

THE DEATH PENALTY AND SOCIETY IN EAST ASIA
—HOW TO UNDERSTAND AND COMPARE THE DEATH
PENALTY IN CHINA, JAPAN AND SOUTH KOREA—*

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I. *Same East Asia, Different Tendency*

China usually practices the most death sentences and conducts the most executions in the world today. Some people estimate that the average number of executions is about one thousand every year, but others indicate there seem to be more executions, even 8 thousands or more¹. However, even such China has changed its traditional death penalty policy to a new one called as “Firstly retain death penalty, secondly limit it and finally abolish it”, and has shown some important improvements in its death penalty system. Such improvements include reducing the capital offences in its criminal law from 68 to 55; making the standard of death sentences stricter; using more “the Death Penalty with a Two Years suspended execution” rather than “the Death Penalty with a Immediate Execution (about 99% of the offenders sentenced to “the Death Penalty with a Two Years suspended execution” would be reduced to a unfixed-term or fixed-term imprisonment finally); and building up “a Chinese Super Due Process for Death Penalty Cases” that limits both of the death sentences and executions².

Japan had been very cautious to the death penalty and kept the death sentences and executions very rare, but recently turned to a temporary increase both in its death sentences and executions. For example, the numbers of confirmed death sentence in Japan from 2000 to 2009 changed as follows: 6(2000), 5(2001), 3(2002), 2(2003), 14(2004), 11(2005), 21(2006), 23(2007), 10(2008), 17(2009).

South Korea traditionally implemented many death sentences and executions, but has been in a moratorium since December 1997.

II. *A New Method: Analysis of “Social Character”*

Why are there so many differences among China, Japan and South Korea in the death

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¹ David T. Johnson & Franklin E. Zimring, *The Next Frontier: National Development, political Change, and the Death penalty in Asia*, Oxford University Press, 2009, p.225.

² Wang Yunhai, “The Death Penalty and Society in Contemporary China”, *Punishment & Society: The International Journal of Penology*, (U. S. A), Volume 10 Number 2, April 2008, p.146.

penalty policy and practice even though they are the same “East Asia”?

Until recently, the main method used to explain those differences is the “social system” approach. According to this approach, a social phenomenon can and should be explained by the society’s system: Socialism or Capitalism? In my view, this approach affords only an external perspective of a society: we are limited to comparing only two societies which have different system, Socialist China and Capitalist Japan. We can not compare those societies which have a same social system, for example, Capitalist Japan and Capitalist South Korea. Thus we need a different method, one that allows us to explore internal social mechanisms, and at the same time to compare several societies. Here I propose a “social character” approach and use it to understand and compare the death penalty and society in China, Japan and South Korea.

The main ideas of this approach are followings.

Every society has a fundamental core (or the strongest social power) that might be called its “social character”. This core of a society may be defined as encompassing three elements: state power, law, and culture (Here, **“Culture” means an informal spiritual force that exists in private civilian society as moral standards or social customs etc.**); the death penalty policy and practice is a product not only of a society’s external social system but moreover of its internal social character. The social character arguably plays a more determinative role than the social system; indeed, the operation of a social system itself is in part determined by factors of social character

III. *Chinese Society and Death Penalty*

1. **China as a “State Power Society”**

I have argued that China can be characterized as a “state power society” basing on the following three grounds³.

(1) State power as the fundamental core of Chinese society

State power serves as the ultimate governing standard in Chinese society, just as gold serves as an ultimate monetary standard. China’s prospects of maintaining its national identity hinge on whether the state has strong, stable power. In essence, the identity “China” is a political concept, defined in terms of the scope of the Chinese state’s power.

(2) Law as a secondary force

From ancient China there has been a legal principle called “Fa Zhi” which is similar to the western legal word “Rule of Law” as a vocabulary, however, this “Fa Zhi” principle did not constitute a legal order or “rule of law” at all; rather, it served the purposes of rulers and officials, and were always subordinate to state powers. To this day, this situation has not changed fundamentally. Hence, law cannot be regarded as the original core of Chinese society, and it remains a secondary or third force in contemporary Chinese society.

³ see, Wang Yunhai, “The Three Models in a Comparative Study of Criminal Law: China as a Power Society, America as a Law Society and Japan as a Culture Society”, *Hitotsubashi Journal of Law and Politics*, Volume 23, February 1995, p.71.

(3) Culture as lacking independent existence

As stated above, cultural practices encompass religions, social customs, and moral practices. In China, the groups or institutions of culture not only are subjected to state power but actively seek state intervention in their operations, for the reason that they lack stable autonomous bases for operating and surviving independently. As a result, religions, social customs and moral practices existing among local institutions cannot truly be considered as aspects of culture, but rather as subsumed by the state power. They do, however, maintain the guise of “culture.”

For example, Confucianism has been described as China’s most prominent religion, but in fact a close scrutiny of its content and function suggests that this title may not be apt. In fact, the most contents of Confucianism concern the translation of power relations into cultural norms in society. Additionally, Confucianism focuses heavily on how people should make themselves adaptable to state power. Unlike other religions that contribute to intellectual reflection among the general public, Confucianism serves as an instrument by which state power rules over peoples’ spiritual beliefs and practices. The example of Confucianism shows that culture cannot be the original core of Chinese society.

2. Reasons for the Death Penalty in China

(1) The death penalty always as a political issue of state power

Since China is a “state power society”, the death penalty in China is primarily a political issue, rather than a legal or cultural one, and its situation is determined mostly by the state power’s ideology. Basing on the ideologies the state power practiced so far, the history of the People of Republic of China can be divided into three stages since it was founded in 1949. That is, Mao’s “Political China”; Deng’s “Economic China” and Jiang-Hu’s “Legal China”.

In Mao’s “Political China,” an ideology called “the class struggle theory” served as the supreme principle to rule Chinese society. Under this ideology, crime and law enforcement were defined as political actions and explained as “Political Struggle’s Tools”. Not only so called “Political Crimes”, but also some non-political crimes as well were defined as “counterrevolution crimes”. Such crimes were deemed as attacks by the enemy against the revolutionary government, the most serious crimes. Moreover, the relationship between the revolution government and the enemy is explained as that of “to kill or to be killed”. To avoid being killed by the enemy the revolutionary government must preemptively destroy these them; the most efficient and effective way of destroying enemies is to sentence them to death and execute them. Such was the main rationale for the death penalty in Mao’s era, and the reason why the offences punishable by death concentrated on political crimes in that time.

Since 1980s China entered a Deng’s “economical China”, in this stage, an ideology called “doing one’s all to develop the economy and enrich the people” had been promulgated, in place of class struggle theory. To enforce this new ideology, many new policies were initiated which promoted private property and market expansion. In fact, these new economic policies were essentially political policies insofar as they were fashioned by the state. The ideals of private property and capital markets in contemporary China can thus be understood as political ideologies directly supported by the state power. So, crimes undermining economic policy are

not just deemed as “economic crimes”, but held as “crimes against the state power”; defined as the most serious crimes, they are subject to the most severe punishments.

Meanwhile, as Chinese society became “economicalized,” a shift in social sensibilities occurred such that individuals were conceived as subordinate to economic systems. The social value of human individuals became secondary to monetary benefits. Crime and criminal justice, in turn, came to be considered from an economic perspective; accordingly, the death penalty changed to function as an instrument of economic competition.

Those above are the real reasons why many economic crimes or non-violent crimes were prescribed as offences punishable by death, and a high number of criminal executions were completed, and the practice of death penalty in China began to be connected with “money”, “property” and “economic order”, from Deng’s “Economic China.”

From 1995 to today, China can be called as the “Legal China” of Jiang and Hu where the importance of the “Rule of Law” has been recognized to some extent, and recently a new ideal of “Building a Harmonious Society” has been advocated. As the results, some improvements in Chinese death penalty system have been conducted, such as limiting new death penalty law-making, completing the special procedures for capital cases and changing the method of execution, and at all, China has become more cautious than ever in its death penalty policy. However, the basics of Jiang and Hu’s “Legal China” are the succession to that of Mao’s “Political China” and Deng’s “Economic China”, so, even in today the grounds and the situation of death penalty has not changed fundamentally yet in China.

(2) The death penalty always as inevitable result of criminal policy in a “State Power Society”.

In China, a “State Power Society”, it is incumbent on the state to carry out most functions necessary for creating and maintaining the social order. Conversely, law and culture have a minimal role in creating and maintaining the social order. As a result, responsibility for social functions is concentrated at the top of the social hierarchy, near the sources of political power, and the masses near the bottom of the hierarchy partake minimally in social functions. Therefore, the social order in China is run and dominated by a minority.

As such, China’s social order usually faces a problem of limited capability. The social order is created and maintained only by minor officials and law enforcers through physical methods. However, the officials and law enforcers are a limited population and thus cannot bear the entire burden of creating and maintaining social order. To solve this problem, the state adopted a criminal policy that I defined as “A Narrow but Heavy Criminal Policy”. i.e., the scope of criminalized conduct is narrowly defined while the punishments imposed are heavy. The state thus strives to achieve a broad, “radial” deterrent effect by subjecting a small number of crimes to extremely heavy punitive responses.

Accordingly, the concept of crime in Chinese criminal law includes both qualitative and quantitative aspects. Crimes are defined in terms of not only the form of illegal conduct but also the level of severity. Severe punishment is reserved for conduct that crosses a specified threshold of severity, Capital punishment, as the heaviest possible form of punishment, is expected in this system to achieve the fullest possible “radial” deterrent effect against crime in general, Here is one reason for which, the death penalty policy and practice is so prevalent in China, and so many “Strike Hard Campaigns”, that usually result more death sentences and executions, have been often launched. The reason why even economic crimes, especially some public officials’ crimes (Bribe-taking and Embezzlement) are punished by death penalty can also

be found from here.

(3) The death penalty as a non-legal and contingent matter

As this paper has analyzed, the death penalty in China has been propounded mainly by the state, based on the state power's ideology. As a result, death penalty policy in China has been a function of state-defined political problems or the public's instinctive sensibilities. A third social perspective, independent of the state power and transcending the public's vindictive instincts, has not yet to emerge. The death penalty has not been subject to serious consideration and discussion among the general public, neither has it been considered in terms of social values. For the Chinese public, it seems a very natural reaction that "the people who killed other must be killed too", and "crime must be punished as harsh as possible". As the result, almost of general Chinese people or a majority of the Chinese public not only support the death penalty but demands its expanded implementation. This is the reason why the prevalent death penalty policy (including the death sentences and executions to non-violent crimes), and the "Strike Hard Campaign" have been usually supported strongly by Chinese public.

IV. *Japanese Society and Death Penalty*

1. **Japan as a "Social Culture Society"**

Differing from the "State power Society" China, Japan can be defined as a "Social Culture Society" basing on the following three grounds⁴.

(1) Social culture as the fundamental core of Japanese society

Social Culture serves as the main governing standard in Japanese society, and the ultimate power in determining social phenomenon. Japan's prospects of maintaining its national identity hinge on its social culture. In essence, the identity "Japan" is a cultural concept, defined in terms of the scope of Japanese culture.

(2) State Power as a secondary force

Of course, the state power in Japan also plays an important role. Nevertheless, the state power itself and its role are secondary. The state power has to fit itself to the social culture and to flatter it. The real relation between them is that "not the state power leads the social culture, but the social culture leads the state power". For example, in the political world of Japan, whether politician can be elected or win popularity, usually depends not so much on whether he or she has a good policy but rather on whether he or she can act or perform in a way that Japanese culture prefers.

(3) Law as a dependent existence to the social culture

Japan has a very organized justice system and a well trained legal professional population, its legal disciplines and legal academic scholars are also very diligent and distinguished. So, one can say that law is also an important power in Japan. However, this is just a surface

⁴ Ibid.

phenomenon, if observed the way that Japanese justice system, legal professionals and legal scholars consider and act, it would turn out that Japanese law depends on its social culture very deeply. For example, even although defendant's apology is only one of many factors to be considered in sentencing according to Japanese Criminal Law, Japanese courts usually take the apology as one of the most important factors when they determine sentences, if defendant apologized the sentence would become very light, if not it will be very heavy. In some cases, even if the defendant just only conducted his right to be silent or other criminal procedural rights, it would be deemed as "No Apology" and a heavier sentence would be determined. That is because Japanese culture takes an apology as a signal of re-obedience to "Japanese Legitimacy". Moreover, Japanese criminal law scholars have constructed a long tradition of "Criminal Law-study Academics" and developed a lot of strict logical criminal law doctrines. However, the concepts of "Crime" or the elements of "Crime" established by such criminal law study and criminal law doctrines are just a "qualitative one", "crime or not crime" in the criminal law meaning is equal to "right or wrong" in the cultural meaning. They explain legal concepts or elements by a cultural way, depending on moral standards, consciously or not consciously.

2. Reasons for the Death Penalty in Japan

(1) The death penalty always as an issue of social culture

Since Japan is a "Social Culture Society", the death penalty in Japan is primarily a cultural issue, rather than a legal or state power's one, and its situation is determined mostly by the social culture.

What is Japanese culture? The key point of it is a principle that can be called as "Japanese Legitimacy". That means the "Japaneseness" or "Japanese-Worthiness" (In Japanese, "Nihonjinrashisa"). All Japanese society and Japanese people are integrated by this Japanese Legitimacy and competing for the less or more of this Japanese Legitimacy with each other. The less or more of this Japanese Legitimacy determines the relationship between the state and individuals, and the position of individual in Japanese society. In order to keep, get or show Japanese Legitimacy, there are two concepts or methods socially prepared: Humane Kindness or Humane Sympathy to same Japanese (In Japanese, "Nasake/Ninjou") and Duty or Responsibility's Distinction as same Japanese (In Japanese, "Giri/Kejime"). The former is considered as a normal usual way or method for the state or individual to deal with each other as same Japanese, conversely, the latter as an exceptional unusual one.

The situation of death penalty in Japan seems to be mysterious. On the one hand, Japan still retains death penalty, however, from Meiji Revolution to today, even during the World War Two, Japan has kept its death sentences and executions to same Japanese in its own country so rare and minor that makes people doubted whether its death penalty system has a significant meaning. But, on the other hand, Japan has never tried to abolish the death penalty, and has shown a long will to keep it going on. Why? This mystery just comes from Japanese culture. According to Japanese culture, state, law and people should deal with same Japanese normally or firstly with Humane Kindness or Humane Sympathy, that is same to the Japanese who have conducted crime and become criminals because they are still Japanese and bear some Japanese Legitimacy more or less. To such Japanese, death penalty can not be used so many

and so often. However, if the death penalty itself was abolished completely, another side of Japanese culture: Duty or Responsibility's distinction will lose its eventual way or method to be practiced. In order to avoid this happening, it is necessary to retain the death penalty as an exceptional measure for an unusual case.

The executions in Japan are often conducted in a strict secret condition and with a very polite ceremony. Why? The main reason of keeping executions secret is that the state is very afraid of image-down of its Humane Kindness or Humane Sympathy to Same Japanese, caused by opening the raw scenes and other information of the executions. The real reason of holding a very polite ceremony is that the state seeks to show to the death row himself and others concerned that the state has treated the death row with Humane Kindness or Humane Sympathy as more as possible, even although it has to eventually force the death row to conduct the distinction of duty or responsibility by execution.

On February 9, 2010, Japanese Government released a survey result. It shows that 86% of the answers recognize the retaining of death penalty in Japan. This number is higher than last time. Why is it so high and became higher than last time? The answer can also be found from Japanese culture. The real intention of the 86% answers is that they "recognize" but not "support" the death penalty in Japan. It only means that they see the death penalty as an undesirable, unavoidable and exceptional punishment. The 86% people are only a negative group to recognize death penalty, but not a positive group to support the death penalty. This attitude is consistent with the equation of Japanese culture: "Normally usually Humane Kindness or Humane Sympathy to same Japanese; Exceptionally unusually Duty or Responsibility's Distinction as same Japanese".

Moreover, the reason for the number of recognizing death penalty has become higher than last time can also be found from Japanese culture. Japanese decide when to show more Humane Kindness/Humane Sympathy or more Responsibility's Distinction, usually by their feelings on the security situation and other social mood. In recent years, the issue of crime in Japan has been popularized to a main social problem, and the mass media have been conducting a victim-oriented broadcast. As the result, a fiction or a false image has been established in recent Japan that the crimes in Japan are creasing day and day, and the social security is becoming worse and worse. In such situation and mood, it is very nature for the most Japanese to ask more Responsibility's Distinction than Humane Kindness/Humane Sympathy.

(2) The death penalty always as inevitable result of criminal policy in a "Social Culture Society"

In Japan, a "Social Culture Society", the social relations and individuals' social positions are mainly determined by the "Japanese Legitimacy", and the social order is created and maintained by the competition in the "Japanese Legitimacy" conducted by Japanese with each other. The Emperor is the top of Japanese cultural social hierarchy, and he is supposed as the most holder of Japanese Legitimacy naturally. Conversely, the general Japanese people who are located at the middle or the bottom of Japanese cultural social hierarchy are supposed the least or less holder of it. In order to improve their social position they have to do their best to get more Japanese Legitimacy. There is an indirect ratio between Japanese Legitimacy and social function. That is, the lower in the social hierarchy and the more in the number of population who are, the more necessary they are to get Japanese Legitimacy and the greater social function

they have to play. So, the most general Japanese people are the main makers of social order in Japan and conduct the most responsibilities in creating and maintaining social order. That means the social order in Japan is a majority's cultural one, and the punishment necessary to create and maintain social order are mainly made by civil society as an invisible sanction. Over there, what to be expected to criminal law and criminal policy is just to confirm and strengthen the social order and cultural sanction that the general Japanese people has created, maintained and made. This has two meanings that seem to be contrary to each other but actually do not. On the one hand, Japan has been always conducting a criminal policy that I defined as "A Broad but Light Policy". That is, the concept of crime established by Japanese criminal law is just a qualitative one, and the scope of criminalized conduct is defined very broadly, it is as the same as that of "wrong conduct" or "immoral conduct" defined in Japanese culture, while the punishments imposed by criminal law or criminal courts to such broad crimes are very light. It is unnecessary to seek a radial deterrent effect, it is also unnecessary to use many death penalties to create and maintain social order, because the necessity to punish criminals usually has been completed by social cultural sanctions made by the civil society. But, on the other hand, by the same reason that its function is only to confirm and strengthen the social order and cultural sanction, Japanese criminal law and criminal policy will never give up the death penalty as long as the majority of Japanese people or Japanese culture continues to support or recognize the death penalty.

(3) The death penalty as a non-legal and non-political matter

As stated above, a recent survey shows that 86% of Japanese recognized the death penalty in Japan. How about Japanese legal professionals and legal scholars? I suppose that a high percentage would be found if a same survey was made among Japanese legal professionals and legal scholars. In fact, the main current or main stream of Japanese legal professionals and legal scholars have never shown a negative attitude to retaining death penalty in Japan, rather than they have tried to use their professional knowledge and authority to defend the death penalty. They have never realized that death penalty is or should be a independent legal problem, and it is necessary to be dealt with as a problem of "Rule of Law" at least by the legal professionals and legal scholars.

How about Japanese politicians and political world? A same situation exists over there too. In the past, Japanese politicians and political world had been very modest from reacting to the problem of crime and death penalty. In their political activities, they had shown neither a positive attitude nor a negative one to such problem. However, in recent years, the main current or main stream of Japanese politicians and political world have changed their political styles and become active to response directly to the punitive demands of crime-victims and the public. They have not realized that one responsibility of a politician and a political party is to hold some rational ideals and to lead the public and society with them, rather than only to curry favor with the masses.

In recent Japan, new criminal law-makings and current criminal law-revisions have taken placed so frequently than ever. The directions or aims of such makings and revisions are to change the criminal law harsher in order to answer the demands shown by the public. Some of such movements have even ignored the "Rule of Law" and the common principles of modern criminal law. For example, the principle of Legality of Crime and Punishment is the basic principle in modern law, and one of its contents is to prohibit any retroactivity strictly.

However, in today's Japan, a new revision to current criminal law has been conducted in order to withdraw the time limitations of criminal charge to serious crimes, in this revision a surprising article is included, which rules that withdrawing of the time limitation is supposed to be used to the criminal acts conducted not only after this new law but also before that. This is a typical retroactivity. Who are the advocators and the drafters of such punitive law-makings and revisions? They are some politicians, legal professionals and legal scholars. Why do they take initiative on such revision? As I have pointed out above, because Japan is a Social Culture Society, the main aim or function of law and state power is supposed just to confirm social culture. Legal professionals, legal scholars and politicians usually have no brave and consciousness enough to take crime and death penalty as an independent problem that just need to be considered professionally or politically. In today's Japan, there is a very popular criticism that Japanese legal professionals, legal scholars, even politicians have been too far and too insensible to the normal feeling and knowledge of Japanese civil society. Japan now has been conducting a Legal Reform, one goal of this Legal Reform is supposed to bring such normal feeling and knowledge back to justice and other legal world. But, in my point of view, the situation is contrary, the real problem in today's Japan is not that Japanese legal professionals, legal scholars, politicians have been too far and too insensible, but too near and too nervous to the civil society and the social culture, so that they have lost their independency as a legal or political subject. That is the real reason why Japanese death penalty system has still stayed as a non-legal and non-political matter, and has never faced a challenge from the main current of Japanese legal professionals, legal scholars and politicians.

V. *South Korean Society and Death Penalty*

1. **South Korea as a “Combined Society with Culture and Power”**

Comparing with “State Power Society” China and “Social Culture Society” Japan, South Korea can be characterized as a “Combined Society with Culture and Power” basing on the following three grounds.

(1) Both social culture and state power as the fundamental core of South Korean society

The social core or the ultimate governing standard in South Korean society is not one but two: Social Culture and state power. The combination of social culture and state power mostly determines social events and social relations. South Korea's prospects of maintaining its national identity hinge on how the social culture and the state power combine. In essence, the identity “South Korea” is a cultural and political concept, defined in terms of the scope both of the social culture and the state power.

(2) Law as a dependent force

In South Korea there has been a very organized justice system and a well trained legal professional population, its legal disciplines and legal academic scholars are also very diligent and distinguished. So, one can say that law is also an important power in South Korea. However, this is just a surface phenomenon, if observed the way that South Korean justice system, legal professionals and legal scholars consider and act, it would be found that South

Korean law depends both on its social culture and the state power very deeply. For example, on the one hand, South Korean criminal law and courts traditionally had dealt very strictly with “Military Crimes”, “Political Crimes” and “Anti-Moral Crimes”. But on the other hand, the defendants of such crime would be sentenced lightly if they apologized and appealed that they are same Koreans.

(3) Social culture and state power as parallel existences to each other

In the relations with law, the social culture and state power in South Korea are not only independent to the law but usually display very large function to the law. However, in the relation with each other, they are always paralleling to each other. As a result, the social culture (religions, social customs and moral practices) usually influences the state power, at the same time it is also influenced by the state power. The situation is same to the state power. In South Korea, social events and social relations are mainly determined by how the social culture and the state power combine with each other.

2. Reasons for the Death Penalty in South Korea

(1) The death penalty always as an issue both of social culture and state power

Since South Korea is a “Combined Society with Culture and Power”, the death penalty there is a cultural issue as well as a political one, rather than a legal issue. It is determined mainly by the social culture and the state power, especially the way they combine.

What is South Korean culture? The key point of it is a principle that can be called as “Korean Legitimacy”, in other words, the “Koreanness” or “Korean-Worthiness”. That means a “Generalized but Graded Fraternity as Same Korean”. All individual in Korean society are generally considered and dealt with as same Korean Brothers, but, at the same time, all individual in Korea are supposed to be considered and to be dealt with differently basing on their grades, even though they are the Same Korean brothers. There is an equation that looks like contradictory. On the one hand, all Korean must be dealt with as same Korean Brothers generally. But, on the other hand, they have to be dealt with differently. It depends on social moods and other social parts whether the “Generality” should be stressed or the “Difference” should be taken important.

What is the South Korean state power? The South Korean state power is in common to state powers in other country. However, it does embrace some characteristics that other state powers do not have, because of the special situation in Korean Peninsula and the special history of South Korean especially after World War Two. As well known, Korean Peninsula has been divided to two parts: Capitalist South Korea and Socialist North Korea, there has been always a very high tension between two sides. It has been always the most important issue for the South Korea state power to deal with and to compete with North Korea. Moreover, as an inside issue, South Korea had experienced a tough process of democratization after World War Two, this democratization had been the most important factor to influence the South Korea state power.

1990s is the turning point for the South Korea as it is to the whole world. The Cold War was ended outside, and democratization was realized inside. These two events have influenced the social culture and the state power, and their combination in South Korea, eventually changed the death penalty policy and raised the moratorium of execution since 1997. The end

of the Cold war lightened the tension between the South and the North, made South Korean Culture to consider the North Korea as more Same Korean brothers than enemy. And the competition between two sides changed its core from military competition to political or cultural one. It has become very important to get more and more international political sympathy and cultural reputation. In order to get and to keep a political or moral superiority to the North, South Korea state power became apt to adopt a new death penalty policy that could be praised by the main stream of international society or democratic countries. That is, to abolish death penalty or to keep moratorium of execution. At the same time, the democratization in South Korea has worked at same direction. Many of democratic politicians who had ever been sent to prison or even sentenced to death and had become death row, have come to the main stage of South Korea state power since the middle of 1990s, they knew the irrationality and inhumanity of death penalty by their own experiences and took an initiative to reduce or abolish the death penalty.

(2) The death penalty always as inevitable result of criminal policy in a “Combined Society with Culture and Power”

In South Korea, a “Combined Society with Culture and Power”, two kinds of social order exist there. One is the social order concerned with the social culture and moral standard, the other is that concerned with the state power and politics. The former is created and maintained by the most South Koreans, it is a majority social order. Conversely, the latter is created and maintained mainly by the state power and its officials, it is a minority social order. The criminal Policy in South Korea reflects the differences between these two kinds of social order. With the cultural or moral social order, a criminal policy that can be called as a “Broad but selective policy” has been conducted. That means South Korean criminal law defined the concept of “crime” concerned with culture or moral as broadly as South Korean culture deems what is immoral. But, at the same time, it determines when and which part of crimes should be punished heavily by selection, even although they are same crimes. Conversely, with the political or state power’s social order, a criminal policy that can be called as a “Broad and Heavy Policy” has been conducted. That means South Korean criminal law defined the concept of “crime” concerned with the internal or Korean Peninsula’s politics broadly and the punishments are also heavy.

The above is the real reason why South Korea criminal law had traditionally prescribed so many capital offences that its number extended to several hundreds, and they were concentrated upon so called “Military Crimes”, “Political Crimes” and “Anti-Moral Crimes”. Otherwise, the reason for current moratorium in South Korea can also be found from the above. It is a result of the selection included by the “Broad but selective policy”, and the change of the political situation that the “Broad and Heavy Policy” has based on.

(3) The death penalty as a non-legal matter

On February 25, 2010, the South Korea Constitution Court delivered a judgment again that held the death penalty was constitutional, and was not cruel and unusual punishment. This judgment is not accidental. South Korea courts sometime still determine death sentences even during the period of moratorium that has started since 1997. In fact, the main current or main stream of South Korea legal professionals and legal scholars have never taken initiative in discussing and reconsidering the death penalty, they have not realized that the death penalty

was or should be an issue concerned with the basic principle of “Rule of Law”. The continuing moratorium in South Korea is not a result of legal efforts made by the legal professionals and legal scholars, but a result of political and cultural initiatives taken by some social activists and politicians. That means, in South Korea the problem of death penalty has not developed to a legal matter yet, despite the moratorium there has continued for about 14 years.

VI. *Same East Asia, Different Future*

As well known, most countries in the world today have abolished death penalty. However, there is no any case where the abolition was realized by a public opinion poll and basing on a majority’s will expressed in such poll. Rather, in most cases the abolition were realized by some politicians, social activists, legal professionals and legal scholars etc., basing their strong faith in Human Right, Human Tolerance, Rationality, Civilization (In this paper, I defined them as the “Spirits or Principles of Rule of Law or Legal Ideals), and without fearing public opinion or majority’s will that demand the continuation of death penalty. The experiences of abolishing death penalty so far have told us that the problem of death penalty should be considered more as a legal problem of “Rule of Law”, rather than a political problem of Democracy. The essence of Democracy is rule of power. Its fundamentals are popular sovereignty, citizen’s vote, majority’s determination. Conversely, the essence of “Rule of Law” is rule of human right. Its fundamentals are individual liberty, due process and rationality. In this perspective, one can say that the futures of death penalty in East Asia depend more on what extend the “Rule of Law” be recognized, rather than how much the democracy be realized in China, Japan and South Korea.

Now we are facing an era of Globalization and Information, one of the main consequences of Globalization and Information is a prevalence of Populism. Populism sometime may show some temporary democratic aspects, but in the most cases it does embrace many same elements with that of the orthodox Despotism, Totalitarianism and Authoritarianism, the only difference is that the Populism usually takes a name or a face of “Public Opinion” or “Citizens’ Majority’s Will” etc., rather than a name or a face of individual or state. Both of them may destroy the “Rule of Law” and human right. What should be especially pointed out here is that some going on Reforms or Legal Reforms in some countries today are only Returns to the Middle Ages rather than real reforms or real legal reforms, most of them are motivated and conducted by Populism. Populism fashioned in today’s world is usually a rebirth of orthodox Despotism, Totalitarianism and Authoritarianism. So, in order to predict the futures of death penalty in China, Japan and South Korea, it may be a key point to analyze the situations of Populism there.

In China, at the beginning of so called “Reform and Openness Policy” that started from 1980s, Populism was very weak and the state power had held an absolute authority, both of Chinese public and state power took a stand that China had to learn from the West and should accept some universal values from the outside. This stand has been the main reason that China has tried to complete its legal system, turned to be more sensitive to human right than ever, and in recent years begun to improve its death penalty system. Unfortunately, at the same time a situation that can change this stand has emerged larger and larger as Globalization and Information have been gonging on in China. Along with Globalization and Information,

especially the development of Internet, Chinese state power, whose political base is the principle of “One Communist Party Rule”, has begun to feel more and more pressures because election system is still weak there. In order to overcome this weakness and to get more legitimacy for the principle of “One Communist Party Rule”, Chinese state power has grew more sensitive to the public’s opinions and interests, sometimes to an extent beyond that of even some democracies. As pointed out, from 1980s, Chinese Public had taken a stand of learning from the West and the outside despite it supported death penalty, however, in latest years Chinese public seems to have become overconfident and to begin to change its stand from learning the West to resisting the West as Chinese economy has become strong and succeeded. That means the original support of Chinese public to death penalty may become stronger than before. It will be a key point for the future of death penalty in China that the West and the outside should converse and cooperate with not only Chinese state power but also Chinese public, and convince them that economical development should be connected with the protections of human right and the expansion of human universal value. It is also very important to do everything to avoid a situation where the state power’s will and Chinese public’s will to continue death penalty come together.

In Japan, Globalization and Information have caused a result that made many Japanese felt Japan society had lost its identity. This feeling has been strengthened by the bad situation of Japanese economy. Japanese public now is in a condition I called as “Over-unconfidence”. Populism in today’s Japan just came from such backgrounds. In order to rebuilt or to feel Japanese identity, Japanese public and society has turned to emphasis Japanese culture and Japanese tradition than ever, and to stress more responsibility or liability than humane kindness or humane sympathy. This stand raised a temporary increase in the death sentences and executions. So, it will be a key point how to make Japanese public to recovery its confidence, and how to convince Japanese public that Japan is still one of the most developed and democratic countries in the world and should take leadership in expanding human right, although its economy is not so good temporarily.

In South Korea there has been also a Populism caused by Globalization and Information. However, its Populism embraces different characteristics with that of China and Japan. The tension between the South and the North has not changed thoroughly, in order to appeal its superiority to the world, it is still necessary for South Korea to compete with the North on human right issues. Moreover, the politicians of democratic generation are still taking a leadership in South Korea society. As the result, the Populism in South Korea is still under control and its effect has not extended to obstructing the moratorium. The key point for the future of death penalty in South Korea is how to make the legal professionals and legal scholars also to become supporters of moratorium or abolition of death penalty. It is also very important how to make the next generation’s politicians to take a same stand to death penalty with the current politicians of democratic generation.

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