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ON CAPITAL PUNISHMENT

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Prefatory Remarks

The past two or three years have seen Japan for the second time the stage for a public debate on the retention or abolition of capital punishment. This represents the second time since the dawn in the Meiji era of modern legal thought. The latter-day reassertions of the arguments for abolition accompany the half-way Anglo-Americanization of the Criminal Procedure Code in Japan that has taken place since the war and have their origin in the increased difficulty of arriving at unequivocal interpretations of the facts of a case.

A criminal procedure which places over-emphasis upon the confession has of course a grave defect in that it is fraught with the danger of infringement upon human rights. When the confession is depended upon, however, and when there is no mis-identification of the offender in question, unequivocal elucidation becomes possible of even the minutest details of the facts of many a case. Against this it can be said that there are numerous advantages to be seen in the revised, post-war criminal procedure which under-emphasises the confession. In the absence of anyone who can compare to the principal for knowledge of the facts of a case, however, it is not possible to uncover the particulars constituting the crime nor the psychological turns involved without depending on the confession. In this lies the cause of "equivocal" findings. Fail to be unequivocal and you invite the public to voice suspicions of "Couldn't that have been a miscarriage of justice?" It is in this respect that with regard to a number of noted death sentence cases the public has repeatedly expressed doubts about whether there might not have been judicial error in fact-finding. These doubts are undoubtedly heightened also by irresponsible utterances of journalists and intentional propaganda through ideological channels with the result that there have been many who entertain doubts regarding these noted death sentence cases. Consequently there has been strong feeling along the lines of "We cannot put up with this sentencing people to death in error," and keen opposition has been voiced against capital punishment.

The abolition of the death penalty in Western Germany in 1953 and the adoption by the British House of Commons in 1956 of a motion for the abolition of the death penalty for one of the four capital offences (i.e. murder; this was erroneously reported to the Japanese people as the total abolition of the death penalty
in England) have stimulated the abolitionists in this country, especially the association headed by Dr. Akira Masaki. This association was organized shortly before the British adoption of the abolition of capital punishment and it began an active campaign toward the same end, culminating in the introduction of a bill for abolition before the House of Councillors in the same year (this bill was not passed). Such being the trend, scholars both for and against capital punishment have, together with the general public, participated in debates on the propriety of total abolition of capital punishment in newspapers and magazines, and over radio and television. I myself expressed my views as an expert through these four media of mass communication from the standpoint of a retentionist of the death penalty.

As the problem of the retention or abolition of capital punishment is, to my mind, a world-wide one, I will express some of my views on the subject here and will be happy to receive any suggestions or criticisms.

Main Subject

From the standpoint of reforming the convict, capital punishment has no significance whatsoever, since it deprives him of life. It cannot be denied, however, that capital punishment exercises an educational effect on the popular mind because of its powerful deterrent influence. Since this penalty destroys human life and we human beings have an instinctive attachment to life, the prior warning that such a punishment exists can serve importantly as an intimidation to criminals. The law, therefore, expects capital punishment to exert a powerful deterrent influence. It is also an indisputable fact that capital punishment definitely answers the purpose of segregating criminals from society.

However, it must be taken into consideration that there are influential arguments against the death penalty. Arguments against the death penalty are advanced from various points of view, but the principal considerations are the following:

(1) In the event of judicial error, the consequences of capital punishment are irrevocable.
(2) It is contrary to principles of humanity for a human being to deprive another of life.
(3) Much deterrent effect cannot be expected from capital punishment (the term "intimidatory effect" is occasionally employed, but this belongs to a past age and is unsuitable now). Available data indicate that capital punishment has been abolished without any resulting increase in the crime rate.
(4) Capital punishment has no reformative or educational function.

These arguments, however, do not have sufficient basis for support. First, it is true that the death penalty is irrevocable, but the irreparability of judicial error is not confined to the death sentence; any other punishment is
likewise more or less irrevocable. Since the course of life is irreversible, the fact that a person was, for instance, deprived of liberty for some time is absolutely irrevocable; it often happens, furthermore, that he is obliged to change the course of his life as a result. In this sense it is a fact that judicial error in the passing of the imprisonment sentence is also irrevocable. This is also true in the case of fines classified as the lightest of punishments: even this penalty might have adverse influences on the personal status and social position of the person on whom it was inflicted until his innocence is established and in certain circumstances might involve losses not retrievable for the rest of his life. Notwithstanding, in case of judicial error capital punishment brings graver results than any other penalty since this penalty destroys human life. Greater precaution should therefore be taken in sentencing a criminal to death, but it is not fair to say that only the death penalty is irreparable.

Of course judicial errors in passing sentences are undesirable, but since these are acts of human beings, it is inevitable that errors will sometimes be committed. This is not confined to the death sentence alone; there are possibilities for error in all judgments passed by human beings. It goes without saying that miscarriages of justice must be eradicated, but dealing with the problem by making generalizations out of rare judicial errors which were unavoidable in spite of the efforts of the judges results in a denial of the administration of criminal justice. The wisdom and intelligence of the human race is challenged with the problem of devising a judicial system which permits no errors.

Under the existing system, an error of justice is less liable to be committed in death penalty cases than in other cases, for both public procurators and judges take a more cautious attitude in the handling of death penalty cases; for example, regardless of the provisions of the Criminal Procedure Code reading "Request for reopening of procedure shall not have the effect of staying the execution of the penalty" (Article 442 of the Criminal Procedure Code), the execution of the death penalty is stayed in practice upon request for reopening of procedure (the very proviso of the Article). Moreover, in order to avoid error, the Code makes provisions for specially circumspect proceeding with regard to the execution of the death penalty (Article 475). It must not be forgotten that the dark feudal trials of the late middle ages still occurred in the period of enlightenment when the case against the death penalty was first voiced, and the error of justice in death penalty cases was a particularly serious issue under these social circumstances.

Again, there is a point more important from legal principles which is that to argue for or against the death penalty from the premises of judicial error is extremely immature. It is not to be overlooked that among criminal cases there are a good number in which there is no danger of committing error. As the prevention of the miscarriage of justice depends on judicial technique it should be treated as a problem concerning the entire judicial system. When we discuss the problem of the death penalty, we should take up a case in which there is clear evidence of the crime and no danger of misjudgment, and then discuss whether the sentence should be death or not.
Second, the view that capital punishment is contrary to the law of humanity is certainly important, but it is to a great extent sentimental in nature. Although human feelings must be taken into consideration as a basis for legislation, what the abolitionists call humanitarian sentiment does not represent sound human feeling. If the deprivation of a criminal's life by the death penalty is considered contrary to humanity, the deprivation of his liberty by imprisonment should be likewise considered contrary to it. Thus, it is inconceivable that full satisfaction would be afforded to the humanitarian theory if capital punishment should be substituted for with life imprisonment with no provision for release (this should not be understood to be the life imprisonment prescribed in the existing Criminal Law of Japan, under which a convict may be released after serving ten years of his sentence according to Article 28; recent statistics show that release is made after thirteen-odd years on the average). Another group of opponents of the death penalty oppose it on the grounds that the convict might suffer more under such a sentence than through the death penalty. To my thinking, the so-called humanitarian theory must be described as originating in the aversion which we feel to the deprivation of the life of a human being. Even he who may mercilessly destroy the life of other innocent animals is reluctant to take the life of his fellow-creature, chiefly because we human beings feel the greater aversion toward the death of a living thing the closer it is to us in its biological genealogy. It is perhaps because of this tendency of ours that we are able to escape committing murder. The sentimentalism in the so-called humanitarian theory is also rooted in this tendency and not in theoretical reasoning. Reason must go beyond instinct.

Available statistics on Japanese criminal justice in recent times reveal that a large majority of the offenders sentenced to death were persons guilty of robbery-and-murder (Article 240) and of robbery-rape-and-murder (Article 241). In Japan during the period of five years from 1950 to 1954, 185 persons were sentenced to death at the first trial, of whom 134 persons were sentenced to death for the former category and 6 were sentenced for the latter, making a total of 140 in all; in other words, about 88 percent of those sentenced to death are robbers who committed murder. These cases clearly show that almost all of the offenders took the lives of innocent persons who gave no reason whatsoever for being killed. They intimidated and destroyed the peace of innocent people and took lives as mercilessly as wild animals. Those who were sentenced to death for other offences were guilty of wrongs no less wicked than those of these criminals. To abolish capital punishment is exactly equivalent to enacting a law guaranteeing the lives of atrocious criminals at the sacrifice of the lives of innocent people. Is this in accord with justice and the law of humanity? First of all we must not forget that the death penalty is inflicted as an administration of justice. The administration of justice cannot be contrary to the law of humanity. Human life should be held in respect and the rights of the offender too should not be ignored. However, the view that the death penalty is contrary to humanity comes from a dogmatic, blind belief that life of one's own kind should not be taken
away. Those who advocate this view are advocating the humanitarian theory only for the criminals themselves, quite oblivious of the presence of the law-abiding citizens who suffer at the hands of these criminals.

The abolition of the death penalty guarantees the lives of the most brutal offenders and would on one hand enable them to swagger about without anxiety or fear, and on the other hand seriously endanger the policemen who fight against them as well as the jailors in charge of them. It would oblige the law-abiding citizen to tremble before dangerous persons running rampant assured of their own lives. Such cannot be regarded as humanitarian. There may, moreover, sometimes be occasions when a person who confronts a dangerous criminal is obliged to resort to emergency measures in defence of his own life. As a result, there would be that much more chance of an offender losing his life through the measures taken in self-defence by his victim or by policemen rather than by the execution of the death penalty. This creates danger for the offender himself. Those who assert the brutality of the death penalty or the risk attending the death penalty in cases of judicial error are concerned too much with the cases of dark trials of the past. The opponents to the death penalty in Japan often refer to the views of J. H. Pestalozzi, Feodor Dostoevski and others as the grounds for their arguments, but when they do this they are oblivious of historical background and progress in judicial institutions.

A derivative form of the humanitarian theory, peculiar to postwar Japan, maintains as another basis for opposition to capital punishment the unconstitutionality of the death penalty. The main point of this contention is that the death penalty is in violation of Article 36 of the Constitution of Japan, which provides that “The infliction of torture and cruel punishments by any public officer are absolutely forbidden.” Whether the death penalty executed even by one of the painless methods is equivalent to the cruel punishment stated in this Article is a matter of opinion so far as interpretations of the language are concerned. In my view, the Article affords no grounds for the interpretation that the intent of the Constitution is to abolish the death penalty which existed at the time of its enactment, regarding it as a cruel punishment, because the fact that the Article declares “cruel punishments are absolutely forbidden” and not “cruel punishments are abolished” makes it impossible to conclude that cruel punishments were necessarily felt to be in actual existence at the time. It can even be said that the Constitution approves the imposition of the penalty of depriving a person of life by procedure established by law: Article 31 provides 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”. The theory of the unconstitutionality of the death penalty does not hold true. The Supreme Court of Japan also held the death penalty constitutional in its decision of March 12, 1948 (Vol. 2 of the Criminal Reports of the Grand Bench of the Supreme Court, p. 191).

Third, if capital punishment has no deterrent effect there is obviously no justification for its retention, but denying its deterrent value is in the last analy-
sis only impracticable theorization. There are many concrete illustrations of men’s attachment to life and numbers of episodes relating to criminals given death sentences. It is not right to attempt to disprove deterrent effect on the basis of rare exceptional instances. The statistical data referred to by the opponents of the death penalty which indicate that the death penalty has been abolished without any resulting increase in the crime rate furnish no negative evidence as to its deterrent operation, for instances have occurred in which atrocious crimes increased as a result of the abolition of the death penalty, and moreover, as the abolition of the death penalty is ordinarily carried out in such stable and peaceful times as are not adversely affected by such an action, it can be considered quite in the nature of things that the removal of capital punishment from the system should not be followed by an increase in crime. This situation may be compared to the application of medicines. Just because there are instances in which the suspension of medicine administered a convalescent invalid has had no ill effect on his condition, it does not mean that the general inefficacy of the medicine has been proved. On the other hand, in times when capital punishment is frequently imposed, the community is usually in an unsettled condition and there are destructive criminal trends that even the frequent use of capital punishment frequently fails to suppress. The deterrent power of the death penalty cannot, however, be denied for this reason. Even the most effective medicine cannot save the life of a patient whose condition is too advanced.

In addition to what I have already stated, there is another, psychological reason why the abolition of capital punishment does not cause such a rapid and marked increase of crime. Our feeling of hesitation in committing a crime is so deep-seated that it cannot be abruptly eradicated by a mere abolition of capital punishment. Even the most civilized people have a feeling of fear and horror toward a corpse though scientifically it is only a lump of matter. In the same way, though the humanization of the Emperor has been realized, there still remains a feeling of reverence toward him as toward a deity among the Japanese masses. Accordingly the removal of the prohibiting effect of severe penalties placed on certain acts does not result in an immediate rise in the number of such crimes. Therefore, though the abolition of the death penalty does not promote a rapid increase in crime, this is only natural, and to deny its deterrent value for this reason is to jump to conclusions too quickly. The “intimidatory effect,” the common expression for this operation of the death penalty which we are today averse to, means nothing other than the deterrent influence of this punishment on crime. If it can be proved that the deterring power of the death penalty on crime is not greater than other penalties, it will apparently have no raison d’être. The scientific solution of the question of whether the death penalty is to be retained or abolished depends on the establishment of the proof of its deterrent power. If it should be clearly proved in the future that the death penalty has no deterrent influence on crime, we should give our whole-hearted support to the abolition of the institution. At present, however, there exist an abundance of definite instances showing grounds for crediting it with deterrent value, while
there are none which sufficiently justify a negative conclusion regarding the deterrent influence of the death penalty.

Although some thirteen crimes are punishable with death in the existing Criminal Code and other special laws, the one crime for which the only penalty is death is that of inducing foreign aggression upon the state of Japan (Article 81 of the Criminal Law) and even here the offender’s life may be spared because provisions are made to mitigate the death penalty in cases of extenuating circumstances. If we pass legislation to abolish the death penalty, it will be nothing less than laying down a law assuring the most atrocious criminal of his life. It is impossible to assert that such legislation involves no risk of giving rise to crime. The existing law, which warns reprehensible criminals of a "legal possibility of sentencing to death," puts the court in a position to decide whether to sentence the criminal to death or not according to the circumstances of the case. But, if we go further than this and institute a law abolishing the death penalty, we go to such an extreme as to promulgate a law absolutely guaranteeing the lives of the most atrocious offenders. The current system should be said to be proper legislation, because on the one hand it expects the court to make a judicious use of capital punishment and on the other it exerts a psychological deterrent influence by warning potential criminals of the possibility of a death sentence.

Finally, capital punishment has, as the opponents of this penalty point out, no significance in respect to the reformation of the convict concerned. True, to be sure, but in my opinion punishment does not and should not aim to produce an educational effect on the convict alone. Thought must be given to the fact that there are cases where morality requires the offender to atone for his crime with his life. In sentencing a criminal to death, the state attempts to dispense justice on its authority, giving up the education of the individual criminal. It should not be ignored, however, that the death sentence exercises at the same time an educational effect on individuals of the community other than the condemned.

The proposition is made that a long term of imprisonment should be substituted for the death penalty and that the income from the labour of the condemned in prison should be appropriated to the indemnification of damages caused the victim. This seems to be a reasonable view, but it is worthy of little serious consideration for the bereaved family of the victim might be reluctant to receive an indemnity from the offender himself, and even if the income is first received into the Treasury as national income with the bereaved receiving an indemnity from the Treasury as state compensation, it would not go far toward bringing income to the state sufficient for such compensation since those sentenced to death are in a small minority.

From every standpoint, as I have pointed out, there is no justification for doing away with the death penalty immediately. Capital punishment should be retained. The arguments for and against capital punishment should be made with due consideration for prevailing social conditions. I do not adhere to the opinion that the death penalty should never be abolished even in the day of more
advanced civilization. On the other hand, at the present time in which our country is suffering from a crop of atrocious crimes, I cannot side with those who are ill-advised enough to attempt to abolish the death penalty. Some people hold the view that if the state abolishes the death penalty, which is itself an act of murder, people will come to realize the sacredness of human life and that as a consequence murder will disappear. This is nothing but an empty optimistic theory made in the name of civilization. To its advocates I should like to put this question "Can you then assert that if prisons are abolished, thieves will disappear?" The view which puts capital punishment inflicted by law in the same class with murder stems from a lack of clear understanding of values and justice. The problem of capital punishment should be studied and discussed in a more dispassionate atmosphere.