sup. Ct., G.B., June 17, 1970) [extracted in H. TANAKA, JAPANESE LEGAL SYSTEM 774-75 (1976) [hereinafter H. TANAKA] (Minor Offenses Law art. 1(33), first clause: "without good reason"); 24 Keishū 12 (Sup. Ct., 1st P.B., July 2, 1970) (Subversive Activities Prevention Law arts. 39-40); 27 Keishū 1205 (Sup. Ct., 3d P.B., July 10, 1970) (Income Tax Law arts. 234(1), 242(8)); 27 Keishū 547 (S. Ct., G.B., Apr. 24, 1973) (United Agricultural and Forestry Employees' Union case) (National Public Service Law art. 110(1)(vii): "acts of incitement").

17. It has been maintained that legal limitations on punishments do not advance the cause of protecting freedom, see, e.g., G. WILLIAMS, CRIMINAL LAW: THE GENERAL PART 464 (1st ed. 1953), but that does not render the *nulla poena* concept superfluous.

certainty is required. If neither the category nor magnitude of punishment, or if only the category and not the magnitude, is prescribed, the security functions of the criminal law are seriously impaired; that is obvious in the first alternative but also present in the latter. The *nulla poena* principle requires both type and magnitude of punishment to be fixed by law if its primary objective is to be achieved.¹⁸

II. JUST AND COMMENSURATE PUNISHMENTS

The language of Article 31 of the Constitution of Japan¹⁹ had its genesis in the due process provisions of the United States Constitution.²⁰ Consequently, although the expression "due process" does not appear in the text of Article 31, that provision properly should be construed as incorporating the requirement that statutes imposing criminal penalties comport with due process. The concept that not only procedures, but substance as well, must be fair should be recognized as commensurate with the mandates of what is called in the United States "substantive due process." That concept should comprehend both: (1) the requirement that criminal statutes be sufficiently precise; and (2) the principles governing the interpretation of criminal penalty provisions, discussed in the preceding part. The principle of parsimony of punishment²¹ might well be considered a dimension of the just punishments concept. Substantive due process contains a vast array of spe-

18. Under § 103(2) of the Basic Law [*Grundgesetz*] of the Federal Republic of Germany (as was true under § 116 of the Weimar Constitution), "acts may be punished only if their *punishability* [*Strafbarkeit*] was fixed by law before they were committed." (emphasis added). This was incorporated intact into § 2 of the 1953 Penal Code (now § 1 of the current 1975 Code). Before the 1935 Nazi Government revision of the Code, § 2 was precisely the same as the current law. Article 2 of the 1935 revision, however, provided that an act might be punished: (1) if it was declared punishable by specific provisions of law, or (2) if it deserved punishment according to "basic concepts of penal law and the sound feelings of the people." At the time, certain scholars maintained that this was definitely permissible under the principle of legality. The validity of that premise had, however, been discredited by the time the commentary to the 1962 draft revised code had been published. See ENTWURF EINES STRAFGESETZBUCHS (StGB) MIT BEGRÜNDUNG 106 (1962).

19. See *supra* note 15.

20. U.S. CONST. amends. V, XIV.

21. That principle has come to be recognized in both the interpretation and application, as well as the enactment, of statutes imposing criminal penalties. As to the interpretation process, see the Nagoya Central Post Office case, 31 Keishū 182 (Sup. Ct., G.B., May 4, 1977). In that case, the Supreme Court, construing Article 3 of the Public Corporation Labor Relations Law, resolved an important issue by holding Article 1(2) of the Trade Union Law to be inapplicable to labor disputes involving employees of public corporations and other entities. *Id.* The author, in dissent, invoked the parsimony principle in support of his position that Article 3 should govern.

cific applications, but two of them especially should be taken up in the present context.

First, in the course of enacting penal legislation, it is imperative to ascertain the legal interests²² that should be protected through penal statutes, and the scope of those safeguards; a determination of necessity should underlie the legislative process. In particular, care should be exercised that fundamental human rights are not infringed through criminal law provisions.

The second point bearing on fairness is that criminal penalties set forth in legislation should be proportionate to the harm inflicted.²³ Cruel punishments are absolutely prohibited by the Constitution,²⁴ of course, but even penalties that are not cruel in the constitutional sense ought to be viewed as violative of due process,²⁵ if they are remarkably disproportionate. Criminal penalty provisions should conform to whatever the prevailing social values embrace as appropriate. An evaluation of criminal penalties, however, must not be undertaken as if those penalties are intended to provide redress for an actor's infringement of private rights; that is the objective of private law. The criminal law, which regulates the relationship between individuals and the entirety of society, is governed by a concept of allocation or distribution. The *lex talionis*, an "eye for an eye, a tooth for a tooth," reflected an ancient culture that did not differentiate between civil and criminal responsibility. In contrast, the proportionality of punishments mandated by the legality principle in modern law must be aimed at protecting the whole body of society, and must reflect an evaluation of each penalty on behalf of that body.²⁶

22. In recent years, the concept of decriminalization has been stressed in many countries, particularly the United States. In other words, there should be a reduced reliance on criminal punishments, and a retreat from over-criminalization. This is not unrelated to the rationale underlying the principle of parsimony, and should be considered a way of concentrating the energies of the police, criminal justice system and correction on serious crimes. Among the wealth of literature on the point, N. MORRIS & G. HAWKINS, *THE HONEST POLITICIAN'S GUIDE TO CRIME CONTROL* (1970), and H. PACKER, *LIMITS OF THE CRIMINAL SANCTION* (1968), are particularly helpful.

The problem of a legal interest [*hōeki*; *Rechtsgut*; *bien juridique*; *bene giuridico*] is not only very important as a matter of legal interpretation, but also is highly relevant to legislation-related discussions in the context of this portion of the main text. See also SCHÖNKE-SCHRÖDER, *supra* note 10, at 109 paras. 8-10.

23. The principle occasionally is stated expressly in foreign constitutional provisions. See, e.g., ILL. CONST. art. 2(2) (1961); cf. ILL. CONST. art. 1 § 2 (due process and equal protection clauses).

24. Const., *supra* note 8, art. 36.

25. *Id.* art. 31; see *supra* note 15.

26. What society views as moral varies from country to country, depending on its system of values. For example, a great majority of countries that retain the death penalty

Proportionality of punishment does not govern the legislative process alone, but extends as well to the stage of adjudication. It is necessary for the courts to assess a suitable specific penalty based on the facts of each case.²⁷ This should be what is meant by the concept of "individualization of punishment."²⁸ Adherents of the so-called modern school of penology have argued that criminal penalties should be individualized, not according to the danger that offenders pose to society, but rather according to their social adaptability; some of them even went so far as to advocate an extension of sanctions beyond the limits of punishment prescribed by law—even an abolition of all limits on punishment.²⁹ That, however, very clearly runs counter to the principle that penalties must be proportionate to harm.

III. THE INTERPRETATION OF PENAL STATUTES

The principle of legality forbids the application of penal provisions by analogy.³⁰ Since the imposition of criminal penalties should be ac-

in their legislation apply it in cases of murder. In contrast, the Soviet Union, governed by a different value system, had provided for a much less severe penalty of deprivation of liberty not to exceed eight years for all categories of homicide including murder, with the sole exception of aggravated murder which had been punishable by deprivation of liberty for ten years or less until the death penalty was authorized for murder, effective Apr. 30, 1954.

Moreover, value systems often change in the course of history. On the aspect of evolution in the criminal law, see generally H. MANNHEIM, *CRIMINAL JUSTICE AND SOCIAL RECONSTRUCTION* (1946); D. OEHLER, *WURZEL, WANDEL AND WERT DER STRAFRECHTLICHEN LEGALORDNUNG* (1950).

Problems have arisen in this context concerning the relevance to the fairness of criminal penalties of two provisions of the Constitution: Article 11, states that "the people shall not be prevented from enjoying any of the fundamental human rights"; and Article 13, states that "all the people must be respected as individuals," and that their right to life, liberty and the pursuit of happiness should be the paramount consideration in legislation and other governmental affairs, "to the extent that it does not interfere with the public welfare." Relevant precedent includes 2 Keishū 1934 (Sup. Ct., G.B., Dec. 27, 1948); 10 Keishū 1331 (Sup. Ct., 3d P.B., Sept. 11, 1956) (concerning whether identical punishments may be assessed for intentional crimes and crimes of negligence); 15 Keishū 725 (Sup. Ct., 1st P.B., Apr. 20, 1961) (concerning whether inflicting death and inflicting injury can be punished identically).

27. In assessing penalties, undue reliance on either general prevention [*Generalprävention*; *prévention générale*] or special prevention [*Spezialprävention*; *prévention spéciale*] creates a risk of contravening the requirement of proportionality, and thus of violating human rights. This can be true to some extent as well in the context of protective measures. Cf. N. MORRIS & C. HOWARD, *STUDIES IN CRIMINAL LAW* 157-63 (1964).

28. See R. SALEILLES, *L'INDIVIDUALISATION DE LA PEINE* (2d ed. 1909).

29. See E. KRÄPELIN, *DIE ABSCHAFFUNG DES STRAFMASSES* (1880).

30. Some statutes state the principle directly, e.g., Louisiana Criminal Code art. 3; La. Rev. Stat. Ann. 14:3 (West 1986). There are also provisions to the effect that the

complished through legislation, the courts should not extend the legal limits established in that way in the guise of interpreting that legislation. There are two points that ought to be kept in mind in that regard.

The first point is that neither the definition of criminality nor statutory penalty provisions properly may be expanded through analogy to the detriment of an actor. In particular, analogy may not be used to expand the constituent elements of a crime beyond those set forth in the specific language of the penal statute itself. Even if it appears appropriate from the viewpoint of criminal policy to punish those acts, that should be a problem for the legislative branch to address, not the judicial. That certainly does not mean, however, that courts cannot construe statutory language delineating the constituent elements of a given crime. Instead, they should select a rational interpretation that comports with the legal stereotypical crime projected in each statutory provision, even if on occasion they have to transcend the literal language of the legislation in doing so.³¹ In other instances, the courts can give an expansive reading to specific terms within a statutory definition of a crime.³² Only in that sense can one understand the

general language of a penal code should be construed according to the fair import of its terms, but if the statutory language can support constructions, then it should be interpreted in a manner that promotes the general objectives of the code and the special purposes of the individual statutory section undergoing interpretations. See N.Y. PENAL LAW § 5.00 (McKinney 1982); ALI MODEL PENAL CODE § 1.01(3) (1985); see also W. SAX, DAS STRAFRECHTLICHE "ANALOGIEVERBOT" (1983); Ancel, *L'Analogie en droit pénal*, 26 R. INT. DROIT PÉNAL 277 (1955). On analogy in the ancient Chinese T'ang Code, see W. JOHNSON, THE T'ANG CODE 36-38 (1979).

31. For example, the term "occupation" [or enterprise] [*gyōmu*] [the Japanese term in *romaji*, or Western phonic notation — Trans.] in Penal Code, *supra* note 1, art. 211, which penalizes those who cause injury or death through a want of care in the conduct of a business or occupation, carries no specific literal limitations. It should be construed, however, to include only occupations or enterprises that, by their nature, involve a risk to human life and bodily integrity or otherwise give rise to a duty to safeguard life and bodily integrity.

On the matter, see 12 Keishū 1090 (Sup. Ct., 2d P.B., Apr. 18, 1958); 39 Keishū 362 (Sup. Ct., 1st P.B., Oct. 21, 1985) 9 Kōsaikeshū 1336 (Hiroshima High Ct., Dec. 25, 1956) (meaning of the term "damage" [*sonkai*] in Penal Code *supra* note 1, art. 98, penalizing aggravated escape based on "damaging" or destroying a detention facility or restraints).

32. For example, a gasoline-powered train was properly construed to fit within the term "steam or electric-powered train" [*kisha, densha*] in Penal Code, *supra* note 1, art. 129, which penalizes the negligent endangerment or destruction of such vehicles. 19 Keishū 540 (Gr. Ct. Cass., Aug. 22, 1940) [*summarized in H. TANAKA, supra* note 16, at 106-07]. The means of powering railway equipment—steam, electricity, or gasoline—have no significant distinguishing relevance to the application of Article 129. In contrast, a bus, which does not operate on a railway right-of-way, cannot be expected to

premise that interpretation by analogy is not permitted, but that an expansive interpretation³³ is acceptable.

The second point of concern in this context is that interpretations tending to benefit offenders properly may be considered to lie outside the principle of legality, and therefore, simply fall within general principles of statutory interpretation. Particularly in the context of non-responsibility based on want of illegality or culpability, there should be no objection to considering anything that is relevant in its characteristics to the issue of responsibility, whether or not it is referred to specifically in legislation, as long as this is done rationally in the context of the entire legal order.³⁴

fall within the coverage of that provision. Buses would be covered by a different law, namely, the Road Transportation Law art. 136.

There are other precedents bearing on the problem of interpretation through analogy that should be considered: 9 Keiroku 874 (Gr. Ct. Cass., May 21, 1904) [*translated* in H. TANAKA, *supra* note 16, at 105-06] (theft of electricity, now expressly included as property in Penal Code, *supra* note 1, art. 245, was brought within the coverage of the pre-1907 Penal Code term "property," which did not expressly refer to electricity); 13 Keishū 483 (Gr. Ct. Cass. June 21, 1934) (taking fish by the use of fish hooks violated a statutory prohibition against catching and gathering fish by means of a "gaff"); 17 Keishū 614 (Gr. Ct. Cass., July 28, 1938) (a prohibition against trafficking in birds or animals covered a transfer of animal hides or bird skins); 9 Keishū 381 (Sup. Ct., 3d P.B., Mar. 1, 1955) [*summarized* in H. TANAKA, *supra* note 16, at 104] (the National Personnel Authority rule 14-7 term "candidate" does not include a person who intends to become a candidate); 14 Keishū 1139 (Sup. Ct., 1st P.B., July 14, 1960) (crime of failing to pay overtime compensation under Labor Standards Laws arts. 37(1), 119(1) was committed even though the overtime labor itself was performed in violation of that law); *see also* 13 Keishū 1577 (Gr. Ct. Cass., Nov. 17, 1934); 9 Keishū 1189 (Sup. Ct., G.B., June 11, 1955) (the *Mitaka* case, concerning the interpretation of Penal Code art. 127 — the aggravated crime of endangering railway or maritime traffic).

Compare other judgments placing a restrictive interpretation on legislation: 11 Keishū 1275 (Sup. Ct., 1st P.B., Mar. 28, 1957) (simple hoarding of tobacco for use of guests at a hot-springs inn did not constitute preparation to sell tobacco in violation of arts. 29(2) and 71(5), last clause, of the Tobacco Monopoly Law); 31 Keishū 96 (Sup. Ct., 1st P.B., Mar. 25, 1977) (theft of forest products in violation of Forest Law art. 197 is not governed by Penal Code art. 242, which views an owner's property in the possession and control of another person as property subject to theft).

33. *Ausdehnende Auslegung*; *see* SCHÖNKE-SCHRÖDER, *supra* note 10, at 28, paras 55-56.

34. Precedent also recognizes, at least in theory, the propriety of considering factors excluding culpability even though they are not stated affirmatively in legislation. *See* 10 Keishū 1605 (Sup. Ct., 3d P.B., Dec. 11, 1956) (first headnote). The Supreme Court, however, displayed a negative attitude toward it in practice. *Cf.* 12 Keishū 3439 (Sup. Ct., 3d P.B., Nov. 4, 1958).

In contrast, grounds for withholding imposition of punishment, by their nature, ought to be stated specifically in legislation, but if they are not, they still may be recognized in the process of statutory interpretation if sufficient grounds for that action exist. Punishability, conceptually speaking, comes into being, as a matter of principle, when a

Precision in the delineation of the constituent elements of crime

crime is constituted (a matter not of time, but of logic in the sense that punishability accompanies crime). Nevertheless, there are instances in which punishability is subjected to special conditions, called prerequisites to punishability or, by some, objective conditions to punishability [*objective Bedingung der Strafbarkeit; condizione obiettiva di punibilità*]. See also SCHÖNKE-SCHRÖDER, *supra* note 10, at 133-36, paras. 73-83.

Examples include the legal finality of a bankruptcy adjudication for crimes relating to bankruptcy, Bankruptcy Law arts. 374-376, 378; the legal finality of a decision to commence reorganization proceedings in the context of a crime of fraudulent corporate reorganization, Corporation Reorganization Law arts. 290, 291; official enforcement actions to collect delinquent taxes in criminal obstruction of tax enforcement, National Tax Enforcement Law art. 32; and assumption of the status of a public official after commission of the crime of receiving, promising to receive or demanding a bribe in relation to future duties as a public official, Penal Code, *supra* note 1, art. 197(2).

In several contexts, the absence of certain factors is a condition to punishability. These may be called grounds barring punishability [*Strafausschließungsgründe*]. See also SCHÖNKE-SCHRÖDER, *supra* note 10, at 425-26, paras. 127-31. To illustrate, accomplices who lack the personal status of relatives are ineligible for a remission of punishment under Penal Code art. 257(2), available to certain relatives who commit the crime of receiving property obtained through a property crime, *id.* art. 256, from other such relatives, *id.* art. 257(1). Therefore, the actor's personal status ordinarily serves to remit penalties, and thus is a ground barring punishability. The same thing should govern the nonpunishability of theft committed between close relatives, *id.* art. 244, but there are certain problems of interpretations peculiar to that context.

There are problems if grounds barring punishability are based on other than statutory provisions. As long as the elements of an offense are not lacking, to go beyond legislative language by withholding punishment is to imply that governmental conduct is irregular and the governmental exercise of the power to punish [*ius puniendi*] is unjust. One might compare by analogy the doctrine of entrapment as developed by United States court precedents. See C. WHITEBREAD & C. SLOBOGIN, *CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS* 443-54 (2d ed. 1986). There is one precedent that rather strikingly appears to have gone beyond statutory coverage in finding grounds barring punishability — the Nagoya Central Post Office case. 31 Keishū 182 (Sup. Ct. G.B., May 4, 1977). The Court in that case barred punishability on the basis of legislative process and the maintenance of equilibrium with other statutes. The author dissented from the Court's judgment, but on other grounds agreed with the Court on this particular point. *Id.* at 240.

There are other illustrations of personal factors barring punishability:

- (1) Under Article 51 of the Constitution, members of the two Houses of the Diet cannot be held accountable for speeches, debates or votes cast during legislative sessions. There are, of course, a number of problems bearing on the objectives of that provision. [Compare U.S. CONST. art I § 6, cl. 1; see *United States v. Helstoski*, 442 U.S. 477 (1979). — Trans.]
- (2) Under international law, foreign ambassadors cannot be punished for crimes they commit in a host country. This is not simply a matter of criminal procedure, as one precedent has held. 27 Keirokū 187 (Gr. Ct. Cass., March 24, 1921). Some scholars, however, urge that this be construed as a matter of personal status precluding punishability under substantive penal law.

should be sought in the course of interpreting legislation, just as it must during the legislative process itself.³⁵ This also is the case when

Thus, under this principle, personal factors barring punishability turn ordinarily on an actor's personal status. There are various policy reasons undergirding both prerequisites to punishability and personal factors barring punishability, which are unrelated to a normative evaluation of either the acts or the actor, and unrelated to the elements of a crime (although there are proponents of the premise that prerequisites to punishability should fall within the purview of illegality).

There are two points to be noted as a consequence:

- (a) Acts are illegal even though prerequisites to punishability cannot be met or personal factors are present barring punishability. That means, in turn, that (as an example) even though relatives within the relationships specified in Penal Code, *supra* note 1, art. 244(1), cannot be punished for theft, there is still room to punish accomplices who lack the status of relatives. In the same way, either a relative or one who is not a relative can assert a defense or justification based on protection of rights against imminent and unjust infringement, *id.* art. 36, concerning the acts of a relative who is not punishable under Article 244(1).
- (b) The elements reflecting prerequisites to punishability or personal factors barring punishability of an actor bear no relationship to the presence or absence of criminal intent. There is a lower court precedent to the contrary, however. 3 Kōsai Keishū 487 (Fukuoka High Ct., Oct. 17, 1950). The court held that, in an instance in which someone stole property under the mistaken belief that it belonged to someone in the same household, the case should be adjudicated in conformity with Penal Code, *supra* note 1, art. 244.

35. In this sense, the Supreme Court properly held, in its United Agricultural and Forestry Ministry Employees Union case, 27 Keishū 547 (Sup. Ct., G.B., Apr. 25, 1973) [extracted in H. TANAKA, *supra* note 16, at 806-11], that "an unclear (although restrictive) interpretation will impair the protective function of the stereotypical constituent elements of crime in legislation, and may even be considered to violate art. 31 of the Constitution, which requires clarity in legislative language." 27 Keishū at 564.

The same premise applies to the interpretation of prerequisites to punishability in general as well as to the constituent elements of crime. Even in the context of illegality (which by its nature transcends any particular legal provision), courts should avoid, as far as possible, an interpretation that obscures the borderline between the existence and nonexistence of illegality. For example, in the Tokyo Central Post Office case, 20 Keishū 901 (Sup. Ct., G.B. Oct. 26, 1966), the Supreme Court construed Article 34 of the former Public Corporations and Government Enterprises Labor Relations Law [now the National Enterprises Labor Relations Law] against the background of Trade Union Law art. 1(2). It considered the actions of employees in the context of a public labor dispute or strike as essentially lawful under Article 1(2) unless they impaired seriously the public interest [*kokuminseikatsu*]. That standard, as expressed in the Court's opinion, was not, of course, absolutely precise. The author could not support the holding of the Court in its later Nagoya Central Post Office case, 31 Keishū 182 (Sup. Ct., G.B., May 4, 1977) (which found Article 1(2) not to govern public employee labor disputes). The author thought the Tokyo Central Post Office holding on the applicability of Article 1(2) to be correct, so that it should have controlled the Nagoya Central Post Office case as well, but believed that the Court's standard in the Tokyo Central Post Office case, based on serious impairment of the public interest, was too imprecise. Therefore, the author main-

judicial interpretation of the constituent elements of a crime is restrictive, and in that sense favorable to a defendant.

The principle, mentioned earlier,³⁶ that "statutory provisions should be construed rationally and, as far as possible, consonantly with the spirit of the Constitution and in accord with its terms," is reflected in judicial precedent.³⁷ It is obvious on the basis of that principle that restrictive interpretations of legislative language will be required on occasion.

IV. PROHIBITION AGAINST RETROACTIVITY OF PENAL LEGISLATION

The matter of a transitory or interim penal law³⁸ presents a special problem in this context. In particular, the idea that it is wrong to apply penal laws retroactively has come down to us from ancient times;³⁹ it has been recast in the form of the principle of legality that provides the principal content of the prohibition against retroactive punishments. That principle is embodied in a number of constitutions.⁴⁰ Although the prohibition against retroactivity did not appear expressly in the Meiji Constitution, the principle was acknowledged in judicial precedents of the time. It is firmly fixed today in Article 39 of the Constitution, which provides that "no person shall be held criminally liable for an act which was lawful at the time it was committed." The Penal Code reflects a corollary principle in Article 6, which states that "when a punishment is changed by law after the commission of a crime, the lesser punishment shall be applied." The rationale of the prohibition against retroactivity even dictates the retrospective application of new

tained that the Tokyo Central Post Office standard should have been made more precise in conformity with the legality principle, and that the criminality of public sector labor activities could not be determined properly unless that were done. Therefore, the defendants should have been acquitted. *See id.* at 226-27, 238-39.

36. *See supra* note 30.

37. Accordingly, a judgment concerning the constitutionality of a given statutory provision also should be based on a reasonable interpretation of that provision, as described in the main text, without excessive regard for the literal language of the provision in question. *See* 23 Keishū 305, 310 (Sup. Ct., G.B., Apr. 2, 1969) (Tokyo Teachers Ass'n case); 23 Keishū 685 (Sup. Ct., G.B., Apr. 2, 1969) (United Judiciary Workers, Sendai Branch case).

38. *Intertemporales Strafrecht; droit pénal transitoire; diritto penale transitorio.*

39. The doctrine was recognized in ancient Greece, and appeared strongly in the writings of Hobbes and others. During the T'ang and Sung dynasties in China, the principle of nonretroactivity of punishments and even the concept of the retroactivity of reduced penalties were recognized. During the Ming dynasty and thereafter, however, retrospective penalties became the practice.

40. [*See* U.S. CONST. art. I § 9, cl. 3, § 10, cl. 1; *Miller v. Florida*, 107 S. Ct. 2446 (1987); *Weaver v. Graham*, 450 U.S. 24 (1981). — Trans.]

legislation that provides a lesser punishment.

There are three dimensions that should be explored. First, if certain acts are to be punished, a legal provision authorizing their punishment must have been promulgated, before their commission, through a statute or an appropriately authorized administrative order.⁴¹ This is the significance of the constitutional language, "no person shall be held criminally liable for an act that was lawful at the time it was committed."⁴² If a penal provision has been promulgated by the time of a criminal act but the actor is unaware of the fact, the problems are those of ignorance of the law⁴³ and unawareness of the illegality of that act. In other words, this should be considered a matter of criminal intent.⁴⁴

Second, if a punishment is changed by law after the commission of a crime, the lesser of the punishments (old and new) should be applied.⁴⁵ The criterion for "after a crime" is the time of the criminal activity—the acts of perpetration.⁴⁶ Even if a crime requires that specified consequences flow from an act,⁴⁷ the critical time should not be the emergence of those results, but rather that of the acts of perpetration. It is natural to think of these points as falling within the principle

41. On the promulgation of laws and orders, see 11 Keishū 3461 (Sup. Ct., G.B., Dec. 28, 1957) (method of promulgation); 12 Keishū 3313 (Sup. Ct., G.B., Dec. 15, 1958) (time of promulgation).

42. Const., *supra* note 8, art. 39.

43. Penal Code, *supra* note 1, art. 38(3) states: "Ignorance of the law is not the equivalent of a lack of intent to commit a crime; provided, however, that punishment may be reduced in light of the circumstances."

44. Cf. ALI MODEL PENAL CODE, *supra* note 30, § 2.04(3)(a).

45. Penal Code, *supra* note 1, art. 6 states: "When a punishment is changed by law after the commission of a crime, the lesser punishment shall be applied."

46. *Commencement d'exécution; Anfang der Ausführung.* The German statutory term now is *Verwirklichung des Tatbestandes*, see STRAFGESETZBUCH [StGB] § 22 (W. Ger.) [hereinafter German Criminal Code], but the concept probably has not changed. See SCHÖNKE-SCHRÖDER, *supra* note 10, at 282-83, paras. 24-31. Consequently, in the setting of a single crime, for example, a continuing criminal transaction, if the penalty is changed during the time period through which the criminal activity continues to take place, it is not a matter of a critical selection between the old and new provisions, but simply of applying the new provision. 6 Keishū 1093 (Sup. Ct., 1st P.B., Sept. 25, 1953); cf. StGB § 2(2) (W. Ger.) (Draft 1962) [hereinafter West German Draft Penal Code of 1962].

Even if there is a single crime for the purpose of determining punishment, the precedent appears to apply the same premise. See, e.g., 17 Keiroku 1314 (Gr. Ct. Cass., June 23, 1911) (related crimes [*kenrenhan*]). The author entertains doubts about that interpretation, however, because from the substantive aspect they ought to be viewed as separate crimes.

47. *Kekkahan; Erfolgsdelikte; reato di evento*; see German Criminal Code, *supra* note 46, § 18; SCHÖNKE-SCHRÖDER, *supra* note 10, at 252-53, paras. 1-3.

of legality. When a "change in punishment"⁴⁸ occurs, however, concerning the order of gravity of punishments,⁴⁹ and the choice is between the penalty in force at the time of the criminal act and that in effect at the time of adjudication, the lesser of the two should be selected. Should there be an interim penalty between that in force at the time of the criminal act and that in effect at the time of the adjudication, the least of the three should be selected, for otherwise an unfair punishment may well be generated.⁵⁰

In instances in which there is no change in penalties between a new statute and its predecessor, scholarly opinion is divided as to which statute should be applied. From the standpoint of criminal legislation as a model or standard for judges, there is relatively strong advocacy, as one might expect, for the premise that the statute in force at the time of adjudication should govern. Because there may be a problem in deciding whether the old or the new statute should serve as the standard for a particular case, however, the logical necessity of such an interpretation is not inevitable. Preferably, the problem should be evaluated with the principle of nonretroactivity of criminal penalties as the base, which in turn means that the law in force at the time of criminal activity should govern. Judicial precedent adopts that analysis.⁵¹

Third, the power to impose criminal punishments lapses if a penal provision governing criminal activity has been repealed by the time of

48. Penal Code, *supra* note 1, art. 6, does not govern later changes that do not affect punishment. Examples include changes in the prescriptive period [statute of limitations] governing the offense, *cf.* KEIHŌ SHIKKŌ HŌ art. 13 (Law No. 29, 1909) (Japan) (Law for the Enforcement of the Penal Code) [hereinafter Law for the Enforcement of the Penal Code]; the period governing institution of prosecution, *cf.* KEIJISOSHŌHŌ SHIKKŌ HŌ art. 6 (Law No. 249, 1948) 2 E.H.S. 2601 (1985) (Japan) (Law for the Enforcement of the Code of Criminal Procedure); and criteria to determine whether the prerequisites for an accusation have been met, *id.* art. 4.

In contrast, changes in periods of detention in a workhouse (*see* Penal Code, *supra* note 1, art.18; KEISŌHŌ art. 505 (Law No. 131, 1948) (Japan) (Code of Criminal Procedure)) ought to fall within the provisions of Penal Code, *supra* note 1, art. 6. 20 Keishū 425 (Gr. Ct., Cass., July 17, 1942). Precedent, however, does not hold that way if changes are made in statutory provisions governing requirements for suspending the execution of a sentence. *See* 2 Keishū 694 (Sup. Ct., 3d P.B., June 22, 1948); 2 Keishū 1660-61 (Sup. Ct., G.B. Nov. 10, 1948). The author thinks that inappropriate, as did Justice Tsuyoshi Mano in his dissenting opinion.

49. Penal Code, *supra* note 1, art. 10; *cf.* Law for Enforcement of the Penal Code, *supra* note 48, art. 2.

50. *Cf.* Draft Penal Code art. 2(2). [The Draft Penal Code of 1975 has not been adopted thus far by the Diet. The Preliminary Draft and commentary were published in English. *See* A PREPARATORY DRAFT FOR THE REVISED PENAL CODE OF JAPAN 1961 (B. George ed. 1964), presented in 8 AMERICAN SERIES OF FOREIGN PENAL CODES. — Trans.]

51. 13 Keishū 28 (Gr. Ct. Cass., Jan. 31, 1933).

adjudication.⁵² Under the Code of Criminal Procedure, if this occurs, the sentencing court should enter a judgment of acquittal.⁵³ One should note, however, that the problem of legislation with a stated period of effectiveness, addressed in the next part, constitutes an important exception to what has been discussed in this context.

V. TIME-LIMITED LEGISLATION

Legislation that carries within its own terms a specified period of legal effectiveness is called time-limited legislation.⁵⁴ The West German Penal Code⁵⁵ provides expressly that "a law stating a fixed period of effectiveness from the time of its enactment is to be applied, after it has ceased to be in force, to criminal acts committed during its period of effectiveness."⁵⁶ There are examples of administrative criminal statutes in Japan that contain language to the same effect. Because the Penal Code contains no specific provisions paralleling the West German law, however, criminal penalties probably cannot be enforced after the statutes defining the underlying criminal activity have lapsed, unless the contrary is expressed through special language in any penal statute encountered outside the Penal Code.

There are, however, two counterarguments to that conclusion. One is that time-limited legislation properly may continue to govern criminal acts committed during its stated period of effectiveness, unaffected by its ensuing loss of force. That conclusion seemingly rests on the premise that there is no practical probability of exacting punishments during a limited period of statutory effectiveness, which would render

52. Under certain foreign penal codes, even if the repeal occurs after a criminal sentence has been determined and announced, the criminal penalty and the power to enforce it are extinguished. This is explicit, for example, in CODIGO PENAL [C.P.] art. 2(1) (Brazil) [hereinafter Brazilian Penal Code]; Danish Criminal Code art. 3(2); Greek Penal Code art. 2(2); CODICE PENALE [C.P.] art. 2(2) (Italy) [hereinafter Italian Penal Code].

53. Code of Criminal Procedure, *supra* note 48, art. 337(2); *see also id.* arts. 383(1)(ii) (ground for *koso* appeal), 411(1)(v) (ground for *jokoku* appeal).

54. *Genjihō; Zeitgesetz; temporäres Gesetz; loi temporaire; legge temporanea*. The basic concept includes statutes that govern criminal acts committed during their stated period of effectiveness and which are enforced after they have lapsed. For purposes of clarity in terminology, it probably is more appropriate to call this "substantive time-limited legislation," in contrast to "formal or modal time-limited legislation," a more appropriate designation for the concept in the main text. Ultimately, of course, it becomes a considerable problem to correlate the two concepts, "substantive" and "formal."

55. West German Draft Penal Code of 1962, *supra* note 46, § 2(4); *see* SCHÖNKE-SCHRÖDER, *supra* note 10, at 50-51, paras. 34-40.

56. Other legislation to the same effect includes Brazilian Penal Code, *supra* note 52, art. 3; Danish Criminal Code, *supra* note 52, art. 3(1); Greek Penal Code, *supra* note 52, art. 3; Italian Penal Code, *supra* note 52, art 2(4); Romanian Penal Code art. 16; *see also infra* note 59.

the criminal penalty provisions utterly meaningless. If there is a special provision in the statute addressing the point, however, it is easy to resolve problems as they arise.⁵⁷

The second counterargument distinguishes between instances in which the legal interpretation changes, following abrogation, concerning the punishability of acts committed before abrogation, and those in which there is simply an alteration in the factual context. In the first, the abrogation of penalties renders acts done before abrogation nonpunishable, while in the second the punishability remains. This is called the "motivation" theory.⁵⁸ Nevertheless, because the distinctions between the two categories of cases are highly correlative, such a theory is likely to impair stability in legal principles. Some scholarly opinion in Japan emphasizes the motivational theory, not only concerning time-limited legislation in the strict sense, but also with reference to statutes of an interim or transitional nature.⁵⁹

Penal Code, Article 6, as well as the Code of Criminal Procedure, Article 337(ii),⁶⁰ is extremely significant from the standpoint of the *nullum crimen* or legality principle.⁶¹ In view of the absence of express

57. Other considerations exist as well. An example may be found in the repeal in 1947 (Law No. 124) of the earlier Penal Code coverage of crimes against the Imperial House and the crime of adultery. The supplemental provisions to the repealer statute, by their terms, stated that the repeal went into effect on the twentieth day after promulgation. The repeal thus converted the Penal Code provisions in question into a species of time-limited legislation (contrasting, of course, with the usual form of such legislation, which fixes the period of effectiveness at the time of enactment and not at a later time). Even the proponents of the position restated in the main text, however, probably would not claim that such crimes committed before the repeal became effective could have been punished afterwards, for the simple reason that there was no practical possibility of imposing punishment after the repealed provisions had ceased to exist.

58. *Motiventheorie*. For illustrations of the motivation theory in the context of proposed legislation, see StGB § 6(4) (Ger.) (Draft 1919) [hereinafter German Draft Penal Code of 1919]; StGB § 2(2) (Ger.) (Draft 1922) [hereinafter German Draft Penal Code of 1922]; StGB § 2(2) (Ger.) (Draft 1925) [hereinafter German Draft Penal Code of 1925]; StGB § 3 (Ger.) (Draft 1927) [hereinafter German Draft Penal Code of 1927]. These codes stated in effect that statutory provisions eliminating coverage on the basis of special facts nevertheless covered acts committed while the coverage was in effect, thus allowing enforcement even after the statute had lost its effectiveness. Such provisions were eliminated, however, from the StGB (Ger.) (Draft 1930) [hereinafter German Draft Penal Code of 1930].

59. *Rinjihō*. German precedent seems to apply the above-quoted § 2(4) to both time-limited and temporary legislation without regard to the specific language of the provision.

60. Article 337(ii) provides that a judgment of acquittal on procedural grounds [*mensō*] must be entered "where the punishment has been abolished by a law or ordinance enforced subsequent to the commission of an offense." See S. DANDO, JAPANESE LAW OF CRIMINAL PROCEDURE 145, 385 (B. George trans. 1965).

61. See *supra* note 10.

statutory language in Japan corresponding to the provisions of the West German Penal Code, Section 2(4),⁶² courts should not recognize any exception to the *nullum crimen* principle simply for practical reasons of crime control.

One must take note of instances, however, in which changes are made, not in the provisions setting forth the legal elements of an offense, but rather in provisions relating solely to the facts corresponding to those elements.⁶³ For example, the Civil Code used to embody a family relationship between the stepparents and stepchildren identical to that prevailing between natural parents and the children of their marriage.⁶⁴ That relationship was eliminated from the revised Civil Code. If before that revision took place, however, a stepchild should have murdered a stepparent, the crime still would have been that of killing an ascendant,⁶⁵ and there would have been no escape from criminal liability if the stepchild had been prosecuted and convicted after the Civil Code revision. In the same way, for example, under price control legislation, it is proper to view subsequent changes in price-control regulations as having no impact on the criminality of contraventions occurring before amendment.⁶⁶

62. See *supra* note 56 and accompanying text.

63. It may be difficult to distinguish between the two, but a determination nevertheless can be made whether a given legal provision covers solely the legal elements of a crime.

64. Former Article 728 of the Civil Code provided that "the same relationship exists between a stepfather or stepmother and the stepchild as . . . between parent and child."

65. Penal Code, *supra* note 1, art. 200. That assumes the statute is constitutional under Const., *supra* note 8, art. 14(1) (stating that "[a]ll the people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin."). The Supreme Court so held initially, 6 Keishū 1441 (Sup. Ct., 1st P.B., Dec. 25, 1952), *rev'd*, 27 Keishū 265 (Sup. Ct., G.B., Apr. 14, 1973) [*translated in* H. Tanaka, *supra* note 16, at 725-28]. The author agrees with the later precedent, although on somewhat different grounds bearing on the breadth of the penalties.

66. The following case notes indicate the shifting position in precedent:

(a) 17 Keishū 853 (Gr. Ct. Cass., Oct. 29, 1938). In the Law Temporarily Restricting the Transfer of Horses (Law No. 89, 1937), the transfer or movement of horses in certain specified locations required a government permit. After the accused had transferred a horse without a permit, administrative orders issued by the Ministries of the Army and of Agriculture and Forestry removed the place of the transfer from the statutory coverage, so that permits no longer were required. At first-instance trial the accused was convicted despite the intervening governmental action, and a summary order issued. The Procurator-General maintained in the government's statement of reasons in opposition to an application for emergency *jokoku* appeal that the case did not involve time-limited legislation. The Great Court of Cassation, in allowing the appeal, vacating the summary order and dismissing the prosecution, stated the following grounds for its actions:

If acts are committed at a place covered at the time by prohibitory regulations, but thereafter the regulations are changed so that the location no longer is covered, the result is that "the place is [no longer] governed by legal restrictions under art. 2 of the Law, and the constituent elements of that crime no longer exist. Accordingly, the penalties set forth in the Law no longer can be assessed.

This decree might well be considered by some as a temporary or interim measure treated as time-limited legislation. Those emphasizing a teleological analysis, however, as well as administrative law specialists, have voiced strong criticisms of the holding in this case.

(b) See 19 Keishū 401 (Gr. Ct. Cass., July 1, 1940); 15 Keishū 459 (Gr. Ct. Cass., July 18, 1940). Under the Temporary Measures Law Concerning Import and Export Commodities, whatever price-control regulations were in force at the time a violation occurred governed; the fact that, after the criminal act had been committed, the regulation in question was withdrawn had no effect on criminality. The objective of the statute, according to the first of the two decisions was: "To determine an appropriate price in light of the economic circumstance prevailing at the time in question; as it was anticipated from the outset that the provision would be altered if future circumstances warranted it, the provisions in force at the time of activity would govern that activity." (Statute Repealed). According to the second of the two precedents, therefore, even though there are many examples of specific legislative language to the effect that provisions in force at the time of an act should be applied even though they were later changed, "even in default of such specific language, the same interpretation should be placed on the legislation in question."

(c) Following the conclusion of the Pacific War, however, one or two precedents took a contrary view of the matter.

(d) Soon thereafter, a judgment of the combined divisions of the Great Court of Cassation affirmed the judgments summarized in (b), *supra*. Unreported case (Gr. Ct. Cass., Apr. 15, 1947) (stated that "[t]here appears to be no reason to alter the holding of this judgment. Therefore, inconsistent prior judgments [as stated in (c), *supra*] are to be disregarded and the earlier judgment of the Division of the Court will govern later cases.").

(e) 4 Keishū 1972 (Sup. Ct., G.B., Oct. 11, 1950). This decision was the first Supreme Court judgment tracking the position of the Great Court of Cassation. The case involved what was designated as the Price Control Regulation. The defendant sold apples for an amount exceeding the price that could be charged under Finance Ministry Directive (No. 581, 1946), based on an earlier version of the Regulation. Shortly afterwards, the directive was rescinded. According to the Court, based on the language of Article 1 of the Regulation, the Regulation itself was destined, sooner or later, to be rescinded after the unusual economic difficulties during the postwar period had ceased to exist. Therefore, to quash the criminal penalties already assessed before rescission, based on the rescinding of directives issued under the Regulation, was inconsistent with the objectives of the Regulation. Justice Nobori Inoue, Saburo Iwamatsu and Tsuyoshi Mano dissented, however, from the Court's holding that the criminal penalties should not be quashed. The Court's conclusion is consistent with the premise advanced by the author in the main text, although he agrees with Justice Mano's dissent criticizing as "irresponsible" the Court's reasons for concluding that the statute should be construed as a form of time-limited legislation.

(f) Two ensuing precedents refused to apply the concept of time-limited legislation. See 7 Keishū 1562 (Sup. Ct., G.B., No. 325 (*wa*) 1950, July 22, 1953) (dealing with the Order for the Punishment of Acts Prejudicial to Occupation Objectives); 8 Keishū 1791 (Sup. Ct., G.B. No. 343 (*wa*) 1950, Nov. 10, 1954) (addressed the Public Utilities

VI. TERRITORIAL LIMITS AFFECTING PENAL LAW⁶⁷

The Penal Code⁶⁸ applies to persons who commit crimes within Japan⁶⁹ or on board Japan-registry vessels⁷⁰ or aircraft⁷¹ outside Japan, whether the offenders are Japanese nationals or not. In other words, Japan follows the territorial principle.⁷²

Order) [hereinafter Electric Industries Strike Case]. Both Orders were considered somewhat special provisions governing a limited context.

(g) 9 Keishū 344 (Sup. Ct., G.B., Feb. 25, 1955), considered whether criminal penalties for violating the Customs Law provisions relating to the clandestine, illegal import or export of commodities in the territory of a foreign country should be quashed if the location of the activity were subsequently considered not to be within the territory of a foreign nation. The Court refused to quash the criminal penalties originally imposed on violators.

(h) Soon thereafter, however, the Court changed its position on the matter and ordered the criminal penalties quashed. 11 Keishū 2497 (Sup. Ct., G.B., Oct. 9, 1957).

(i) The Court addressed the issue again in 16 Keishū 345 (Sup. Ct., G.B., Apr. 14, 1962). Provisions of a Niigata prefectural traffic ordinance, prohibiting two persons from riding together on a bicycle fitted with a motor, were rescinded after the violation at issue. The Court, however, ruled that the subsequent rescission did not have to constitute grounds for quashing the criminal penalties assessed in the case.

It is obvious from the above summaries that the doctrine has been in disarray, a disarray largely brought about by changes in judicial personnel which have had an unfortunate effect of impairing the development of sound doctrine. The precedents cited *supra* in paragraphs (a) through (e) adopt essentially the same premise as the author's but the cases in (h) and (i) obviously take a contrary position.

67. The problems discussed in the present context should not be confused with the matter of the competence of courts to adjudicate criminal cases arising outside Japan. See S. DANDO, *supra* note 60, at 43.

68. Penal Code, *supra* note 1, art. 1.

69. If any portion of the acts corresponding to the material elements of a crime occurs within Japan, then the entire crime is considered to have been committed there. Legislative examples, covering attempted crimes, and providing that the place where an offender intended the results of activity to occur is the place of the crime, include the German Draft Penal Code of 1925, *supra* note 58, § 9; German Draft Penal Code of 1922, *supra* note 58, § 9; German Draft Penal Code of 1930, *supra* note 58, § 8; SCHWEIZERISCHES STRAFGESETZBUCH [STGB] art. 7 (Switz.) [hereinafter Swiss Penal Code]. To the author, however, this seems wrong even as a matter of statutory principle.

70. A Japanese vessel is defined in Vessels Law art. 1, as a vessel with Japanese government registry. On vessels under a bareboat charter, see Consular Convention, Mar. 22, 1963, United States - Japan, arts. 19-21, 24, 15 U.S.T. 768, 799-804, 806, T.I.A.S. No. 5602, at 33-37.

71. "Aircraft" is defined in Aviation Law arts. 3-2, 4; see also Treaty on International Recognition Rights in Aircraft, opened for signature June 19, 1948, art. XVI, 4 U.S.T. 1830, 1840, T.I.A.S. No. 2847 at 12.

72. *Zokuchishugi; Territorialprinzip*; see West German Draft Penal Code of 1962, *supra* note 46, § 3-4; SCHÖNKE-SCHRÖDER, *supra* note 10, paras. 4-5, 69-70, at 53-54, commentary to § 3-4, at 53-54. [On the corresponding United States doctrine, see, e.g., Blakesley, *Extraterritorial Jurisdiction*, in INTERNATIONAL CRIMINAL LAW: PROCEDURE 3,

By its terms, the Penal Code⁷³ applies to such crimes as arson,⁷⁴ homicide⁷⁵ and theft⁷⁶ committed by Japanese nationals⁷⁷ outside Japan. Within the limits thus established through Article 3, Japan has recognized the personality principle.⁷⁸

The crimes of insurrection,⁷⁹ promoting foreign aggression,⁸⁰ counterfeiting currency and uttering it,⁸¹ forgery of documents, etc.,⁸² counterfeiting securities,⁸³ and counterfeiting or wrongfully using official seals and marks⁸⁴ are punishable if committed outside Japan⁸⁵ by any-

8-11 (M. Bassiouni ed. 1986); George, *Jurisdictional Bases for Criminal Legislation and its Enforcement*, MICH. Y.B. INT'L LEGAL STUD. 3, 4-5 (1983). — Trans.]

73. Penal Code, *supra* note 1, art. 3; *see also* Law for the Enforcement of the Penal Code, *supra* note 48, art. 27.

74. Penal Code, *supra* note 1, art. 3(1)(i); *see id.* arts. 108, 109(1), 119 (referring to damages to structures by flooding), and art. 3(1)(ii).

75. *Id.* art. 3(1)(vi); *see id.* arts. 199-200, 3(1)(vii) (referring to crimes of bodily injury), arts. 204-205, 3(1)(viii) (referring to crimes of abortion), arts. 214-216, 3(1)(ix) (referring to aggravated abandonment and death or injury from abandonment), arts. 218-219, 3(1)(x) (referring to wrongful imprisonment and death or injury resulting from it), arts. 220-221, 3(1)(xi) (referring to kidnapping and abduction), arts. 224-228, 3(1)(xii) (referring to defamation), and art. 230.

76. *Id.* art. 3(1)(xiii) (referring to theft and robbery), arts. 235-236, 238-241, 243, 3(1)(xiv) (referring to fraud and extortion), arts. 246-250, 3(1)(xv) (referring to embezzlement in the conduct of business), arts. 253, 3(1)(xvi) (referring to certain acts of receiving), art. 256(2). The remaining offenses covered by the article are in art. 3(1)(iii) (counterfeiting and forgery), arts. 159-161 (as well as falsification of electromagnetic records), arts. 161-162 *amended* by Penal Code through Law No. 52 (1987), art. 3(1)(iv) (counterfeiting or wrongful use of private seals and attempted wrongful use), and art. 167.

77. Under Const., *supra* note 8, art. 10, "the condition for being a Japanese national shall be determined by law." *See generally* Nationality Law.

78. *Zokujinshugi; Personalitätsprinzip; see* SCHÖNKE-SCHRÖDER, *supra* note 10, at 71, paras. 6-7; *id.* at 54, paras. 1-2, commentary to German Penal Code § 5. The principle originally was recognized in old German law. The penal law of the Soviet Union (*e.g.*, RSFSR Penal Code art. 5) is a recent example of the legislative use of the personality principle. RSFSR, CRIMINAL CODE, [C. CRIM.] art. 5 (USSR). [On the corresponding United States doctrine, *see* Blakesley, *supra* note 72, at 22-27; *see also* George, *supra* note 72, at 4, 6, 23. — Trans.]

79. Penal Code, *supra* note 1, arts. 2(1)(ii), 77-79.

80. *See id.* arts. 2(1)(iii), 81, 82, 87, 88.

81. *See id.* arts. 2(1)(iv), 148 (including attempts).

82. *See id.* arts. 2(1)(v), 154, 155, 157, 158, 161-62.

83. *See id.* arts. 2(1)(vi), 162, 163.

84. *See id.* arts. 2(1)(vii), 164-166 (including attempts to violate Articles 164(2), 165(2) and 166(2)).

85. Whether or not certain offenses are included in the enumerations within Articles 2 and 3 has an impact on the interpretation of their constituent elements. *See* Penal Code, *supra* note 1, arts. 2, 3. For example, Penal Code art. 175 is not enumerated in either article. The Supreme Court has interpreted the phrase "purpose of sale" in Article 17 to include only sales which will take place within Japan. 31 Keishū 1176 (Sup. Ct., P.B., Dec. 22, 1977).

one, whether a Japanese national or not.⁸⁶ In addition, persons who are public officers of Japan may be punished if, while outside Japan, they commit the crimes of allowing detained persons to escape,⁸⁷ drafting false official documents⁸⁸ and certain forms of abuse of authority.⁸⁹

All cases falling within Article 4, and at a minimum the crimes of insurrection⁹⁰ and promoting foreign aggression⁹¹ within Article 2, have the objective of safeguarding various legal interests of Japan, and thus fall within the spirit of the so-called protective principle.⁹² By virtue of the partial revision of the Penal Code in 1947, Japan had moved somewhat away from the protective principle,⁹³ but until 1987⁹⁴ had not significantly gravitated in the direction of reliance on the universality principle.⁹⁵ Admittedly, there had been at least a glimpse of that principle in certain portions of Article 2,⁹⁶ particularly the references to counterfeiting and wrongful use or attempted use of private seals.⁹⁷ In addition, Article 7 of the Draft Penal Code reflects the trend in that

86. Penal Code, *supra* note 1, art. 2; Law for the Enforcement of the Penal Code, *supra* note 48, art. 26.

87. Penal Code, *supra* note 1, arts. 4(1)(i), 101 (including attempts, *id.* art. 102).

88. *Id.* arts. 4(1)(ii), 156.

89. *Id.* art. 4(1)(iii), referring to Article 193 (abuse of authority), Article 195(2) (violence or cruelty by a guard or escort against a person in custody), Article 197(1)-(4) (bribery offenses), and the killing or injury of persons during violations of Article 195(2).

90. *Id.* art. 2(1)(i).

91. *Id.* art. 2(1)(ii). Articles 2(1)(v) and 2(1)(vii) do not reflect the so-called universality principle, but rather the protective principle. The deleted provisions of Article 2(1)(i) covered crimes against the Imperial House defined in the now-repealed Articles 73-76 of the 1907 Penal Code.

92. *Hogoshugi; Schutzprinzip; Realprinzip; see* SCHÖNKE-SCHRÖDER, *supra* note 10, paras. 1, 7, 71, commentary to German Penal Code, § 5, at 54. [On the corresponding United States doctrine, see Blakesley, *supra* note 72, at 17-22; George, *supra* note 72, at 4, 6, 15-18; see also Banks, *International Activities and Criminal Considerations Under United States Antitrust Laws*, in INTERNATIONAL CRIMINAL LAW: A GUIDE TO U.S. PRACTICE AND PROCEDURE 51 (V. Nanda & M. Bassiouni eds. 1987); *Extraterritorial Criminal Jurisdiction in Securities Laws Regulation*, in *id.* at 79. — Trans.]

93. Penal Code, *supra* note 1, art. 3(1)(ii), before its revision in 1947, provided that "anyone who commits any of the listed crimes outside the Empire of Japan against a national of the Empire of Japan is also punishable." This represented a clear application of the protective principle.

94. See *infra* notes 100-119 and accompanying text.

95. *Sekai shugi; Universalprinzip; Weltrechtsprinzip; see* SCHÖNKE-SCHRÖDER, *supra* note 10, paras. 8, 75-77, commentary to German Penal Code, § 6, at 54. [On the corresponding United States doctrine, see Blakesley, *supra* note 72, at 31-33; George, *supra* note 72, at 4. — Trans.]

96. See also Law for the Enforcement of the Penal Code, *supra* note 48, art. 26(1)(iii)-(iv); Law Punishing Violations of the Revenue Stamp Law art. 4.

97. Penal Code, *supra* note 1, arts. 2(1)(iv), 167.

direction manifested in certain contemporary foreign statutes⁹⁸ and, if adopted, would expand the limits of offenses governed by the principle.⁹⁹

In 1987, the Diet took an important step toward recognition of the universality principle in the context of the development of new policies against international terrorism.¹⁰⁰ Through that enactment, the Penal Code was brought into conformity with two newly-ratified international conventions:¹⁰¹ the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents,¹⁰² and the International Convention Against the Taking of Hostages.¹⁰³ The provisions of the 1987 law conform to those two conventions¹⁰⁴ by: a) establishing criminal penalty provisions based on contraventions of their terms; and 2) expanding the limits of punishability for crimes committed outside Japan. Only the latter dimension is addressed briefly in this context. Under the new Article 4-2 of the Penal Code:

98. See German Draft Penal Code of 1925 and subsequent drafts, *supra* note 58. Legislative examples include Greek Penal Code, *supra* note 52, art. 8 and German Federal Republic Penal Code art. 6.

99. Under Article 4(1)(vii) of the Preliminary Draft Penal Code, crimes of trafficking in pornography and solicitation for sexual intercourse would have been included, but Article 7 of the Draft Code eliminated such coverage, despite Japan's ratification of the International Convention for the Suppression of Traffic in Pornography (Treaty No. 3, 1936). This elimination of Draft Code coverage is based on the very evident and marked difference of opinion in various countries over whether criminal law should be used as a basis to intervene in matters of sexual morality.

100. Law for the Partial Revision of the Penal Code, Etc. (Law No. 52, 1987).

101. There are actually three earlier international conventions directed against hijackings as countermeasures against international terrorism to which Japan is a party, namely, the Tokyo Hijacking Convention, Sept. 14, 1963, 20 U.S.T. 2941, T.I.A.S. No. 6768, 704 U.N.T.S. 219 (Japan Treaty No. 5, 1970); the Hague Hijacking Convention, Dec. 16, 1970, 22 U.S.T. 1641, T.I.A.S. No. 7192, 860 U.N.T.S. 105 (Japan Treaty No. 19, 1971); and the Montreal Hijacking Convention, Sept. 23, 1971, 24 U.S.T. 564, T.I.A.S. No. 7570, 974 U.N.T.S. 177 (Japan Treaty No. 5, 1974).

102. G.A. Res. 3166, 28 U.N. GAOR Supp. (No. 30), at 147, U.N. Doc. A/9030 (1974) [hereinafter UN Diplomats Convention] (opened for ratification by the United Nations in 1973; in effect since 1977; ratified and promulgated by the Government of Japan as Treaty No. 3 of 1987).

103. G.A. Res. 34/416, 34 U.N. GAOR Supp. (No. 16) at 245, U.N. Doc. A/34/46 (1979) [hereinafter UN Hostages Convention] (opened for ratification by the United Nations in 1979; in effect since 1983; ratified and promulgated by the Government of Japan as Treaty No. 4 of 1987).

104. Because of the phenomenon of international terrorism in recent years, the UN General Assembly urged the speedy ratification of both treaties by each member state. That, in turn, came to be a focal point for debate within the UN concerning the relationship between international terrorism and popular liberation movements.

In addition to the three preceding articles, the provisions of this [Penal] Code apply to and may be invoked against any person who commits outside Japan a crime set forth in Book II [The Special Part of the Penal Code] and [who is] required to be punished, even though [the crime was] committed outside Japan, by virtue of international treaties.¹⁰⁵

Counterpart language was inserted at the same time in the Law Concerning the Punishment for Taking Hostages¹⁰⁶ and the Law Concerning the Punishment of Violent Acts.¹⁰⁷

These enactments conform to the obligations that Japan undertook on the basis of Article 3(1) of the United Nations Diplomats Convention¹⁰⁸ and Article 5(1) of the United Nations Hostages Convention.¹⁰⁹ One should differentiate as a matter of logic the concept of the power to adjudicate from that of the limits of the applicability of penal law. Nevertheless, in essence, as Japanese courts are called upon to apply these penal provisions which Japan was required to enact by virtue of its status as a party to the two conventions, there is reason to anticipate that they will exercise their adjudicatory powers only concerning extraterritorial acts which appropriately may be punished by Japan.

The provisions falling under the new Article 4-2 apply to persons who are not Japanese nationals although, of course, it is necessary to extradite them or otherwise secure their physical presence before Japanese courts before they can be tried in accordance with constitutional principles. As discussed above,¹¹⁰ the provisions of Articles 2 through 4 of the Penal Code already made punishable crimes committed abroad (although the above-mentioned special statutory provisions created ex-

105. Law for the Partial Revision of the Penal Code, *supra* note 100, art. 4-2.

106. Law No. 48, 1987, art. 5.

107. Law No. 60, 1926, arts. 1, 2. Thus the provisions of Article 4-2 are couched in a comprehensive form to the extent they relate to the various crimes defined in the Penal Code. The special punishment-related provisions in the particularized legislation described in the text in form extend the power to punish criminal acts committed abroad only concerning those two specified laws; because they are not comprehensive there is at least some possibility that they will prove inefficacious in the future. Because the provisions relating to the punishability of extraterritorial crimes are founded in the power to punish, they should be considered circumspectly in the specialized form in which they are stated and viewed within the spirit of Const., *supra* note 8, art. 31. Indeed, there is some danger that the requirements of the conventions embodying policies against international terrorism have been developed without a full consideration of this matter; these requirements may well make it necessary in the future to revise the legislation based on actual circumstances.

108. See *supra* note 102.

109. See *supra* note 103.

110. See *supra* text accompanying notes 68-89.

ceptions to their coverage), but standing alone they could not fulfill completely the requirements of the two international conventions adopted by Japan. Consequently, new legislation was necessary addressing matters lying outside the existing provisions. That is the significance of the language, "in addition to the three preceding articles," in Article 4-2.

The terminology in Article 4-2, "by virtue of international treaties," refers not only to the current international treaties but also to ones which Japan may ratify in the future. As of now, however, Article 4-2, because of the United Nations Diplomats Convention,¹¹¹ creates a duty to adjudicate in conformity to its provisions. Obviously, of course, and to the extent no new revisions come into being affecting the 1987 enactments, the issues of whether a given situation falls within the earlier provisions of the Penal Code or Article 4-2 and the constituent elements which control that determination are problems of construing together both those constituent elements and the conventions.

In that regard, under the language of the United Nations Diplomats Convention,¹¹² state parties must take necessary measures to establish jurisdiction¹¹³ over crimes constituting the intentional commission of: a) a murder, kidnapping or other attack upon the person or liberty of an "internationally protected person;"¹¹⁴ b) a violent attack upon the official premises, the private accommodation or the means of transport of an internationally protected person likely to endanger that individual's person or liberty; c) threats to commit any such attack; and d) attempts to do so.¹¹⁵ The term used in the Convention, "Head of State,"¹¹⁶ in the case of Japan refers to the Emperor. That poses a problem under the Constitution,¹¹⁷ but the term is commonly used in diplomatic relations as including the Emperor of Japan as well, and should pose no difficulties in terms of the interpretation of the lan-

111. See *supra* note 102.

112. See *id.*

113. UN Diplomats Convention, *supra* note 102, art. 3(1).

114. Defined in *id.* art. 1(1).

115. [*Id.* art. 2(1)(a)-(d). Accomplices must be punishable by forum penal law. *Id.* art. 2(1)(e). — Trans.]

116. Defined in *id.* art. 1(1)(a).

117. [Under Const., *supra* note 8, art. 1, the Emperor is "the symbol of the State and of the unity of the people, deriving his position from the will of the people with whom resides sovereign power." *Id.* art. 4, para. 1 provides: "The Emperor shall perform only such acts in matters of state as are provided for in this Constitution and shall not have powers related to government." — Trans.]

guage of the United Nations Diplomats Convention. The term "Head of Government" in the Convention¹¹⁸ refers to the Prime Minister.¹¹⁹ The Convention, however, applies to heads of state and heads of government only when they are "in a foreign State."¹²⁰

VII. EFFECT OF FOREIGN ADJUDICATIONS

Even if a person has been adjudicated a criminal in another country,¹²¹ there is no bar to the entry of a Japanese criminal adjudication imposing punishment based on the same acts.¹²² If the criminal penalties imposed on an offender by a foreign court have been enforced completely or in part, however, the enforcement of the punishment assessed by the Japanese court must be either reduced or remitted.¹²³ Before the 1947 revision of the Penal Code, remission of the enforcement of criminal penalties could be allowed in the exercise of judicial

118. The term is included in the definition of "internationally protected person" in UN Diplomats Convention, *supra* note 102, art. 1(1)(a).

119. [See Const., *supra* note 8, art. 66(1) ("[T]he Cabinet shall consist of the Prime Minister, who shall be its head, and other Ministers of State, as provided for by law."). *Id.* art. 65 provides that "executive power shall be vested in the Cabinet." — Trans.].

120. UN Diplomats Convention, *supra* note 102, art. 1(1)(a).

121. During the United States military occupation of the Amami Islands, a judgment by a court of the Government of the Ryukyu Islands was not considered a "foreign adjudication," but Article 5 nonetheless was applied by analogy. 9 Keishū 2263 (Sup. Ct., 3d P.B., Oct. 18, 1955).

122. Penal Code, *supra* note 1, art. 5 (main clause). This, proviso however, is not within the prohibition against double jeopardy in Const., *supra* note 8, art. 9.

123. Penal Code, *supra* note 1, art. 5 (proviso). Remission of the execution or enforcement of punishment differs from remission of punishment as such; only the execution of criminal penalties (not the criminal adjudication of criminal penalties itself) is remitted. Nevertheless, it can be very difficult to choose between remission and reduction of penalties as well as to fix the severity of the penalty. The differentiation or determination becomes extremely difficult to accomplish if the structure of criminal penalties in the foreign nation differs from that in Japan. Consequently, it is preferable that a court address specifically the matter of remission or reduction based on the execution of a foreign penal judgment in the portion of the adjudication covering the criminal penalties imposed by the court, although the matter essentially is one concerning the execution or enforcement of those penalties - the responsibility of a public prosecutor under Article 472 of the Code of Criminal Procedure. See S. DANDO, *supra* note 60, at 64. The precedent substantially recognizes that preference, but has gone perhaps a little too far in stating that the remission or reduction of penalties, of necessity, should always be determined by the courts themselves. See 8 Keishū 2288 (Sup. Ct., 1st P.B., Dec. 24, 1954); 9 Keishū 374 (Sup. Ct., 1st P.B., Feb. 24, 1955), discussed in S. DANDO, *supra*, at 71 n.10. The author believes that position to be questionable. See *id.*

Article 5 should be invoked even in the case of life imprisonment, because it can benefit offenders in the context of provisional release (parole) from prison. See 9 Keishū 1103 (Sup. Ct., G.B., June 1, 1955); 9 Keishū 2263 (Sup. Ct., 3d P.B., Oct. 18, 1955).

discretion, but the revised code strongly adopted a position based on the universality principle, and therefore required the courts to take that action.¹²⁴

124. Consequently, consistent with the universality principle, courts are required to limit the exercise of their discretion in this regard to a choice between remission and reduction of penalties, and to the determination of the penalty. The West German Draft Penal Code of 1962, *supra* note 46, § 66 (like its predecessors going back to 1913 StGB 8 (W. Ger.) (Draft 1913)), provided that the penalties already enforced pursuant to a foreign criminal adjudication should be computed as part of the domestic penalties. (That approach is embodied in the Japanese precedents cited *supra* note 105, in the context of calculating service of sentences to life imprisonment). The Swiss Penal Code, *supra* note 69, arts. 3-5, embodies a special legislative solution to the problem; *see also* StGB, art. 3ff (Switz.) (Draft 1918).

