of the Supreme Court on this issue.

In a peculiar case like the current case it seems beyond all question to allow an amendment of an action even in *jokoku* appellate instance. Rather, to reverse the original judgment and remand the case would only make the legal procedure very troublesome. In this context, the current decision may be regarded as an appropriate judgment which dealt reasonably with the case in a manner fit for the actual conditions of the case.

By Prof. TETSUO KATO
NORIYUKI HONMA

5. Criminal Law and Procedure

a. Criminal Law

1. A case in which it was disputed whether or not execution of the death penalty was barred at the expiration of the period of limitation when a person who had been convicted of robbery and homicide and sentenced to death had been confined for thirty years after the conviction and sentence without the execution of the death penalty.

Decision by the First Petty Bench of the Supreme Court on July 19, 1985. Case No. (*ku*) 256 of 1985. A case of petition for habeas corpus. 1158 *Hanrei Jihō* 28.

[Reference: Criminal Code, Arts. 11 and 32.]

[Facts]

The applicant for the petition for habeas corpus in question was Mr. Hirasawa. He had been sentenced to death for the crime of robbery and homicide by mass poisoning (so-called Teigin case) which had occurred at the Shinano-machi Branch of the Teikoku Bank in January 1948. Mr. Hirasawa had been impris-

oned for over thirty years from the day when this sentence had become irrevocable on May 7, 1955, on the basis of the provision of the Criminal Code, Art. 11 (2). (However, he had filed 17 times in petitions for review and 5 times in requests for amnesty.) Mr. Hirasawa demanded his release on the basis of the Habeas Corpus Act, asserting that execution of the death penalty was considered to have been barred at the expiration of the period of limitation in accordance with the provision of Art. 32 of the Criminal Code as the death penalty in question had not been executed for thirty years after the irrevocable judgment, and that, therefore, further confinement of him would be restraint without due process.

The Tokyo District Court dismissed this petition for habeas corpus, concluding that his assertion was not appropriate (Decision by the Tokyo District Court on May 30, 1985, 1152 *Hanrei Jihō* 26). Mr. Hirasawa was not satisfied with the decision and appealed in a special complaint to the Supreme Court.

[Opinions of the Court]

Special complaint dismissed. Decision of the original court affirmed.

(1) In the case that a person who was sentenced to death is confined in prison according to the provision of Art. 11 (2) of the Criminal Code, the period of limitation does not run. From this point of view, the decision of the original court is justifiable.

(2) Confinement as fixed by the provision of Art. 11 (2) of the Criminal Code is a preceding procedure which inevitably accompanies an execution of the death penalty. Therefore, the confinement is provided by law so that it should continue until the execution of the death penalty. Thus, the assertion of Mr. Hirasawa that the execution of the death penalty after being confined for thirty years would be cruel punishment under Art. 36 of the Constitution is not appropriate.

[Comment]

Article 9 of the Criminal Code of Japan provides the death

penalty as a kind of punishment. The decision by the Supreme Court on March 12, 1948, concluded that the death penalty was not unconstitutional in light of Art. 36 of the Constitution (Decision by the Supreme Court on March 12, 1948, 2 *Keishū* 191). Furthermore, abrogation of the death penalty has been debated by scholars from a legislative standpoint. However, at the present time, the point of view opposing abrogation is strong.

In this case, the condemned criminal, Mr. Hirasawa, is still confined in prison without execution of the death penalty. And how to legally judge this unusual situation was disputed. In the controversy concerning this case, academic theories are divided in two: a standpoint that despite Mr. Hirasawa's confinement in prison, the period of limitation has expired regarding the death penalty in question in accordance with Article 32 of the Criminal Code, since thirty years have passed without execution of the penalty (hereinafter called Theory A); and the other standpoint that the period of limitation has not run (hereinafter called Theory B). We want to clarify the controversial situation by a general review of the differences between the two theories, as follows.

1. Interpretation of the provisions of Articles 32 and 11 (2) of the Criminal Code

Theory A: "Its execution" in the provision of Art. 32 means the execution of the death penalty itself. Even if the words "its execution" are understood to be "the execution of the irrevocable decision which sentenced to death" as in Theory B, "confinement" as fixed by the provision of Art. 11 (2) is not the execution itself of the decision which sentenced to death. Therefore, as in this case, when the execution of death penalty itself has not taken place and thirty years have passed, the period of limitation expires.

Theory B: "Its execution" in the provision of Art. 32 means "an execution of the irrevocable decision which sentenced to death." Furthermore, "confinement" as fixed by the provision of of Art. 11 (2) is a preceding procedure which inevitably accompanies the act of executing the death penalty, so it is included

in the execution of the irrevocable decision which sentenced to death. Therefore, as long as the confinement continues according to the provision of Art. 11 (2), the period of limitation with regard to the death penalty does not run.

2. Re the substantial grounds for the system of the period of limitation regarding the criminal punishment

Theory A: As a result of thirty years having passed, the feelings of victimization and need for punishment in this case are softened considerably. A situation no longer requiring the execution of the death penalty is naturally formed. Therefore, it is hardly necessary now to execute the death penalty.

Theory B: A case in which a criminal has escaped and is living publicly in society is substantially different from the case in question in which the criminal is confined for the death penalty. In other words, it is impossible to consider a situation no longer requiring the execution of the death penalty as occurring naturally for a criminal who has been confined for thirty years to face the execution of the death penalty as in this case, in contrast to a criminal on the run.

3. Re the parallel to the deserter

Theory A: It is unfair for a person who has been confined for thirty years not to benefit from the expiration of the period of limitaion while it is recognized for a deserter who has escaped for thirty years.

Theory B: The system of the period of limitation is fundamentally based on the idea that the law itself respects the situation which is against the expectation of the law because of the continuation of the situation. In short, the situation in which the period of limitation runs is fundamentally against the law. Therefore, it cannot be helped that the treatment between a deserter and a prisoner differs.

4. The relationship with the prohibition of cruel punishment (Article 36 of the Constitution)

Theory A: It is nothing but "a cruel punishment" to execute a condemned criminal in addition to imprisonment for thirty years.

Theory B: The decision to execute the death penalty should be made very carefully, so it is unavoidable if imprisonment is prolonged to a certain degree. Therefore, it is not necessary to recognize the expiration of the period of limitation regarding the death penalty only for the reason that confinement of the condemned criminal has extended over thirty years. In this case, the repeated petitions for review and the applications for amnesty from Mr. Hirasawa prolonged his imprisonment.

As mentioned above, the main points of view of the two theories have been reviewed. Theory B is cogent and is appropriate as a legal theory. However, the Minister of Justice orders execution of the death penalty in our country (Art. 45 of the Code of Criminal Procedure). Due to the tendency by successive Ministers of Justice to hesitate in ordering execution, a fair number of criminals under the sentence of death have been imprisoned over a long period of time. A legislative measure needs to be discussed in order to relieve these condemned criminals in such a situation.

2. A case in which a mistake in the type of drugs caused a legal issue.

Decision by the First Petty Bench of the Supreme Court on June 9, 1986. Case No. (*a*) 172 of 1986. A case of violations of the Cannabis Control Act and the Narcotics Control Act. 1198 *Hanrei Jihō* 157.

[Reference: Art. 38 of the Criminal Code; Arts. 28 and 66 of the Narcotics Control Act; Arts. 14, 41.2 and 41.6 of the Stimulant Drug Control Act.]

[Facts]

The defendant was charged with receipt, transfer and possession of marijuana and also with possession of a stimulant drug. In opposition to this, the defendant asserted that he possessed the stimulant drug mistakenly believing it to be cocaine which is a kind of narcotic. In accordance with his assertion, an alternative count was added to the count of the crime of unauthorized

possession of a stimulant drug. The court of first instance acknowledged the alternative count and concluded that "it came under the provisions of Art. 66 (1) and Art. 28 (1) of the Narcotics Control Act for the defendant to possess a stimulant drug mistakenly believing it to be a narcotic." The court, taking other facts into consideration, sentenced the defendant to two years' penal servitude and confiscated the stimulant drug and others in question.

In opposition to this, the defendant lodged a *koso* appeal, but the Tokyo High Court dismissed the appeal and he filed a *jokoku* appeal to the Supreme Court.

[Opinions of the Court]

Jokoku appeal dismissed.

(1) The defendant actualized a fact which came under the crime of unauthorized possession of a stimulant drug with the intention of committing the crime of unauthorized possession of a narcotic. The crime of unauthorized possession of a narcotic and the crime of unauthorized possession of a stimulant drug are different from each other in the following two respects, namely, ① The criminal object is a narcotic or a stimulant drug respectively; ② The crime of the latter imposes a heavier penalty than that of the former. However, the elements of both crimes are same except for the aforesaid two points. When considering the similarity of narcotics and stimulant drugs, the elements of both crimes substantially overlap within the boundary of the crime of unauthorized possession of a narcotic which has a lighter penalty. As the defendant had no recognition that the drug which he possessed was a stimulant drug, it is hard to say that he had the intent to commit the crime of unauthorized possession of a stimulant drug. However, even if it were so, the intention of the accused is recognized at the overlapping limit of the elements of both crimes, in other words, at the limit of the crime of unauthorized possession of a narcotic. Consequently, in the case of the accused, the crime of unauthorized possession of a narcotic is constituted (Reference: Decision by the First Petty Bench of

the Supreme Court on March 27, 1979, 33 *Keishū* 140).

(2) Re the confiscation of the stimulant drug in question

The crime which is constituted in this case is the crime of unauthorized possession of a narcotic. However, the object of the punishment is the action of possession of a stimulant drug, which falls objectively under the provisions of Art. 41.2 (1) (i) and Art. 14 (1) of the Stimulant Drug Control Act. Moreover, the confiscation of the drug has the nature of a security measure preventing the harm to the public that is caused by the drug. It should be concluded that the confiscation in question is based on the provision of Art. 46.6 of the Stimulant Drug Control Act.

[Comment]

The current decision has a practical significance concerning a mistake that exists between types of drugs with respect to the following two points: ① it clarified which crime was to be constituted among the two crimes of different legal punishments and ② it clarified the applicable provisions in case of the confiscation of the drugs.

With regard to ①, it becomes a question whether the responsibility for intentionally committing A crime could be charged to an offender when he committed A crime with the intention of committing B crime (so-called mistake of fact).

Concerning a mistake of fact, precedents, as well as common opinion, recognize the application of the lighter legal punishment to a crime in the case of overlapping elements between A crime and B crime. The current decision, based exactly on such a perspective, recognized the application of the crime of unauthorized possession of a narcotic, the legal punishment for which was lighter in this case.

However, counter to such a perspective, some critics have added that it is unclear in which case the elements of the two crimes overlap. Therefore, it is necessary to clarify the standard criteria recognizing the overlapping. Even in the current decision, it cannot be said that the standard criteria were clear. We might say that standard criteria should be sought in the identity of

objects of punishment and legal benefits (Rechtsgut), and the common features of the methods of offence.

In reference to ②, the current decision recognized the application of the crime of unauthorized possession of a narcotic to the case in spite of the objective possession of a stimulant drug by the accused. Then, another problem arose questioning which provision should apply to the confiscation of the seized stimulant drug, the provision of confiscation from the Narcotics Control Act (Art. 68) or the provision of confiscation from the Stimulant Drug Control Act (Art. 41.6). In other words, it becomes a question whether it is possible to apply the provision for the confiscation of narcotics to stimulant drugs in the case of confiscation based on the Narcotics Control Act. Furthermore, in the case of confiscation based on the Stimulant Drug Control Act, another question arises whether the confiscation is possible on the basis of the said Act although the crime is not of that Act.

On this point, the current decision recognized confiscation based on the Stimulant Drug Control Act, emphasizing the character of the confiscation of the drugs as dispositioning. If the current decision had emphasized that the confiscation was a kind of punishment, it would have recognized the confiscation in accordance with the Narcotics Control Act.

By Prof. MINORU NOMURA
TOSHIMASA NAKAZORA

b. Law of Criminal Procedure

1. A case in which it was disputed whether or not a proceeding of taking a urine sample from a criminal suspect without a warrant was legal and whether or not to recognize the evidentiary competency in the document of urinalysis by an expert witness.