Penal Reform for Drug Offenses in Japan[1]

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Abstract

The "Report of the study group on the state of criminal law regarding young persons" was released in December of 2016. The focus of this report concerns the criminal law system regarding young people, particularly matters such as the qualifying age at which the Juvenile Act applies and policy measures. The report primarily considers measures that would enable making correctional treatment programs mandatory for prisoners, These programs would be implemented, after integrating prison terms and imprisonment. The report also proposes an examination of the "unification of punishment," addressing prison terms particular to Japan, as they relate to the international standards of imprisonment.

In contrast to the above views, and amid discussions of the Prison Law Amendment, which is based on the perspective of respecting the independence of the inmate, many researchers have pointed to the necessity of discretion regarding the relationship between the principle of the treatment of the sentenced person and the "obligation" for correctional treatment. In addition, even in the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Mandela Rules), the state of treatment ensuring inmate independence is clearly expressed, and the above mentioned report may contradict this.

Against this backdrop, this paper aims to clarify the issues in Japan's attempt to reform punishment, via restricted freedom, for drug offenses in which "recovery" is enforced.

Introduction

The "Report of the study group on the state of criminal law regarding young persons" (hereafter, Report) was released in December 2016. As the title

suggests, the Report focuses on the criminal law system regarding young people, particularly focusing on their qualifying age for application of the Juvenile Act and policy measures, etc. The discussion on lowering the qualifying age considered that there are cases involving people over the age of 20 that contribute to improved reformation and rehabilitation and prevent recidivism in young persons. Based on this enriching disposition and assessment, the following issues were examined: (1) "criminal policy measures for enriching the institutional treatment of sentenced persons"; (2) "criminal policy measures for strengthening the link between institutional treatment and community-based treatment"; (3) "criminal policy measures for enriching community-based treatment"; and (4) "criminal policy measures for preventing the recidivism of persons subject to a fine or a suspended prosecution."[2]

In relation to (1) "criminal policy measures for enriching the institutional treatment of sentenced persons" in this discussion, the Report states, "(in short) with regard to 'imprisonment with work' within the punishment terms of the existing law, work is considered the substance of the criminal sentence. Work fulfills an important role in the improvement of a sentenced person's reformation and rehabilitation; a specific period must be set aside for work in cases where other correctional treatment is also suitable, considering the characteristics of the sentenced person. In short, correctional treatment should be limited to better suit the individual, such as by devoting a large part of the prison term to reform guidance and course instruction, etc., suited to the inmate's characteristics. Furthermore, in relation to 'imprisonment without work', the carrying out of work can be made uniformly obligatory, and there are cases, depending on the characteristics of the sentenced person, wherein work is useful for the improved reformation and rehabilitation of a person. Accordingly, legal and institutional measures that make work obligatory for a sentenced person, including all kinds of correctional treatment, are considered based on integrating imprisonment with work/imprisonment without work." The unification of the two modes of imprisonment (with/without) was considered a significant point to be examined.[3]

Hayashi, Director-General of the Criminal Affairs Bureau in the Ministry of Justice, raised the matter of prosecutorial activities focused on the recent "entry support" efforts for prevention of recidivism and called this a "lively period for criminal policy."[4] Furthermore, Hayashi noted that a similarly vivacious stage for criminal policy was also seen for several years after 1955. During this period, the "Yokohama method" was introduced through cooperation on

probation, centering on the Yokohama District Public Prosecutor's Office. Hayashi stated that there was also "lively" debate about the conditions of punishment during the aforementioned period. In other words, he pointed to the debate that took place during the Penal Code Amendment Preparation Draft Bill (1956), the Amendment of the Penal Code Draft Bill (1971), which was considered and determined by the Special Committee on Criminal Law of the Legislative Council of the Ministry of Justice, and the Amendment of the Penal Code Draft Bill (1979). Hayashi pointed out that within these debates, the issues of the unification of punishment had already been raised, but it was not realized although the basis for actively carrying out correctional treatment not limited to prison work was stated explicitly.[5] Furthermore, Hayashi indicated that work on the amendment of the Penal Code was not realized due to the strong criticism against the Amendment of the Penal Code Draft Bill; however, he felt that there is a need to reconsider, from a contemporary viewpoint, the system for prevention of recidivism, including a debate on punishment unification in the context of the amendment work.[6]

In the debate concerning the Prison Law Amendment, Ishizuka, on the other hand, expressed the need for care with respect to the relationship between the principle of the sentenced person regarding treatment and the "obligation" for correctional treatment from the viewpoint of respecting the independence of the inmate.[7] In particular, concerning the treatment principle, in the outline that became the substance of the Prison Law Amendment of 1980, the treatment of sentenced persons was to "develop their awareness," but in the 1982 Bill, the expression "develop their awareness" was deleted, and then re-inserted in the 1987 Bill, and finally retained in the 1991 Bill. Furthermore, the term "develop their awareness" also remains in the Act on Treatment of Inmates. Examining the text from this perspective gives the impression that great importance is given to the independence of the inmate. However, Ishizuka points out that the aim of the treatment in the outline was "correction" and "re-integration into society," and furthermore, that there was conflict on whether the phrase "appeal to self-awareness" was driven from a functional perspective to carry out effective treatment or was from a perspective based on the autonomy/independence of the inmate.[8] There is arguably a need to reconsider the discussion concerning the recent "unification of punishment" from the perspective of the "independence of the inmate" in the changes in the debate surrounding these Prison Law amendments as well.

There has been discussion on the relationship and harmonization of the

active education improvement principle in the administration of punishment and passivism in the administration of punishment. This struggle has been reflected particularly in the debates around drug offenses, which are indeed the subject of this article. This is the "Drug dependency withdrawal guidance" is included as special reform guidance in the Act on the Treatment of Inmates, which has been enforced since 2006 resulting from the above Prison Law Amendment. Also, in the Recidivism Prevention Promotion Plan, it is clearly expressed as a separate specific type of crime alongside the state of support for elderly people and people with disabilities. Furthermore, "dependence" on medical care is a problem for a person's independence and way of life, and whether to protect this for social security reasons or to continue to perceive it as a criminal justice problem is also becoming an issue increasingly present at international levels.[9] Accordingly, this article will survey the law reforms and lawmaking surrounding people who commit drug offenses, and in particular, people who have committed the offense of simple self-use and the offense of simple possession with the intention for self-use, which make up the 90% of the violations of the Stimulants Control Act. This article examines how the merits and demerits of special reform guidance and "developing their awareness" in the treatment principle of the Act on the Treatment of Inmates should be perceived and the various issues in implementing a "recovery program" in criminal justice.[10]

I. Law Reform Surrounding Drug Offenses

1. Law reform and lawmaking to date

Thorough regulation of simple self-users and simple possessors was central to the response in Japan's criminal justice to drug offenders. A high likelihood of a suspended sentence in the case of a first offense was the norm.[11] However, cases of a subsequent offense during a suspended sentence (re-use or possession for that purpose) led to a jail sentence. The assessment of culpability pronounced becomes heavier for each person and there is evidence of increasingly severe punishment.[12] However, the solution to this fundamental problem did not see a reduction in the rate of recidivism. Therefore, change has been slow through collaboration with and support of private institutions and through recovery support and administration for users. It is not

true that strict regulation exists only for terminal users as per the Five-Year Drug Abuse Prevention Plan and the Ministry of Justice Ministerial Meeting Concerning Measures against Crime, etc.

It is on this background that law reform and law making in criminal justice have taken place. These cover items such as implementing policy that includes cognitive-behavioral interventions and counseling to divert people from criminal justice at the earliest possible period, enriching drug dependency withdrawal guidance within penal institutions, etc., and carrying out drug tests on probationers and counseling them while on conditional release. For example, a summary trial procedure commenced based on the "Law for Partial Amendment to the Code of Criminal Procedure and Other Related Laws" (Act No. 62 of 2004), a summary trial procedure commenced, and in the case of drug offenses where there are few cases of denials, disposal through courts became quick. By implementing this, suspended sentences with probation are handed down and community-based treatment is carried out in which drug improvement programs and urine testing are performed under the administration of probation officers. The law reform responsible for this was the "Act for Partial Amendment of the Probationary Supervision of Persons Under Suspension of Execution of Sentence Law" (Act No. 15 of 2006). As a result of this law reform, the special compliance rules, which until then could only be attached to item (iii) surveillance, etc., for persons on parole, could also be attached to persons on a suspended sentence, an item (iv) subject that is probation. Furthermore, the "Offenders Rehabilitation Act" (Act No. 88 of 2007) led to the rearrangement and consolidation of the Offenders Prevention and Rehabilitation Act and the Act for Partial Amendment of the Probationary Supervision of Persons Under Suspension of Execution of Sentence Act. In other words, with the introduction of the above legal reforms, it became possible to create a program, based on cognitive-behavioral therapy, making drug testing obligatory as a special compliance rule for a person on a suspended sentence.

Furthermore, the object of the discussion in the 2016 Report and the Justice Ministry's Legislative Council Juvenile Act / Penal Code (Related to the Age of Juveniles / Treatment of Criminals) Subcommittee was recidivism prevention measures that were aimed at suspension of prosecution and deferred sentences. Furthermore, as a result of the "Act to Partially Amend the Penal Code and Related Laws" (Act No. 49 of 2013) and the "Act Concerning Partial Suspension of Execution for Persons Committing the Offence of Drug

Possession and Related Offences" (Act No. 50 of 2013), it became possible to partially administer a prison sentence or a suspended sentence entirely, such that part of it would be a prison sentence, and the remainder of the prison term would be a suspended sentence, while until then sentencing necessarily resulted in either a prison sentence or a suspended sentence.[13] Indeed, while this law is not only targeted at drug offenders, an analysis of the implementation of the law one year after it came into force showed that a partial suspension was handed down to 1,596 defendants, of which 93% were for drug offenses (including not only stimulant drugs but also others covered under the Cannabis Control Act, etc.).

I will next survey the law surrounding drug offenders in criminal institutions. In particular, special reform guidance became possible as a result of the "Act on Detention Facilities and Treatment of Inmates" (Act No. 50 of 2005) (strictly speaking, it came into being one year earlier through Article 82 of the Law on the Detention Facilities and the Treatment of Sentenced Persons). The special reform guidance led to the eventual participation of the staff of private recovery support institutions, such as the Drug Addiction Rehabilitation Center (DARC), in the program, something that was previously part of Blocker education. Programs using cognitive-behavioral therapy centered on SMARPP were then established.[14] In other words, treatment shifted from education (which consisted in communicating the harm of initial use) to a more systematic program of dependence recovery. In the next section I will examine the debate surrounding these reforms, that many regard as natural outcome of the Act on the Treatment of Inmates.

2. The debate on the unification of punishment

Using the opportunity of the reduction in the voting age from 20 years to 18 years, the reduction of the applicable age for the Juvenile Act was also debated. The first meeting of the Liberal Democratic Policy Research Council "Special Committee on Age of Adulthood" took place in April 2015, while in September 2015, the "Recommendation concerning the Age of Adulthood" was submitted to the Minister for Justice.[15] Furthermore, in November 2015, the Ministry of Justice "Study Group on the State of Criminal Law Regarding Young People" commenced, and 10 hearings, etc., were conducted. In December 2016, the Ministry of Justice Study Group on the State of Criminal Law Regarding Young people released its "Report." The discussion in the

Report was primarily the state of "criminal policy measures regarding young people" and not the issue concerning age, which was the main theme. However, a few points from the criminal law reform debate were evident. This would be a repeat of the "introduction," but it was considered that there are cases that contribute to improved rehabilitation and prevention of recidivism in young people even above the age of 20 years, and not necessarily only among those below the age of 20. On the basis of enriching disposition and assessment, the following issues were examined: (1) "criminal policy measures for enriching the institutional treatment of sentenced persons"; (2) "criminal policy measures for strengthening the link between institutional treatment and community-based treatment"; (3) "criminal policy measures for enriching community-based treatment"; and (4) "criminal policy measures for preventing recidivism of persons subject to a fine or a suspended prosecution."[16]

In (1) "criminal policy measures to enrich the institutional treatment of sentenced persons," in this discussion, the Report states, "(in short) in respect of imprisonment with work within imprisonment in the existing law, work is considered the substance of the criminal sentence. Work fulfills an important role in the improvement of the sentenced person's reformation and rehabilitation; a specified period must be set aside for work in cases where other correctional treatment is also suitable, considering the characteristics of the sentenced person. In short, correctional treatment should be limited to better suit the individual, such as by devoting a large part of the prison term to reform guidance and course instruction, etc., suited to the inmate's characteristics. Furthermore, in relation to imprisonment without work, the carrying out of work can be made uniformly obligatory, and there are cases, depending on the sentenced person, in which work is useful for a person's improved reformation and rehabilitation. Accordingly, legal and institutional measures that make work obligatory are considered for integrating imprisonment with work / imprisonment without work, including all kinds of correctional treatment, for a sentenced person." "The unification of punishment," centered on imprisonment with work and not on imprisonment without work, was raised as an item for examination.[17]

Kawaide, one of the members of the Ministry of Justice "Study Group on the State of Criminal Law Regarding Young People" stated that "having lowered the applicable age, there was also a proposal to make it possible to apply protective measures when necessary to young adults including 18-and

19-year-olds as well. If this was to be applied in the correctional context, measures corresponding to juvenile institution referral would be implemented for young adults, and correctional education would be conducted." Kawaide raised the fact that in former correctional operations, persons under the age of 26 years had been detained in juvenile prison and given special treatment, etc. However, from a theoretical viewpoint, the state of treatment of young adults, elderly people, disabled people, and so on- in other words, not limited to juveniles, should be actively evaluated from the perspective of seeking the sentenced persons' improved reformation and rehabilitation, which is considered an issue. Kawaide is explicit in saying that it merits examination.[18] Indeed, by doing away with the difference between imprisonment in which prescribed work is obligatory pursuant to Article 12 of the Criminal Code and imprisonment in which it is not, and by integrating the punishment, it might be possible to carry out effective treatment from the perspective of "preventing recidivism" by taking legal and institutional measures that can make work, including all kinds of corrective treatment, obligatory for a sentenced person. However, as Matsumiya states, this appears to be an integration into an "expanded punishment with work" as well by the abolishment of imprisonment without work.[19]

I wish to also consider the discussion that even if the applicable age is reduced, protective measures in correctional facilities, etc., can be put in place so that they can also be implemented for people over the age of 20 years. Indeed, raising the applicable age and carrying out protective measures for young adults, who are the subject of punishment, and reducing the applicable age and carrying out protective measures for young adults, who are the subject of criminal punishment, are close but different, in other words, the protective measures of juvenile institutions determined by domestic courts, provided for in Article 23 of the Juvenile Act, and the protective measures of penal institutions carrying out the punishment of imprisonment with work, provided for in Article 12 of the Penal Code, greatly differ. Hamai, based on his experience in attending court as an expert witness in lay-judge trials in criminal cases involving juveniles, points out that it is difficult to clearly understand the difference between a juvenile institution and a juvenile prison only from institution pamphlets and explanations provided by staff members.[20] With respect to the treatment in juvenile institutions, Hamai states that, from the prescription that the warden of the juvenile institution must not assign inmates work unrelated to correctional education, all treatment in a juvenile

institution must be education for the purpose of the juvenile's re-integration into society. He goes on to state that, on the other hand, juvenile prison is a place where punishment, not education, is carried out, and that even the same "work" and occupational training have a greatly different meaning.[21] Hence, even though a juvenile sentenced person (character "J"; this is an index of Japanese corrections) receives treatment in a juvenile prison and an adult sentenced person (character "Y") will receive treatment in a juvenile prison until the age of 26 years, it can never be considered that an educational (treatment) environment is in place, such as that in juvenile institutions. Particularly, in contrast to the duration and frequency of face-to-face meetings with juveniles in a small-scale juvenile institution, in a large-scale prison, the focus is on managing the treatment of the many sentenced persons. Hence, Hamai argues that while there has been progress in the specialization of staff members and personnel and in the efficient management of the prison, the response to those in need of re-upbringing has not been sufficient.[22]

As outlined above, in the first place, the reason for the existence of juvenile institutions (achieving the aims of the Juvenile Act to strive for education to provide for the healthy development of juveniles) and prisons (a place to carry out punishment) largely differ. Many issues remain no matter how "protective measures" are sought within this context.

II. Is Special Reform Guidance an Obligation?

According to Kawaide, correctional education with an emphasis on education arose from the need to attach importance to educative measures at the place where punishment is executed for juvenile inmates under 16 years. The decoupling of imprisonment with work and without prison work, and the fact that both persons sentenced to imprisonment with or without work also undergo correctional education, like persons sentenced to imprisonment with work, is regarded as ground breaking. Furthermore, this way of thinking is deemed to have become embodied in a general form in the later Act on Penal Detention Facilities and Treatment of Inmates. In other words, Kawaide points out that, in addition to prison work, a legal foundation is provided so that reform guidance and course guidance can be carried out, and it becomes possible to make these obligatory.[23] According to commentary opinion, etc., inmates have a legal obligation to accept special reform guidance carried out

on the basis of treatment guidelines decided by investigation results pursuant to paragraph (3) of Article 84 of the Act on Penal Detention Facilities and the Treatment of Inmates. If guidance is refused without just cause, it would result in a violation of the compliance rule in subparagraph (ix), paragraph (2) of Article 74 of that Act, and disciplinary punishment would be imposed on the basis of paragraph (1) of Article 150. There is a strong view that reform guidance has been made obligatory based on this. However, in relation to this, there are still those who consider that "while it is obligatory, care should be taken in its implementation" and also those who argue that "it was not obligatory in the first place, and that penal provisions also cannot be imposed."[24] However, the debate on whether special reform guidance can be made obligatory continues to be lively.

Yoshioka offers the following reasons for not considering reform guidance obligatory. That is, the perception that reform guidance is compelled by being obligatory is unjustifiable from the perspective of regarding it as treatment of a "criminal." Yoshioka firmly considers that from the perspective of the possibility of acquittal on retrial, the word "criminal" treatment itself is not appropriate; rather, it is the treatment of a "sentenced person."[25] Therefore, he regards as inconsistent the act of the state carrying out treatment to forcibly reform and rehabilitate such persons. Furthermore, Yoshioka considers it natural to think of the "treatment principles" in Article 30 of the Act on Penal Detention Facilities and the Treatment of Inmates as including not only a person who has been sentenced to imprisonment with work but also a person who has been sentenced to imprisonment without work, and the treatment principles cited for detainees awaiting a judicial decision and inmates sentenced to death. In other words, he regards this treatment principle as being close in meaning to the general treatment in the institution and that the rationale underlying this treatment is to make persons sentenced to imprisonment with work and persons sentenced to imprisonment without work to work as well as carry out reform guidance and course guidance in parallel. That is, Yoshioka states "from the point of view that, at the least, correctional treatment (paragraph (1) of Article 84) does not distinguish between inmates sentenced to imprisonment with work and those sentenced to imprisonment without work and treats them equally, so that the obligation as correctional treatment does not mean "mandatory" in the sense of the content of the punishment. This has significance because rules in the institution that inmates, including sentenced persons, should comply with are only to that extent, even

if indirect compulsion through disciplinary punishment, etc., is possible, and there is no mistake that the level is substantially different from that under the old Prison Act.[26]

Furthermore, according to Toyama, Director-General of the Correction Bureau in the Ministry of Justice, "it is not an obligation arising from the Penal Code, but an obligation arising from the administration of punishment."[27] However, an examination of the view that something that is not an obligation arising from the Penal Code can be undertaken through the administration of punishment is probably necessary. For example, there are cases where there are reasons from the point of view of the administration of punishment, such as not permitting acts being committed, that impair the appropriate correctional institution operations for the institution management. Article 74 of the Act on Penal Detention Facilities and the Treatment of Inmates prescribes acts that correspond to compliance rules. Paragraph (1) provides that "wardens of penal institutions are to determine the rules to be observed by inmates," and the following specific compliance rules are set by paragraph (2). That is, that paragraph prescribes (i) "prohibition against criminal acts," (ii) "prohibition against any behavior or statement made in a rude or outrageous manner, or any act causing trouble to others," (iii) "prohibition against self-harm," (iv) "prohibition against obstructing staff members of the penal institution from performing their duties," (v) "prohibition against acts likely to hamper the secure custody of themselves or other inmates," (vi) "prohibition against acts which may disrupt the security of the penal institution," (vii) "prohibition against acts detrimental to hygiene or public morals inside the penal institution," (viii) "prohibition against the wrongful use, possession, transfer, etc., of cash and other articles," (ix) "prohibition against evading work prescribed in Article 92 or 93, or refusal of the guidance prescribed in the items of Article 85, paragraph (1), Article 103, or 104 without just cause," (x) "beyond what is set forth in the preceding items, matters necessary for maintaining discipline and order in the penal institution" and (xi) "prohibition against any attempt to conduct, incitement, inducement, or aid of acts against either the compliance rules, which stipulate the matters set forth in the preceding items, or the special compliance rules prescribed in Article 96, paragraph (4)." Furthermore, paragraph (3) provides "beyond what is provided for in the preceding two paragraphs, wardens of penal institutions or staff members designated by them may, if necessary for maintaining discipline and order in the penal institution, give instructions to

inmates with regard to their life and behavior." In this way, the compliance rules prescribed in paragraph (2) of Article 74 are all set for the purpose of safe administration, for the safety of inmates, and for the safety of staff members. Even from the perspective of administrative law, it is probably difficult to say that, despite this, compliance rules unilaterally infringe on the rights of inmates. If this were the case, then it could not be considered that only (ix) applies as a unilateral right violation. In other words, the setting for an obligation arising from the administration of punishment is limited to situations where there is a possibility of risk in the context of the operation of institution administration, such as safety of the institution, safety of inmates, safety of staff members, etc. It is reasonable to consider that a person not wanting to receive reform guidance is a "just cause," insofar as there is no possibility that the danger will extend to the institution, such as an outbreak of riots, etc.

Furthermore, also from the aspect of the effect, a problem also arises when it does not involve developing the person's self-control. Nowadays, evidence-based decision-making is cited, but this does not fit with things such as guidance for drug dependence relapse prevention and guidance for organized crime group disassociation. For example, unlike guidance for prevention of sex offenses, which is a program based on the results from Canada, guidance for drug dependence relapse prevention, for organized crime group disassociation, etc., and particularly for enhancing a person's willpower, is considered based on one decisive factor. In particular, in group meetings of recovery programs for a certain drug in the context of special reform guidance for drug-related offenders, the AA and NA method, called the 12-steps program, is often used. The first part of the 12-steps program is that treatment starts from acknowledging that one is powerless with respect to drugs and dependence. This is not to say that all people who do not undertake the 12-steps program will not recover, but unmistakably, at least recognizing one's drug problem and in some way aspiring to recover from it is an important factor. Therefore, it is important to carry out a motivational interview with a person who has ambivalent feelings toward drug use, such as "I want to change my behavior, but I don't really care."[28] The method, based on the premise of contradictory emotions, such as "I want to stop, but do not seem able to," continues to change the feelings of a negative person to the rejection of criminality, without allowing the person to confront these emotions. In other words, it works by not denying the feelings at both extremes, but by clarifying the contradiction through empathy and supporting the feeling of

self-affirmation. In this way, "developing their awareness" is sought to the extent possible, and efforts are repeatedly made so that people enroll in a drug dependency recovery program themselves.

III. What Does "Developing Their Awareness" Mean?

1. Changes in the Amendment of the Prison Law

The issue of the legal status of inmates has developed together with debate concerning reform of the Penal Code and the Prison Act. Ishihara argues that, there needs to be harmony between the active education improvement principle in the administration of punishment, from the perspective of human rights protection for sentenced persons, and passivism in the administration of punishment, which refrains from intervention. Ishihara states that "while pre-suppositionally endorsing the move from retribution to reform education, the modern (1970s) idea of administration of punishment in imprisonment led to a suspicion that emphasizing reform education under an administration of punishment structure, such as that of today (1970s), would lead to the strengthening of interventions with regard to sentenced persons, an expansion of obligations, and cause the sentenced persons to be dealt with as objects of treatment. Based on this, expansion of independent freedom and security of human rights of sentenced persons were emphasized. Self-restraint in the administration of punishment and deterrence in the administration of punishment, which is the power function of the state, were asserted as a human rights protection model for the administration of punishment. However, on the other hand, if this is excessively emphasized and if it denies the meaning of treatment that a penal institution carries out, there is probably a risk of it sliding into the nihilism of administration of punishment. Considering the administration of punishment going forward and also the debate concerning amendment of the administration of punishment legislation, neither side should be pressured, and a pathway that harmonizes and sublates both needs to be sought" (notation of (1970s) in above quote is by the author).[29] Ishihara points out that there is a huge gap in content regarding the necessary legal status of sentenced inmates in the reform of the administration of punishment and in the administration of punishment legislation.

It may be said that this was also a central point in the debate on the legal

status of inmates, in particular, debates on the treatment principle, and independence and individualization. In relation to the treatment principle, Kamoshita states that "while there was no clear provision relating to the treatment principle in the old law, paragraphs (1) and (2) of Article 24 of that law were interpreted to imply that the aim of treatment was to provide sentenced persons with reformation and rehabilitation and help them re-integrate into society."[30] In fact, the need for sentenced persons to "develop their awareness" has been stipulated in the law since Article 30 of the Act on Penal Detention Facilities and the Treatment of Inmates (strictly speaking the Act on the Treatment of Sentenced Persons of the previous year), which provides that "sentenced persons are to be treated with the aim of stimulating motivation for reformation and rehabilitation and developing adaptability to life in society by developing their awareness while taking into consideration their personality and circumstances." However, in the debate on the reform of the Prison Law, there were changes surrounding the wording "developing their awareness" before it was given statutory form. Ishizuka points out that there was contention surrounding the treatment principles as follows.[31] That is, the "General Plan for the Outline of the Prison Law Amendment" (report of the Legislative Council of the Ministry of Justice, November 25, 1980) provided that "the treatment of sentenced persons is to be carried out considering their personality and circumstances, developing their awareness, stimulating their motivation for reformation and rehabilitation, and developing adaptability to life in society in order to provide their re-integration into society." The Penal Institution Bill (April 28, 1982, submitted to the 96th session of the Diet) provided that "sentenced persons are to be treated with the aim of stimulating motivation for reformation and rehabilitation and developing adaptability to life in society while taking into consideration their personality and circumstances and continuing to ensure their detention." The words "developing their awareness" were deleted, and the words "ensure their detention" were added in their place. Also, after this, the words "encouraging their awareness" were added in the "Penal Institution Bill" (1985), which provided that "sentenced persons are to be treated with the aim of stimulating motivation for reformation and rehabilitation and developing adaptability to life in society by encouraging their awareness while taking into consideration their personality and circumstances and continuing to ensure their detention." The words "encouraging their awareness" were once again amended to "developing their awareness" in the subsequent "Penal Institutions Bill" (1987, submitted

to the 108th session of the Diet), which provided that "sentenced persons are to be treated with the aim of stimulating motivation for reformation and rehabilitation and developing adaptability to life in society by developing their awareness, while taking into consideration their personality and circumstances and continuing to ensure their detention." Furthermore, "developing their awareness" also remained in the "Prison Institution Bill" (1990, submitted to the 117th session of the Diet). Also, the treatment principle in the new laws of 2005 and 2006 became "sentenced persons are to be treated with the aim of stimulating motivation for reformation and rehabilitation and developing adaptability to life in society by developing their awareness while taking into consideration their personality and circumstances." In the end, the words "continuing to ensure their detention" were left out, and the words "developing their awareness" remained.

An examination of the form of these provisions reveals that, apparently, the independence of inmates is regarded as important; however, Ishizuka points out that there is an issue in its substance.[32] This is because he considers it ambiguous as to whether "developing their awareness" is wording for something based on inmates' independence/autonomy, or whether it is only sought as a necessary factor from the functional point of view of carrying out effective treatment. Fujii criticizes this point saying that "from the development of international human rights, the subjects of treatment are inmates, and institutions are something that focus on support persons for inmates. Despite this, the wishes of inmates are no more than 'considered' and not only is the institution not bound by the inmates' wishes, but it is able to enforce treatment contrary to their will."[33]

2. The independence of inmates according to international standards

In the 1955 "Standard Minimum Rules," attention was not given to the subjectivity of inmates; rather, the effect of the treatment was prioritized. However, in the 1973 "European Standard Minimum Rules for the Treatment of Prisoners," the active participation of inmates in the preparation of treatment plans and communication between inmates and personnel are the guiding principles. Further, the 1987 "European Prison Rules" provides for respect for people, and that following a discussion between an inmate and a staff member(s), an individual treatment plan should be prepared. This led to a promotion of inmates independently participating in the treatment. The

subject is the inmate, and the institution has an obligation to offer the inmate opportunities to participate in its various activities. This probably means that it is necessary to provide for a comprehensive educational program that allows the inmate to achieve his or her needs. Furthermore, the United Nations Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules) also refines imprisonment with Rule 3, which provides that "imprisonment and other measures that result in cutting off persons from the outside world are afflictive by the very fact of taking from these persons the right of self-determination by depriving them of their liberty. Therefore, the prison system shall not, except as incidental to justifiable separation or the maintenance of discipline, aggravate the suffering inherent in such a situation."[34]

Furthermore, an examination of the image of an inmate assumed by the Act on Penal Detention Facilities and the Treatment of Inmates is necessary. For example, the commentary of the Act provides that "inmates, largely, lack normal consciousness; their mind and body are unhealthy and they do not possess the necessary knowledge of and attitude toward life to adapt to society."[35] The tendency is to view inmates as the object of treatment. Therefore, this became law in which institutions emphasize giving instructions such as, "wake up," "grow," and "learn" to people who become the object of reform guidance.[36]

IV. Implementing "Drug Dependence Recovery Programs" in Criminal Justice

1. Contemporary issues

Based on endorsing the assumption that presently there continues to be a move again in the administration of the punishment principle of imprisonment from punitiveness to reform education, a path probably needs to be sought that balances and sublates the active and passive models of the administration of punishment. In particular, the point on intervention for active re-integration into society has become frequent in the debates surrounding forensic social services, and there are modern methods to evaluate this. As noted in Section I of this article, there seems to be a change in the intervention regarding drug offenders together with the actual state of affairs.

Special reform guidance is implemented as per Article 103 of the Act on

Penal Detention Facilities and Treatment of Inmates, and from merely educating offenders of the evils of drug use until now, it has become possible for people from external private support institutions to carry out recovery programs, with recovery programs using cognitive behavioral therapy. In the debate concerning the unification of imprisonment for drug offenses in Japan, an active administration of punishment is being sought, rather than a refinement of imprisonment, such as the Mandela Rules, etc. In other words, the focus of the debate is increasingly becoming about integration into an expanded imprisonment with work and not imprisonment without work. Accordingly, in the final section, I consider the implementation of drug dependency recovery programs in criminal justice in the current situation of unification of imprisonment.

As referred to in the "Introduction," the Report states, "(in short) in respect of imprisonment with work within imprisonment in existing law, work is considered the substance of the criminal sentence. Work fulfills an important role in the improvement of the sentenced person's reformation and rehabilitation, and a specific period must be set aside for work in cases where other correctional treatment is also suitable, considering the characteristics of the sentenced person. In short, correctional treatment should be limited to better suit the individual, such as by devoting a large part of the prison term to reform guidance and course instruction, etc., suited to the inmate's characteristics. Furthermore, in relation to imprisonment without work, the carrying out of work can be made uniformly obligatory, and there are cases, depending on the characteristics of the sentenced person, wherein work is useful for the improved reformation and rehabilitation of a person. Accordingly, legal and institutional measures that make work obligatory for a sentenced person, including all kinds of correctional treatment, are considered based on integrating imprisonment with work/imprisonment without work." "The unification of imprisonment," centered on imprisonment with work and imprisonment without work, was raised as an item for examination.[37] Furthermore, the "Recidivism Prevention Promotion Plan" (below, the Plan) was submitted on December 15, 2017, as a result of the Recidivism Prevention Promotion Act, which was approved in December 2016.[38] There are 115 measures included in the Plan. In addition to work of former inmates, securing residences, and promotion of medical and welfare services, the Plan focuses on the recidivism rate of drug offenders and refers to carrying out treatment/support. As outlined above, while implementation of law reform and system for recovery

support continues to come together, there is continuing evidence that "drug offenders" should be dealt with punishment.

2. "Therapy" and "welfare"

Internationally, drug addiction is originally considered not a problem of will, but a problem associated with the state of the recovery programs. There is debate on whether this has to be dealt with by criminal law, and if it is, how to eliminate the element of force, how to treat "consent," and whether to deal with it as social security without relying on criminal law.[39] However, in Japan, there is a tendency to regard drug dependence withdrawal guidance as obligatory and enforceable as a necessary treatment for reformation and rehabilitation. Indeed, by creating an awareness about it as a "sickness" and the person as needing treatment, criticism of the act of deviation is alleviated. However, while regarding it as a sickness, people who become the object of this problem are pressurized into "receiving treatment."[40] However, mandatory treatment that restricts freedom through criminal law procedures cannot happen only because the treatment for the sickness is considered beneficial for the person. This is because mandatory treatment for social security and crime prevention becomes a problem that is also linked to measures aimed at preserving public peace.

However, Gostin points out that treatment compulsorily carried out is justified if it is acceptable to the person involved.[41] In particular, he considers it possible if the treatment is readily accepted and it does not contravene procedural due process to the extent possible. However, the problem that this "choice" is based on criminal punishment continues to remain. However much it is termed as "treatment" and "welfare," "the element of punishment" underlies the treatment program. One cannot forget that this is taking place in the context of criminal law procedures. Regardless of the extent of the treatment intervention, the state must not be granted the authority to restrict freedom for social security. Even when the treatment is beneficial "for the person," the problem remains that the implementation is based on criminal punishment.

Conclusion

This article focused on the debate concerning the unification of punishment in correctional institutions for drug offenses. The discussion by the Justice Ministry's Legislative Council Juvenile Act / Penal Code (Related to the Age of Juveniles / Treatment of Criminals) Subcommittee includes in its agenda new items for community-based treatment, such as "the state of the suspended sentence system for all sentences," "the state of recidivism prevention measures accompanying suspension of prosecution, etc.," "deferred sentences," etc. The meaning of imprisonment, not limited to drug offenses, is being re-questioned from its origin.

Arguably, in recent years, room to debate on what is "punishment" seems to be disappearing in the university law faculty as well. Even in criminal law classes, opportunities to spend a large amount of time to study the theory of punishment are also on the verge of disappearing. Probably in the present state of affairs in the context of fewer and fewer law faculties conducting courses on criminal policy, the opportunities to reconsider society surrounding "crime" and "re-integration into society" from a criminological view will continue to further decrease. Here, I wish to introduce the view of criminology.

In *The Exclusive Society*, Jock Young stated that "with structural unemployment arising and crimes taking place, exclusion occurs in response to these anti-social acts."[42] It appears as if the social structure, called "the exclusive society," is contrasted with "the inclusive society," in which thoughts on re-integration into society are mainstream. However, this is not simply exclusion from society only for being strict with regard to crime. Rather, Martin Fisher and Helen Beckett point out that since neoliberalism, in a society in which fluid personalization is advancing, the cause also leads to the use of treatment programs in drug offenses in the criminal justice system because of its cost-effectiveness.[43] Labeling theory gave rise to the viewpoint of using selective sanction and labels to give rise to further deviation. In the setting of re-integration into society, this also becomes a label. In other words, a treatment program meant for "re-integration into society" is pressed upon the object and carried out. Therefore, people who do not receive the so-called effective treatment are considered a risk factor. It is considered that a drug offender views receiving treatment as a rational choice.[44] Jock Young, who defined the "exclusive society," later points out that an "excessively

inclusive" society will also be a problem.[45] "Exclusive inclusion," such as the debate on the unification of imprisonment, which regards treatment for improved reformation and rehabilitation to be obligatory, is not giving rise to an age of thought on re-integration into society. It only demonstrates the making of a person who has a drug dependency into a stranger and the creation of an existence that lacks rational judgment and turns a rational and normal person into a "sick person."[46]

Notes

1. This article is a revised and amended version of the author's article "Jiyūkei no tanitsuka to yakubutsujihan [Unification of imprisonment and drug offences]," Keihōdokushokai "Hanzai to Keibatsu [Crime and Punishment]," Seibundoh, 2018, No. 27, pp. 51–72.
2. "Report of the study group on the state of criminal law regarding young persons" http://www.moj.go.jp/content/001210649.pdf (last accessed on June 30, 2018) pp. 4–16.
3. (Report: footnote 2) pp. 9–10.
4. Makoto Hayashi "Keijisesaku to rippō [Criminal policy and lawmaking]" "Tsumi to batsu [Crime and Punishment]" Vol 53, No 4 (2016) p. 2.
5. (Hayashi: footnote 4) pp. 2–4. Hayashi also points out that items other than those discussed in the "Report of the study group on the state of criminal law regarding young people" and the "Conference for the Recidivism Prevention Promotion Plan" (such as the state of the second suspended sentences and the state of the deferred sentence system) had already been debated regarding the Penal Code amendment and that in order to enrich the current criminal policy, it is our duty to continue to advance the discussion from a modern viewpoint.
6. (Hayashi: footnote 4) p. 4.
7. Shinichi Ishizuka "Sengokangokuhōkaiseishi to hishūyōshashogūhō – kaikaku no tōtatsuten toshite no jukeisha no shutaisei – [History of post-war Prison Law amendments and Inmate Treatment Law – The autonomy of sentenced persons as the goal of reform" "Hōritsujihō" Vol 80, No 9 (2008) pp. 53–57.
8. (Ishizuka: footnote 7) pp. 54–55.
9. Debate has begun in the United Nations Office on Drugs and Crime (UNODC) as to whether the punishment of drug users through criminal justice itself is a "human rights violation." "Treatment and Care of People with Drug Use Disorders in Contact with the Criminal Justice System: Alternatives to Conviction or Punishment." http://www.unodc.org/unodc/en/drug-prevention-and-treatment/

treatment-and-care-of-people-with-drug-use-disorders-in-contact-with-the-criminal-justice-system_-alternatives-to-conviction-or-punishment.html (last accessed on June 30, 2018).

10. "Imprisonment," the theme of this article, should also properly examine community-based treatment. However, because this article focuses on examining the special theme "unification of punishment" and for reasons of article length, community-based treatment is omitted. Further, in relation to community-based treatment issues surrounding drug offenses, please refer to the author's article "Shanaishogū no aratana hōkōsei – yakubutsujihansha o chūshin ni – [A new direction for community based treatment – a focus on drug offenders]" Ryukokuhōgaku, Vol. 43, No. 1 (2010) pp. 176–208.
11. According to the annual report of judicial statistics, the punishment delivered for violations of the Stimulants Control Act in the District Court in 2015 was suspended sentences for 3,701 of the total 9,520 cases.
12. (article by author: footnote 10) pp. 193–196.
13. Since a partial suspended sentence is rather a partial prison term, it could be suggested that I should have included it in the "unification of imprisonment" issue, which is the subject of this paper. However, for details regarding the issues in the partial suspended sentence system, refer to the author's article "Yakubutsushiyōsha ni taisuru kei no ichibu no shikōyūyoseido – kei no kobetsuka to ichibuyūyo [The suspended sentence system of partial imprisonment for drug users – the individualization of imprisonment and partial suspension] Rissho Law Review, Vol. 46, No. 1–2 (2013) pp. 87–199.
14. Matsumoto Toshihiko and Fumi Imamura "SMARPP-24 - busshitsūshiyōshōgaichiryō puroguramu – [SMARPP-24- substance use disorder treatment program" (Kongoshuppan, 2015).
15. Liberal Democratic Policy Research Council "Recommendation concerning the Age of Adulthood" http://jimin.ncss.nifty.com/pdf/news/policy/130566_1.pdf (last accessed on June 30, 2018).
16. (Report: footnote 2) http://www.moj.go.jp/content/001210649.pdf (last accessed on June 30, 2018) pp. 4–16.
17. (Report: footnote 2) pp. 9–10.
18. Toshihiro Kawaide "Jiyūkei ni okeru kyōseishori no hōtekiichizukeni tsuite [On the legal status of correctional treatment in imprisonment]" Keisei, Vo. 127, No. 4 (2016) pp. 14–15.
19. Takaaki Matsumiya "'Jiyūkei no tanitsuka' to keibatsumokuteki / gyōkeimokuteki ['Unification of imprisonment' and aim of punishment / aim of administration of punishment]" Hōritsujiho Vol. 89, No. 4 (2017) p. 79.
20. Koichi Hamai "Shōnenjiken no saibaninsaiban de gironsarerubekikoto – shōnenin to shōnenkeimusho no chigai o chūshin – [What should be debated at lay judge trails in juvenile cases – focusing on the difference between juvenile institutions and juvenile prisons]" Quarterly Keiji Bengo, No.78 (2014) pp.

125–126.

21. (Koichi: footnote 20) p. 126.
22. (Koichi: footnote 20) p. 126.
23. (Kawaide: footnote 18) pp. 16–17. According to Kawaide, the reason for it to be obligatory is "in the Act on Penal Detention Facilities and the Treatment of Inmates, where correctional treatment takes place on the basis of the understanding that the aim of imprisonment with work and imprisonment without work includes re-integration into society by the person's reformation and rehabilitation. In this case, the rights of sentenced persons can be limited to a necessary scope (for instance, limitations with respect to access to books and visits) for achieving the aim of correctional treatment."
24. In terms of sources that consider that it cannot be made obligatory, see Masakazu Doi 'Shakaifukki no tame no shogū [Treatment for the purposes of re-integration into society] in "Keimusho shisutemu saikōchiku e no sishin [A guide for the re-building of the prison system]" edited by Kōichi Kikuta and Yūichi Kaido (Nippon Hyoron Sha, 2007) p. 81, (Ishizuka: footnote 7) pp. 55–56 etc. Also, the author's article "Keijishihō ni okeru yakubutsuizonchiryō puroguramu no igi – kaifuku suru kenri to gimu – [The significance of drug dependency treatment programs in criminal justice – the right and obligation to recover]" Keihō Zasshi, Vol 57, No. 2 (2018) pp. 229–247.
25. Kazuo Yoshioka 'Kangokuhō no kaisei to keijishūyōshisetsu no tenbō [The amendment of the Prison Act and the outlook for penal detention facilities] edited by the publication committee for the compilation of essays in celebration of Professor Maeno Ikuzō's 70th birthday "Keijiseisakugaku no taikei [Outline of criminal policy studies]" (Gendaijinbunsha, 2008) pp. 3–17.
26. (Yoshioka: footnote 25) pp. 3–17.
27. Satoshi Tomiyama 'Keijishisetsu ni okeru jiyūkei no shikkō to kyōseishogū no ichizuke [The execution of imprisonment in penal institutions and the status of correctional treatment] Tsumi to batsu [Crime and Punishment], Vol. 54, No. 2 (2017) pp. 2–4.
28. Akira Satomi 'D*ōkizuke* mensetsuhō (mae) – kihontekina kangaekata [Motivational interview methods (first part) – the fundamental way of thinking]' ("Keisei", Vol. 120, No. 6, 2009) pp. 98-104, Emi Togawa 'Dōkizuke mensetsuhō (gō) – kōseijitsumu ni okeru jissen – [Motivational interview methods (second part) – implementation in correctional practice]' ("Keisei", Vol. 120, No. 7, 2009) pp. 114–119.
29. Akira Ishihawa 'Jukeisha no hōtekichiikōsatsu no hōhōron – shōraino gyōkei no tame ni – [Methodology in the consideration in the legal status of sentenced persons – for future administration of punishment]' Keihōzassshi, Vol. 21, No 1 (1976) p. 2.
30. Moritaka Kamoshita "Zenteishingyōkeihōyōron [complete guide to the newly revised law administration of punishment law]" (Tokyo Horei Publishing, 2006)

p. 370.

31. (Ishizuka: footnote 7) pp. 54–55.
32. (Ishizuka: footnote 7) p. 55.
33. Gō Fujii 'Kobetsutekishogūkeikaku no jishi – "shogū no kobetsuka" kara "kobetsukasareta enjo" e [Implementation of individual treatment plans – "from individualized treatment" to "individualized support"]', edited by Keijiripōkenkyūkai "21 seiki no keishisetsu – gurōbaru standādo to shiminsanka – [Penal facilities in the 21st century – global standards and citizen participation]" (Nippon Hyoron Sha, 2003) p. 139.
34. 'United Nations Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules)' (translation by Prison Human Rights Centre) https://www.penalreform.org/wp-content/uploads/2016/12/Nelson-Mandela-Rules_Japanese_final.pdf (last accessed June 30, 2018). In terms of material raising the issue of the independence of the "treatment principle" based on international standards, see Doi Masakazu 'Ikkanshita shakaitekienjo [Constant social support]' Keisei, Vol. 108, No. 4 (1997) p. 55, (Fujii; footnote 33) p. 140 etc. For the debate on the relationship between treatment principle and the "unification of imprisonment," see: (Matsumiya: footnote 19) pp. 80–82.
35. Makoto Hayashi, Atsushi Kitamu and Toshiya Natori "Chikujōkaisetsu keijshūyōshisetsuhō [Annotated commentary Penal Detention Institution Law] (3rd edition)" (Yuhikaku Publishing, 2017: 1st edition published 2010) pp. 499–502.
36. (article by author: footnote 24) pp. 235–236.
37. (Report: footnote 2) pp. 9–10.
38. Ministry of Justice Conference for the Recidivism Prevention Promotion Plan 'Recidivism Prevention Promotion Plan (December 15, 2017)' http://www.moj.go.jp/content/001242753.pdf (last accessed June 30, 2018).
39. For material that examines the question of how to respect the "consent" of a person who is in criminal justice, please refer to the author's article "Keijishihō ni okeru yakubutsuizonchiryō puroguramu – 'kaifuku' o meguru kenri to gimu – [Drug dependency treatment programs in criminal justice – Rights and obligations surrounding 'recovery']" (Nippon Hyoron Sha, 2015). Further, for material that examines the implementation of social security without reliance on criminal punishment, refer to the author's article 'Porutogaru no yakubatsu seisaku chōsa hōkoku / 2014–2015 [Investigative report of drug policy in Portugal / 2014–2015]' Rissho Law Review, Vol. 49, No. 2, pp. 196–234.
40. Talcott Parsons Social structure and personality, New York Free Press, 1964, [Translation: Ryōzō Takeda, translation supervisor "Shakaikōzō to pāsonaritei" (Shinsensha, 1973, special edition published in 1985)].
41. Lawrence O. Gostin "Compulsory Treatment for Drug-dependent Persons: Justifications for a Public Health Approach to Drug Dependency," The Milbank Quarterly, 69 (4), 1991. pp 573–587.
42. Jock Young The Exclusive Society: Social Exclusion, Crime and Difference in

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43. Martin Frisher and Helen Beckett "Drug Use Desistance," Criminology and Criminal Justice, Vol. 6, No. 1, pp 127–145.
44. Pat O' Malley and Mariana Valverde "Pleasure, Freedom and Drugs: of 'Pleasure' in Liberal Governance of Drug and Alcohol Consumption," Sociology, Vol. 38. No. 1, pp. 25–42.
45. Jock Young The Vertigo of late modernity, SAGE Publication, 2007. [Translation: Chigaya Kinoshita, Yoshitaka Nakamura and Masao Maruyama "Kōkikindai no memai" Seidosha, 2008].
46. (Jock Young: footnote 45) p. 380.

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