

Historical Analysis of the Juvenile Justice System in Japan

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I . Introduction

There are two main pieces of legislation concerning treatment of juveniles in Japan. These are the Jido-Fukushi-Ho (Child Welfare Law) of 1947 and the Shonen-Ho (Juvenile Law) of 1949. The Shonen-Ho is thought of as the central pillar of the juvenile justice system in Japan. The Jido-Fukushi-Ho, however, does not play a great role in the treatment of juvenile delinquents. The reason that the Shonen-Ho dominates juvenile justice is because it has the functions of both welfare and justice. The hybrid character of the Shonen-Ho can be traced to the influence of the legislation of the United States. It is doubtful, however, whether or not the American idea of unifying the two functions can truly realized without contradiction, because the function of welfare is inconsistent with that of justice, and vice versa.

The Jido-Fukushi-Ho has been meaningless in the field of the treatment of juvenile delinquents due to the domination of the Shonen-Ho.

To remedy this inequality we think that the Jido - Fukushi - Ho should be applied more widely as a welfare law for juveniles. Concurrently, the application of the Shonen-Ho should be limited within its own

function as a criminal law for juveniles.

The very detachment of the functions and the two 'pure' pieces of legislation accordingly could lead to real cooperation between 'welfare' and 'justice'. The two functions should correspond to two pieces of legislation respectively.

The question then arises about legislative policy on juvenile treatment. What policy should we adopt in regard to the legislation of juvenile treatment? For the purpose of answering this question, we have to inquire into the Japanese history of legislation for dealing with juvenile delinquency. It is true that a large number of studies have been made on the juvenile justice system of Japan, but what seems to be lacking is historical analysis. Even though little attention has been given to the point, we will be able to find out the proper rearrangement of current legislation through an examination of the history of Japanese Juvenile Law. We have numerous arrangements of juvenile justice legislation before the 'single-track operation' of the Shonen-Ho of 1949. We are thus not concerned here with the present justice system of juveniles.

We may consider the history of juvenile law under the following heads : II. Criminal Law ; III. Quasi-Welfare Law for juveniles ; IV. Quasi-Criminal Law for juveniles ; and V. Analysis.

II. Criminal Law

Modern criminal law in Japan can be reasonably dated from the early years of the 8th century. For instance, section 38 of the Penal Code of 1907 (current criminal law), which is the provision on error, is derived from the provision of the Taiho-Ritsu (Penal Code) of 702. The Taiho-Ritsu, which consisted of 6 volumes, was generally patterned after Chinese criminal law of the time, and followed the ritualistic formula characteristic of Chinese legislation. It is not known, however, whether the Taiho-Ritsu made provision for the special treatment for juveniles or not, because the greater part of the texts is unfortunately missing.

It is said that the Yoro-Ritsu of 718 was the first criminal law prescribing special treatment for juveniles. This was the revision of the Taiho-Ritsu and also remained basically Chinese, richly colored with Confucian

philosophy and rules of ethics, though it incorporated native concepts and practices more palatable to the Japanese taste.

Juveniles fell into three categories in the Yoro-Ritsu. Under the age of 7, there was no criminal responsibility. No punishments were inflicted on the juvenile age 7 to 9, with the exception of treason, murder, larceny, and bodily injury. When the juvenile committed treason or murder and consequently should have been punished by death, one had to submit the matter to one's superior so as to decide it definitively. In cases of larceny or bodily injury, fines were imposed on the juvenile as a substitute penalty.

When the juvenile age 10-15 committed a crime punishable by death, he or she was dealt with in the same manner as adults. When the juvenile committed a crime punishable by relegation, he or she was remitted the punishment and instead fines were imposed, unless the mitigating circumstances were extremely severe. Even in the case of relegation, the juvenile was remitted servitude at the relegated place.

It is true that the Yoro-Ritsu had already been behind the times in the mid-10th century. But this code, to our surprise, was formally in effect until the mid-19th century. We need thus mention only three codes before reaching the latter half of the 19th century.

The first is the Joei-Shikimoku, which was enacted by Kamakura Shogunate in 1232. This code, which comprised 51 articles, embodied the basic moral principles of warriors. This was primarily a codification of customary law, though some new provisions were added. While the criminal law of the Ritsu had a strong religious meaning, that of the Joei-Shikimoku had more practical aims. Namely, the maintenance of the regime and the moral code of warriors were its aim. Thus confiscation of estates played a significant role in the punishment system.

The second is the Kujikata Osadamegaki of 1742, which was referred to as the Code of One Hundred Articles. This code, once again, was influenced by Chinese Confucianism and was the result of a recodification of Japanese criminal law by the central government. The first volume was the collection of various acts and the second mainly covered civil and criminal law. It is noteworthy that the second part of this code was a secret code which was accessible only to three commissioners and other senior officials of the Shogunate. We can see here that the principle of

legality had not yet been accomplished.

The third is a couple of codifications, which were basically the Chinese codes of contemporary Ming and Ch'ing dynasty. That is, 1870 saw the promulgation of the New Code, or Shin-Ritsu Koryo, and 1873 brought an amendment called the Kaitai Ritsurei. Neither code was able to play a great role in criminal justice. Such code proved to be obsolete and unsuitable for Japan which aspired to achieve a status equal to European countries in economic and military strength.

The juvenile justice system in Japan has reached a new stage since the latter half of the 19th century. It has broken from Chinese law and seeks new models from the West. But this does not mean that traditional Japanese law has completely disappeared. Metaphorically speaking, Japanese law has largely discarded its Kimono for new European suit.

Despite the reception of Western law, traditional values and virtues still dominate in Japan and Japanese law. We should not thus overlook this stratification of Japanese law which has been influenced by various foreign legal systems yet retains facets which are Japanese in origin. Ignoring this fact is to miss the understanding of modern Japanese law.

Before the beginning of the influence of Western law, however, the Kangoku Soku (Prison Rule) of 1872 provided special rules for the treatment of juveniles. This rule introduced the system of the Choji-kan (Disciplinary Prison), in which the juvenile under the age of 21 who had purged an offence in prison and who still had not repented of his or her conduct could be confined.

It was the Kei-Ho (Penal Code) of 1880, what we call Kyu Kei-Ho (Former Penal Code) today, that was the first criminal code influenced by European law. This code, the draft of which was prepared by Professor Gustave Boissonade, was based upon the French code, with some influence from the Belgian and Italian codes. Thus it was French law that first had many influences on Japanese law, because France was considered to have the most developed codified legal system when the Japanese Emperor's government began looking for a model in the 1870s. During these same years, Germany also had been heavily influenced by French law. Although the Kei-Ho of 1880 was published but not actually promulgated as law, many Japanese jurists accepted it as a statement of natural

principle and they followed it closely in practice. In this code, juveniles were able to be divided into three types and were subject to be dealt with accordingly. Juveniles under the age of 12 were unable to be held criminally responsible. Juveniles 12 to 15 who committed an offence without the ability to distinguish between right and wrong were unable to be held criminally responsible as well. When juveniles 16 to 19 committed an offence, the offence was subject to be extenuated to a lower offence by one grade.

When juveniles under the age of 8 committed an offence, they had no criminal competency. Instead offenders were confined in the Choji-jyo (Disciplinary Institute). Choji-jyo was set up in 1881 in order to segregate juvenile offenders from adult criminals and to provide educational training for them, according to the circumstances of the offence. The Kangoku Soku was thus amended in 1881. The amendment regarded the Choji-jyo as a kind of prison, and provided that not only the juvenile falling under the provisions of Kyu Kei-Ho but also the juvenile age 8-20 who was asked to atone for his or her actions by his or her parents was to be confined in the Choji-jyo. It is important to note that the character of the Choji-jyo system remained in punishment or chastisement completely.

III. Quasi-Welfare Law for Juveniles

Towards the end of the 19th century, the use of the Choji-jyo came to be regarded as highly unsatisfactory in the light of the more progressive concepts of juvenile protection then current in Europe and America. Accordingly, in 1900 the Kanka-Ho (Reformatory law) was enacted following Western models. This code provided that juveniles age 8-15 who did not have parents or proper guardians, and were shown to have prodigals, paupers or participants in other delinquent conduct, or juvenile offenders who were sentenced to detention in a Choji-jyo, or juveniles who were to be placed in a Choji-jyo with the permission of the court should be sent to a Kanka-in (Reform school) for their protection and education.

The first Kanka-in had been founded by Yukie IKEGAMI in Osaka 16 years before. In 1885, the second Kanka-in was founded by Masato

TAKASE in Tokyo. In 1886, the third was founded in Chiba. In 1888, the fourth was founded in Okayama. In 1897, the fifth was founded in Mie. And in 1899, the sixth Kanka-in called Home School was founded by Kosuke TOMEOKA, who introduced both the Kazoku-Ryosha-sei (the system under which children are committed to a dormitory run by a family) and the Fufushosha-sei (the system under a small number of children are committed to a residential unit run by a couple). Thus we see that the Kanka-in started as a private school at first. The Kanka-Ho accepted this system into law and adopted it as public policy. Difficulties occurred, however, because prefectures were not obligated to establish a Kanka-in. Hence the Kanka-Ho was amended in 1908. The amendment provided that the juvenile age 8-17 was to be an object, and that state subsidies were able to be paid to the Kanka-in. In addition, the instructions by the Minister of Justice ordered that the juvenile also under the age of 14 who committed an offence was able to be confined in the Kanka-in.

In 1933, the Shonen-Kyogo-Ho (Law concerning the Education and Protection for Juveniles) was enacted, and the Kanka-Ho was abolished. This code dealt with the juvenile under the age of 14 who was not an offender, and introduced the system of custodial-protection, observed-protection, and entrusted-protection. Moreover, it provided that an institute for juvenile classification was to be established in the Kyogo-in (Child Education and Training Home), which was the former Kanka-in, so as to research the personality of juveniles.

IV. Quasi-Criminal Law for Juveniles

After the First World War, the number of juvenile crimes increased and thus the treatment of not only juvenile offenders but also the 'pre-delinquent juvenile', which corresponds to the 'status offender' in the United States, came to be an issue of wide importance in criminal policy of Japan. The issue, however, was not an object of the Kanka-Ho, which was not a law to cope with juvenile crime. On the other hand, during the period when various European systems were under consideration, what we call the juvenile court movement influenced by the importation of the

child-savers movement from the United States began to flourish, and hence a special law coping with pre-delinquent juveniles as well as juvenile offenders came to be necessary for the juvenile justice system in Japan. After some ten years of research and debate on the issue, the Shonen-Ho (Juvenile Law) of 1922 and the Kyosei-in-Ho (Law concerning the House of Correction) of 1922, based on modern sociological ideas, was promulgated, and implemented in 1923. The Shonen-Ho of 1922, which is referred to as 'Kyu-Shonen-Ho' (Former Juvenile Law) today, was originally called 'the Law of Love' in view of its epoch-making or forward-looking character.

There were six characteristics in the Kyu-Shonen-Ho :

The first was that the code was to deal with the pre-delinquent juvenile as well as the juvenile offender, ages 14-17.

The second was that the code had many special provisions regarding penalties and criminal procedures for juveniles. For example, the restriction of death penalty, life imprisonment, the warrant of detention and the separated treatment from adults.

The third was that the code provided for various protective measures including community-based treatments. It met the needs of the 'individualization of treatments'. These measures were able to be cancelled or changed into other measures even after an adjudication. The fourth was that the code created the Shonen Shimpansho (Juvenile Inquiry and Determination Office). Here, the Shonen Shimpan-Kan (Juvenile Adjudicator) who was appointed among judges or public prosecutors had profound knowledge of juvenile matters and decide on the best measure for the juvenile with the support of the Shonen Hogo-Shi (probationary supervision officer for juveniles). The Shonen Hogo-Shi researched the juvenile's temperament, environment, career, property and so on. The Shonen Shimpan-Kan supervised the execution of the decision with the Shonen Hogo-Shi. The Shonen Shimpansho was a quasi judiciary organization under the Ministry of Justice.

The fifth was that the subject matter jurisdiction of the Shonen Shimpansho was restricted to the juvenile sent by a criminal court or a public prosecutor, who adjudicated that it had not been necessary to punish the juvenile. In particular, the juvenile who committed an offence

punishable with death penalty, life imprisonment with or without forced labor, imprisonment with or without forced labor for a limited term under the provision of law prescribing the minimum period not less than three years, or the juvenile age 16 and older who committed an offence, was not subject to be adjudicated by the Shonen Shimpansho.

The sixth was that the code introduced the method of the research into the juvenile's personality so as to find the best interest of the juvenile. Thereby the needs of the individualization of treatments were satisfied.

Such is an outline of the Shonen-Ho of 1922. Reflection on some of these will make it clear that this legislation is a 'quasi-criminal law for juveniles'. The reason is that those various protective measures were unable to be offered to the juvenile on whom a penalty was to be inflicted. They were only able to be offered to the juvenile sent by a criminal court or a public prosecutor. This dictumized way of thinking 'punishment OR treatment' is thus already old-fashioned.

Since the need of protection has nothing to do with punitive authority, protective measures should be offered to not only the juvenile who need not be punished but also the juvenile who must be punished. The legislators could have introduced such measures, because the measures provided for by this law are not substitutes for penalties. It is not until we have the measures which are not substitutes for penalties that we can offer juveniles real educative measures on the ground of the release from punitive authority. Such real educative measures come to be very similar to the measures offered by welfare law for juveniles. But they are a sort of criminal disposition to the end, because it is necessary to commit an offence or at least a pre-offence so as to apply those measures to the juvenile. We could find the character of the former as a sort of security measure, which is free from criminal responsibility. However, if real welfare law for juveniles can offer various educative measures to the juvenile who also committed an offence or a pre-offence, there will be little room for the application of the measures provided for by the 'real criminal law for juvenile'.

It follows from what has been said that 'real' criminal law for juveniles needs three essential factors. The first is that all penalties must be more lenient than adults. The second is that it has measures which cannot be

substitutes for the penalties. The third is that the measures can be offered to juvenile offenders on whom a penalty is to be inflicted.

V . Analysis

There could be some different forms of legislation in welfare law for juveniles, ranging from the pure welfare law paying no attention to juvenile delinquency to the welfare law taking even severe juvenile offence into consideration. According to the latter idea, juvenile offenders also should be regarded as juveniles in need of protection.

According to the former idea, conversely, welfare law for juveniles deals with only the juvenile who is not an offender, because the juvenile offender comes within the exclusive jurisdiction of the criminal court. From this point of view, Japanese welfare laws for juveniles should be considered to be such 'quasi-welfare laws for juvenile' as the former, by reason of that restricted competence. Because child protection and juvenile delinquency are the concepts that have proper demesne which lie in different dimension respectively, the treatment with welfare law should be given to the juvenile, whether he or she is an offender or not, as long as he or she needs protection.

Criminal law for juveniles could be considered to be the special law of criminal law for adults. It means that the special law should be no less than the real criminal law. It is not until the juvenile commits an offence or a pre-offence that the special law can be applied to him in principle. It is true that the rules in juvenile criminal law matters must be shaped by the general idea of education or 'parens patriae', but the function of punishment could not be abandoned because it is clear that such educative reactions have something to do with punitive authority. When protective or educative measures are provided as substitutes for penalties, they cannot but include the nature of punishment on account of the vector of the punitive authority. In this case, protective or educative measures could not give full play to their own function under the influence of the punitive authority. On the other hand there must be considerable doubt that the penalty could essentially contain the function of education. Such amalgamation as originated in the United States has revealed many

defects recently, particularly in the apparent demise of the rehabilitative ideal. We could thus call such an amalgamated law 'quasi-criminal law for juveniles'.

VI. Conclusion

The history of the special treatment for juveniles falls roughly into three phases.

The first phase is that there is only a criminal law for adults, which takes the matter of juveniles also into consideration. It usually means dealing with juveniles more leniently than adults in the sphere of punishment.

The second is that a welfare law for juveniles comes out in the sphere of non-punishment, in addition to a criminal law for adults. Since we can distinguish child protection from juvenile offence, it may be reasonable to have two pieces of legislation accordingly. In this phase, for the first time, we can recognize a germ of an educative idea different from punitive one, especially in case of having a unique jurisdiction for juveniles. We should not overlook here, however, that such a welfare law for juveniles as this cannot be applied to juvenile offenders in principle. In other words, when the criminal law must be applied to the juvenile, there is no more room for applying the welfare law for juveniles. Each of laws has its respective competence. We could therefore call it 'quasi-welfare law for juveniles' on account of the priority of punishment.

The third is that there are two criminal laws both for adults and for juveniles, in addition to a welfare law for juveniles. In this phase, even juvenile offenders are subject to be dealt with by a special juvenile law. It is an established theory that juvenile offenders should be offered education rather than punishment. Protective measures consequently are imposed on them instead of penalties. But punishment can not be abandoned completely, in particular, when the juvenile commits a severe offence. We thus come to have an idea of the 'educational penalty', which is different from a pure penalty. We could call the juvenile criminal law of this phase 'quasi-criminal law for juveniles' because of this impure character. In other words, the 'quasi-criminal law for juveniles' could

have the measures which are substitutes for penalties.

The important point to note is that criminal law for juveniles must be still the real criminal law. More noteworthy is, however, whether the criminal law for juveniles also should contain the element of education, when welfare law for juveniles plays a great part in this area. It seems that it depends on the availability of welfare law. If the welfare law played a part perfectly, criminal law for juveniles, which differs still from criminal law for adults, could devote itself to its own function. This 'division of labor' could promote the functions of the two. It seems that this is the next phase to come. Unfortunately, the present juvenile justice system of Japan remains in the third phase. We may think the functional disorder of the Jido-Fukushi-Ho as a welfare law for juveniles has brought the present system to the domination of the Shonen-Ho as a criminal law for juveniles.

We arrive at the conclusion that the juvenile justice system could be improved by means of the detachment and co-operation between 'real' welfare law for juveniles and 'real' criminal law for juveniles. The real welfare law for juveniles implies that it can be applied to the juvenile offenders also. The real criminal law for juveniles implies that it has more lenient penalties than adult law, and has protective measures that are not substitutes for the penalties which can be offered to the juvenile who also should be punished. We may thus have the juvenile justice system of 'double-track line' in Japan.

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