

EXTERNAL (for general distribution)

AI Index: ASA 22/05/92
Distr: SC/DP/CC/GR/CO/PG
No. of words: 5148

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7 April 1992

@THE CASE AGAINST CAPITAL PUNISHMENT

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**Paper given at the Forum '90 Conference in Tokyo,
1 December 1990**

Prologue

I expect that everybody gathered here today has an interest in the subject of capital punishment. But I'm not sure exactly what kind of opinions you hold concerning the question of maintaining or abolishing the death penalty. Since you have taken the trouble to attend such a forum as this, I suppose that many of you are in favour of abolition, but there are probably some people in the audience who are in favour of maintaining the death penalty and have come to listen to my lecture. Furthermore, there must be a lot of people here who are undecided in their opinion on this issue. So I would like to talk about this subject in consideration of this situation.

Needless to say, the subject of capital punishment is a very serious and complicated one. It encompasses extremely important and serious issues that touch many fields including philosophy, religion, society and politics. For example, the questions of morality and justice, the power of the state, and of course the ultimate question of human life and death. I think that it is very important for us to investigate the ways in which these matters have been treated in the past and also to consider the laws of other countries. However, I want to avoid examining these points in too great a depth, preferring instead to focus my talk on the interest of today's audience.

The Road Toward the Abolition of Capital Punishment

I am a scholar of criminal law, so naturally I have long had a special interest in the question of capital punishment. Especially from my personal standpoint which embraces a personality-oriented theory of culpability and a dynamic theory of penalties, I have always had strong doubts about capital punishment and I oppose its use even in pure theory. But I have to

confess that I maintained a rather modest attitude for a long time because the subject seemed too important and serious for me to declare myself clearly against capital punishment. In earlier editions of my textbook of criminal law, I once took a cautious and lukewarm attitude, saying that "I cannot help but be inclined against the use of capital punishment." I am ashamed of myself because I was unable to finally make up my mind for so long. I first became an active advocate of the abolition of the death penalty when I was appointed to the Supreme Court where I took charge of cases involving capital punishment. Of course, under the machinery of the existing legal system, judges have to take account of the death penalty as provided by the current law. All the more, I, as a judge, felt serious contradictions and discord in my own mind, and this gradually led me to become a definite advocate of abolition.

The most important reason why I came to take such a stand was that where previously I had thought about the issue only theoretically in my head, I now had to feel with my heart as I dealt with actual cases. Needless to say, uncovering the facts of a case is a task of the utmost importance for a judge. I thought I knew this well enough before I became a judge, but now that I actually sat on the bench in charge of real cases, the matter became essentially more serious for me. It was no longer a mere game of logic played in my brain but a fight with real swords, so to speak. And when the case involved the death penalty, I felt as if I were crushed by the weight of the finding. My stand against capital punishment owes more to that experience than to anything else.

To be sure, there are cases where the crime is so cruel that we can't have any sympathy with the criminal. So I believe that we cannot hold a trial correctly without considering the feeling of the people at large and the position of the victims as well. The purpose of a trial is the position of justice, so we can't make just judgments without also considering the victims and their families.

But in cases involving the death penalty, the judge cannot evade the radical question that comes up: "Can we really say that taking the life of a criminal under the law is a demand of justice?" The law must function as a model for society of how justice should be applied. If the law permits the taking of human life by its own hand while asking the nation to respect human life, the law can no longer exercise its discipline over society. If I may borrow the words of Albert Camus, "It's at most an example that corrupts people." In 1849, Dostoyevsky underwent the experience of being sentenced to death for assertedly participating in the "Petrashevsky circle". His sentence was commuted by a special amnesty just before the execution was due, and he was sent to Siberia. In his novel, The Idiot, the leading character, the Marquis Myshkin, says: "Thou shalt not kill. This is written clearly in the Bible. So you don't have to kill a person because that person killed somebody. To kill a person who has committed a murder is a most unbalanced punishment that doesn't fit the crime." Dostoyevsky himself called the use of the death penalty an insult to the soul. This is indeed a radical question which comes up even if we leave aside the question of misjudgment. But when we think of misjudgment, the question becomes even more serious.

I think that the question of whether or not an individual crime merits the death penalty and the question of whether the death penalty as a legal system should be maintained or abolished are on a different level. When I concern myself with individual cases, even I sometimes think that the death penalty is appropriate. However, the question of the maintenance or abolition of capital punishment is a different question. A legal system cannot be conceived without its being administered, and so the system of capital punishment must overcome the problem of possible misjudgment.

Some scholars have voiced the following line of argument. "Misjudgment doesn't occur only in cases that are subject to capital punishment. So we have to put the misjudgment question into parentheses when discussing the maintenance or abolition of capital punishment.

Then we have to ask and answer the question in its pure form: whether or not we should retain the availability of the death penalty for murder. Otherwise an admixture comes in and confuses the main argument." I think that this argument forgets the problem of the actual working of the system. It may be a good argument from a philosophical point of view, but it doesn't work as an argument of law.

Capital Punishment and Misjudgment

In 1975, the First Petty Bench of the Supreme Court, of which I was a member, passed the "Shiratori Judgment" which loosened the conditions required to begin the retrial of a convicted person. Since this judgment was passed, there have been four cases in which convicted people who were sentenced to capital punishment have been found not guilty. I'm sure these cases remain strong in your memory. Incidentally, among these four cases, the appeals in the Menda case and the Saitagawa case were heard by the First Petty Bench. When I read through the records in great detail, I honestly felt that the original judgments in these two cases had been unreasonable. But not even these cases were able to pass through the gate of retrial until after the Shiratori Judgment was issued. In other words, among those executed people who were unsuccessful in gaining a retrial prior to the Shiratori Judgment, there is a high possibility that some were executed in spite of being innocent. I am afraid that the total number of such cases from the Meiji Era onwards has not been small. My heart aches even to think about it.

Now the way to a retrial has become easier to a certain extent, and the courts charged with fact finding will be even more prudent than before, so I am sure that the incidence of misjudgment in cases involving capital punishment will be much lower than previously. But who can assure with certainty that misjudgment will never occur. Of course judges are well trained and have enough experience in dealing with findings. Even so, as long as they are human beings nobody can claim that they don't make mistakes. Also, there are limits to the aid that a retrial can give, so we can't say that everything is OK just because a retrial is available. So far as there remains any reasonable doubt as to the fact, the accused must be acquitted as not guilty, while if the proof is established beyond a reasonable doubt, the accused is found guilty. This is the fundamental principle of criminal evidence. The borderline is drawn between the existence and non-existence of reasonable doubt. Consequently, it is not only logically possible, but indeed it does happen actually, that the evidence is strong enough for a judge to hold a belief well beyond reasonable doubt, but not strong enough to make the judge believe that the fact is absolutely and infallibly true.

While I was on the Supreme Court, I faced a particular case where I could not find any reasonable doubt even after having several times scrutinized the record, but nevertheless I could not help feeling a kind of uneasiness as to the absolute truth of the fact.

It was a real case, but I will consider it as an abstract case for the purposes of this talk. A murder involving poison occurred in a small country town. There was only circumstantial evidence, which, however, was quite enough to obtain a conviction beyond reasonable doubt. But according to the assertion of the accused's lawyer, the police arrested a suspect after checking only half of the area of the whole town. The suspect was the accused. The police didn't check the other half of the area. If they had done so, who could say that there would be no possibility of finding another suspect in similar circumstances? I forget whether the accused made a confession at the investigation stage or not, but at least after he came to trial, he strongly denied committing the crime and insisted that he was not the person who did it.

Such circumstances alone are not enough to outweigh individual testimonies and pieces of evidence, so it couldn't be said that it put a reasonable doubt on the accused's guilt. We couldn't dismiss the case on the ground of a mistake of fact. But then again, how can we be sure

that there was no mistake in this trial? We must always have a slight worry in such cases. Since we could, as we did, obtain a conviction beyond reasonable doubt, the finding of guilt should follow from the principle of the law of evidence. If the finding was to be guilty at all, the sentence would have to be death, because the circumstances of the crime were extremely bad in this case. It was such a case. I was not the presiding justice but I wondered seriously. But as long as the death penalty system existed, there was no way out.

Finally, the day of the sentencing came, and the presiding justice read out the sentence which was a dismissal of the final appeal. When we left the court, one person, apparently a member of the accused's family, hissed the word "murderers" at us from behind. That voice still sounds in my ears as if it were recorded there. And I can't forget it.

In this way, the problem of fact finding appears to take a special form in cases where the death penalty is applicable. In cases where the circumstances of the crime are so bad that the death penalty is mandated, can we commute the sentence to one of life imprisonment because there may be some slight dent in the fact finding? This rationale can not be realized under the present law. So in such cases, there is no escape as long as the death penalty exists. Certainly, there will be cases where a sentence of life imprisonment may be made possible by some way or other of finding facts concerning the circumstances of the crime. But in cases such as the one I have been speaking about, the law leaves us no room to commute the sentence and we have to give up trying. Moreover, I don't think we can answer the basic question of whether to retain or abolish the death penalty through the use of cheap tricks such as temporizing.

Capital Punishment from the Viewpoint of Justice

Now, let's think a little more about the argument that a person who takes away another's life deserves to lose their own life.

As I explained before, we have to pay sufficient attention to the feelings of the victims and their families. The idea of retribution is a primitive one that goes back to ancient times. The words "An eye for an eye. A tooth for a tooth" are written in the Old Testament and the Koran, and Buddhism includes the concept of the law of cause and effect. Under the law and in court, we cannot accept these ideas at face value, but at the same time we cannot simply ignore them as human feelings.

Of course, the family of a murder victim cannot be satisfied even by the execution of the murderer. The victim cannot thereby be brought back to life, so I am certain that an empty, hollow feeling will remain in the minds of the victim's family members. Among the families of murder victims, there are people who in spite of the suffering they have undergone, call for the abolition of the death penalty and ask for the criminal not to be executed. This is a very noble and moving thing. In this way it may be possible that the feeling of retribution can be sublimated.

But in general, in such cases as where a close relation is murdered without reason, people tend not to be satisfied if the murderer is not executed. I believe that these kinds of human feelings must be satisfied from the point of view of justice. So it is not unreasonable that a deep-rooted feeling of opposition to the abolition of the death penalty exists among the people.

But there is something I wish you to think about very deeply from the point of view of justice. Please try to imagine somebody who is about to be executed shouting "I didn't do it." It was a very long time ago but I did once hear of such a case. According to Dr. Sadataka Kogi, a psychiatrist, condemned criminals often have "delusions of innocence." But not all those who proclaim their innocence are suffering from such delusions. There can be nothing more unjust

than the execution of a person for a crime of which the person was innocent. Some people might say that such a thing can't happen these days. But no one but God can be sure of this.

It is true that it is a demand of justice that the victims' feelings must be satisfied. But the execution of an innocent person is a much greater lapse of justice that is totally out of balance with this demand.

Even if the possibility is very slight, we cannot allow an innocent person to be executed in order to satisfy the feelings of a murder victim's family. This is not allowable from the point of view of justice. And it is for this reason that I believe that capital punishment should not be retained, even from the point of view of justice which forms the basis of criminal law and trial procedure.

"In cases where the death penalty is administered, when a misjudgment occurs, it cannot be reversed." This is a tired old statement. I have known the argument very well from a long time ago and I thought I understood it. But actually, although I knew it in my head I didn't understand it deeply in my heart. It was only when I was in the position of personally deciding cases involving the death penalty that I first felt with a vengeance the full weight of my responsibility to discover the facts of the case. Now, I believe that this tired old argument is the decisive one in the case for the abolition of capital punishment.

Capital Punishment and Public Opinion

The Prime Minister's Office has carried out public opinion surveys on several occasions concerning the retention or abolition of capital punishment. But I think that the way in which the questions were posed was wrong, especially at the beginning. For example, in the survey of 1967, the questionnaire included several items such as "a person who deliberately set fire to an occupied building." And as possible answers the following choices were given: "It is better to be able to make use of the death penalty", "It is better not to be able to make use of the death penalty", "It depends on the case", or "I don't know". In this questionnaire, the possibility of misjudgment is totally neglected. It comes as no surprise to learn that the results showed 70% of the respondents in favour of retaining capital punishment and only 17% in favour of abolition. In the public opinion survey carried out in December 1989, the style of the questions had improved a little. But still, the possibility of misjudgment is only questioned indirectly as a possible reason for taking an abolitionist position. This is simply not good enough. Wouldn't it be better if the question were phrased as follows? "Even though there is a possibility that innocent people will be executed if the worst happens, because this is an unavoidable risk, do you still believe that the death penalty should be retained as a penalty for people convicted of the crime of murder?" If the respondents were properly informed about the death penalty, I believe a different answer would emerge. And misjudgment isn't the only issue. Unless the survey is carried out after people are informed about the issue, the questionnaire cannot produce a valid response. Incidentally, in a questionnaire on this issue given by Professor José Llopart to his students, 177 were in favour of retention and 205 supported the abolition of the death penalty.

A related matter is the so-called "Treaty on the Abolition of the Death Penalty", the exact title being the "Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty". The background reason why the Japanese Government takes a negative stand on the ratification of this treaty is that public opinion is negative. So it is vital that public opinion surveys carried out by the Prime Minister's Office should be performed in a more correct manner. I would like the Japan Federation of Bar Associations to make an appeal to the Prime Minister's Office concerning the way in which this survey is carried out.

Capital Punishment and Criminal Policy

I would like to turn now to the subject of criminal policy. One of the powerful arguments against abolition is based on the viewpoint of criminal policy that if the death penalty were to be abolished, the incidence of heinous crimes would increase. But I don't believe that there is any positive evidence that supports this argument. On the contrary, there are many examples of research carried out by criminologists that prove the argument invalid. For example, in the USA some states have abolished the death penalty while others have retained it. Research has been carried out in which the murder rates of two states are compared, one of which has abolished the death penalty while the other has retained it, but otherwise with similar social conditions. The result of this research showed no significant difference in the murder rates between two such states. And if we apply the criteria of common sense, it's almost impossible to believe that potential murderers will be deterred from their crimes through fear of the death penalty.

On the other hand, even if we admit for the sake of argument that if the death penalty were to be abolished, the incidence of heinous crimes would actually increase to some extent, I can't admit that this factor should take priority over the potential injustice of executing innocent people - a thing that we should never allow to occur from the standpoint of basic humanity. And if there exists somebody who argues that priority should be given to criminal policy over humanity, I can only doubt that person's sentiments as a human being.

"Cruel Punishment" and Capital Punishment

Ladies and gentlemen, the death penalty is a cruel thing. In Japan, execution is performed by hanging. It was quite a long time ago that at my request I was allowed to see the place of execution at Sendai Prison. A hole one or two metres square is cut into the floor and a cover is latched over it. The condemned person is made to stand on this cover and a noose of rope is placed around the neck. The latch is then withdrawn from one side and the condemned person drops into the room below. I believe the person becomes unconscious immediately before being suffocated to death because the neck is broken at the moment the body drops. But the convulsions of the body remain for a while. Usually it takes about 10 minutes or so before death finally occurs. A medical officer is on hand to confirm the time of death. I have never been present at an actual execution. But I believe that to attend an execution must place an intolerable burden on the nerves of any ordinary person. In foreign countries, many versatile methods of execution have been invented to try to ensure that the condemned person suffers a minimum of pain during execution. I have seen a gas chamber at the San Quentin Prison and an electric chair at Sing Sing Prison in the United States. And I've heard stories about executions using these methods. They are very cruel as well.

But the cruelty involved in capital punishment is not concerned only with the execution itself. The marginal psychological situation experienced by condemned persons while they are waiting to be killed, may well be even more cruel than the execution itself. This is precisely the "insult to the soul" about which Dostoyevsky spoke. Mr Otohiko Koga (pen name of Dr S. Kogi) has written about some examples of condemned criminals who subsequently suffered from a variety of mental disorders, and I think this kind of thing is very likely to occur. Among those who are condemned to death, there are some who can attain a state of spiritual enlightenment, peace or purity of mind. However, these people are few in number. How pointless it is to execute such people. The death penalty is a very cruel punishment even when the condemned person is really guilty of the crime. But if we consider that whenever the death penalty system is applied it is inevitable that innocent people will sometimes be executed as a result of misjudgment, the death penalty becomes the ultimate epitome of inhumanity and cruelty.

In 1948, the Supreme Court rendered a judgement that validated the constitutionality of the death penalty in spite of the fact that they understood that "the individual's life is more important than the entire earth". Article 36 of the Japanese Constitution bans "cruel punishments". But on the other hand, Article 31 prescribes that "No person shall be *deprived of life* or liberty, nor shall any other criminal penalty be imposed, *except* according to procedure established by law". So it is difficult to argue that the death penalty is unconstitutional. But the 1948 judgement included a concurring opinion that the death penalty could in future be considered a "cruel punishment" as laid down in Article 36, provided there was a change in the national feeling on this issue. So now, more than 40 years later, and following four actual retrials of death penalty cases in which the defendants were judged innocent, we would have to demand of the Supreme Court a fresh judgment.

The Viewpoint of Encouraging the Abolition of Capital Punishment

Regardless of the success or failure of the argument that the death penalty is unconstitutional, I believe that we should encourage the abolition of the death penalty while drawing support from the spirit of the Constitution as reflected in Articles 13 and 36, and in other places.

Looking around the world as of January 1989, according to information gathered by Amnesty International, 35 countries had abolished capital punishment for all crimes, 18 had abolished it for ordinary crimes and 27 had abolished it for all practical purposes. So altogether 80 countries had already abolished the death penalty. And since that time, a number of other countries including some of the Eastern European countries have moved to abolish capital punishment. Furthermore, some European countries have inserted clauses in their constitutions that expressly forbid the death penalty. In the preamble to the Japanese Constitution it is written that "We desire to occupy an honoured place in an international society striving for the preservation of peace and the banishment of tyranny and slavery, oppression and intolerance for all time from the earth". In light of these words, shouldn't we go forward actively to ratify the so-called "Treaty on the Abolition of the Death Penalty" and move toward the goal of abolishing the death penalty in order to occupy an honoured place in such an international society?

Targeting the Abolition of Capital Punishment

In order to achieve this goal, we must create the conditions that enable the abolition of the death penalty. The first of these conditions is, at an operational level, to minimize the passing of death sentences to a level close to zero, and also, in cases where a death sentence is passed, not to execute it, as far as possible.

Here, we must remember the fact that during a period of nearly 350 years (810-1156) in the Heian Period, there were, with few exceptions, no executions carried out in Japan. Because we have this wonderful heritage of which we can be proud to show the world, it should be possible for us to abolish the death penalty in the present age.

Regarding the death sentence, the "Funada sentence" (so called after the name of the presiding judge), passed by the Tokyo High Court in the Nagayama case that commuted the death sentence of the first instance court to one of life imprisonment, applies a strict principle that sentences of capital punishment should be limited to cases where every court would choose it. Although the Second Petty Bench of the Supreme Court later reversed the judgment and sent the case back to the lower court, when you read the sentence carefully, depending on how you read it of course, I think you'll agree that the main points of the Funada sentence are retained. If we go along with the spirit of the Funada sentence, the incidence of the death penalty should mark a further decrease in future. Though in reality this expectation is not met, you may safely

say that many cases that would have been judged as meriting the death penalty before are now judged as life imprisonment cases. For example, if we survey the frequency of death penalty sentences imposed by the first instance courts in recent years, we find that during the years from 1985 through 1989 their numbers were 9,5,6,10 and 2 cases respectively. The average over the period in question was a little over 6 cases per year. This is a far from satisfactory number, but it does represent a significant decrease from the average of 50.2 for the five years from 1912 and 25.6 for the five years from 1926. Taking these figures into consideration, one could hardly imagine that the abolition of capital punishment would cause disorder in the community. From this point, I think we can safely conclude that Japan is in a more favourable condition to abolish the death penalty than many of the countries that have already done so.

Presently, at the end of 1989, there are forty condemned criminals on death row in Japan. Are there no ways to alter these executions? Also, we might think about making the death penalty nominal from now on. Recently, there has been initiated a movement toward suspending executions, and I think this is an important effort toward the same goal. In the UK, the death penalty was first eliminated for a trial period, after which definite abolition was finally achieved.

The reason why the Japanese Government is so reluctant to abolish the death penalty is that public opinion is reluctant. Because public opinion is expressed in opinion polls, we need to keep a close eye on the government's public opinion research methods. But basically, we need to move public opinion. In this, the insights and leadership of great statesmen are as important as grassroots movements. For example, France achieved the abolition of the death penalty through the decision of President Mitterrand. In Japan too, I am very encouraged that many statesmen and members of the Diet of different political parties and affiliations are joining the movement towards the abolition of the death penalty.

Epilogue

We should be aware that behind all the arguments, a strong feeling of humanism drives those of us who passionately seek the abolition of the death penalty. When I visited the head office of Amnesty International in London last fall (1989), I was very much impressed by the dedication of the people there, with their devoted activities completely independent of any political power, ideology or religious creed. I was also moved by the excellent achievements of their worldwide network. After returning to Japan, I visited the office of the Japanese Section of Amnesty International, and although it was not a large office, I was impressed by the enthusiastic dedication of the staff members and volunteers, and I promised them my cooperation. Apart from Amnesty, there are some other groups who are enthusiastically targeting the abolition of the death penalty. I think that it is very important to widen the circle of people involved in movements like these. Ladies and gentlemen, please, let us work together to widen the circle into a powerful and long lasting movement that can work for and achieve the abolition of the death penalty in Japan. Thank you for your kind attention.