

**Recommendations on  
the Capital Punishment System**

Japan Federation of Bar Associations

November 22, 2002

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## *Summaries of Recommendations*

1. Japan Federation of Bar Associations advocates that a statute should be enacted, in force for a limited period of time, providing that execution of death sentences shall be stayed for such period of time, so that the issue of whether to retain or abolish the capital punishment might be discussed thoroughly and extensively by the people and necessary improvement or reforms might be made on it
2. JFBA should pursue the following efforts concerning the capital punishment system
  - (1) Improve the criminal justice system regarding capital punishment;
  - (2) Promote discussions on the issue of whether to retain or abolish capital punishment among JFBA and start national discussions;
  - (3) Realize disclosure of information on capital punishment;
  - (4) Recommend a maximum penalty in place of capital punishment; and
  - (5) Support crime victims and their families, recover damages, and establish their rights and otherwise.

## *Reasons for Recommendations*

### **I. Trends of the International Community and Responses of the Japanese Government concerning the Capital Punishment System**

1. The International Covenant on Civil and Political Rights (ICCPR), stating in Article 6.6, "Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant," has confirmed the orientation toward abolition of capital punishment. In 1989, the adoption by the U.N. General Assembly of the Second Optional Protocol to the International Covenant on Civil and Political Rights (to be referred to as "the Second Optional Protocol" hereafter), which took effect in 1991, declared the abolition of capital punishment. Japan, along with the United States and China, objected to the convention and has not ratified it to date<sup>(1)</sup>.

In the third review of the report of the Japanese government on November 4, 1993, the United Nations Human Rights recommended the government to take steps toward abolishing capital punishment and reform the conditions for detention of those facing death penalty, which violates ICCPR. However, since then, no improvements were

made in Japan in response to this advice. On November 6, 1998, the Committee again advised the Japanese government to abolish capital punishment and reform the treatment of those facing death penalty.

In addition, U.N. Human Rights Commission has been adopting resolutions on the abolition of capital punishment every year from 1997 through 2002. These resolutions demand retentionist countries to temporarily suspend executions with the prospect of complete abolition of capital punishment, as well as limit the application of capital punishment and ensure the rights of those facing capital punishment.

2. Prior to the United Nations, in Europe, Protocol No. 6 to the European Convention on Human Rights, which provides the abolition of capital punishment in the peacetime, was put into effect by the Council of Europe in 1985, and Protocol No.13 provides the abolition of capital punishment in any time, including wartime, was adopted in February 2002<sup>(2)</sup>. Today capital punishment is, in effect, not applied in forty-four member countries of the Council of Europe<sup>(3)</sup>.

Among them, Russia adopted a moratorium on executions in 1996 and signed the Protocol No.6 in 1997. Turkey, having adopted a moratorium since 1984, passed a bill containing the abolition of capital punishment in August 2002.

Japan is an observer country of the Council of Europe along with the United States, Canada, Mexico and Vatican. Among them, only Japan and the United States retain capital punishment. On June 25, 2001, the Parliamentary Assembly of the Council of Europe (PACE) requested the United States and Japan to temporarily suspend executions as soon as possible and to take steps necessary to abolish capital punishment. PACE also decided that if there is no apparent progress by January 1, 2003, it would object to the U.S. and Japan maintaining observer qualification. However, on December 27, 2001, and September 18, 2002, the Japanese government executed two convicts each, on death row.

In May 2002, in order to secure the effectiveness of the above resolution, members from the Committee on Legal and Human Rights Affairs of PACE visited Japan to co-host a seminar titled "Justice and Human Rights Seminar--Justice and Human Rights in Observer Countries of the Council of Europe: the Abolition of Capital Punishment" with the Diet Members League for the Abolition of the Death Penalty. Mayumi Moriyama, the Minister of Justice, present at the seminar, indicated her stance to retain capital punishment, saying that "the abolition of capital punishment should basically be left to each country's own decision and is not appropriate in light of our public opinion and criminal situations."

On June 13, 2002, based on the result of the seminar, European Parliament adopted a resolution on the abolition of capital punishment in Japan, South Korea and Taiwan, which required immediate abolition of capital punishment or the suspension of executions. Also, European Parliament had already adopted a “Resolution on the Capital Punishment System and the Realization of the Suspension of Executions Worldwide” in June 1998.

3. In the United States, although twelve out of fifty states have abolished capital punishment<sup>(4)</sup>, the federal government and thirty-eight states still retain it. However, recently there have been active discussions on the issue of whether to retain or abolish capital punishment in the country. In 2001, a bill to suspend executions was introduced in Congress (in both the Senate and the House) and has been under review<sup>(5)</sup>. In Illinois, a retentionist state, a moratorium on executions has been applied since January 2000, and Maryland also adopted a moratorium in May 2002. In addition, Kentucky, New Jersey, Oklahoma and Pennsylvania each have a moratorium bill on the table<sup>(6)</sup>.

4. In Asia, South Korea has not carried out execution since Kim Dae Jung took the presidency in 1998. In October 2001, a bill for the abolition of capital punishment was submitted to the Diet with the support of the majority of lawmakers and is currently under discussion. Taiwan has also shown its intention to abolish capital punishment with the minister of justice announcing a plan to abolish it by 2004.

5. Thus, it is prevalent in the international community such as the United Nations and Europe to abolish capital punishment or adopt the suspension of executions if immediate abolition cannot be achieved. This trend has extended to the neighbor countries of Japan.

Notes:

(1) The Second Optional Protocol was passed by the U.N. General Assembly by a vote of fifty-nine for, twenty-six against, and forty-eight abstentions on December 15, 1989. Japan opposed to it, stating, “The abolition of capital punishment should be carefully discussed by each country in consideration of its national sentiment and criminal situations.”

(2) The Committee of Ministers of the Council of Europe adopted Protocol No.13 on February 21, 2002, and countries started to sign it on May 3. As of August 20, thirty-eight out of forty-four countries have signed and three have ratified it. It will

come into effect upon ratification by ten countries.

- (3) In the Russian Federation, Chechnya and the separatist area of Georgia retain capital punishment.
- (4) States that have abolished capital punishment are: Alaska, Hawaii, Iowa, Massachusetts, Maine, Michigan, Minnesota, North Dakota, Rhode Island, Vermont, Wisconsin, and West Virginia.
- (5) National Death Penalty Moratorium Act of 2001. The official title: A bill to place a moratorium on executions by the Federal Government and urge the States to do the same, while a National Commission on the Death Penalty reviews the fairness of the imposition of the death penalty.
- (6) ACLU Death Penalty Campaign--In the States, Death Penalty Information Center--Changes in the Death Penalty Laws Around the U.S.

## **II. Domestic Situations and Efforts of JFBA concerning the Capital Punishment System**

1. In Japan, from 1983 through 1989, a decision of acquittal was given in retrial procedure for four convicts who had been sentenced to death and detained in death row.

<sup>(7)</sup> This proved that the conventional argument that there are no false charges in capital punishment cases is wrong. Amid such circumstances the Japanese government virtually suspended executions for three years and four months after an execution in November 1989 (as mentioned before, the Second Optional Protocol was adopted by the U.N. this year). However, Masaharu Gotoda, then Minister of Justice, unlocked this suspension of executions on March 26, 1993, by restarting executions of three of those sentenced to death. Since then, execution has been carried out more than once almost every year and a total of forty-one prisoners have been executed. Among them are those who may have been mentally disabled at the time of execution, those for whom habeas corpus was claimed and pending and those whose retrial case was in the process of being appealed by defense counsel.

Also, the Diet Members League for the Abolition of the Death Penalty, established by the cross-party Diet members in April 1994, prepared a bill for the suspension of executions in 1995, and is now considering to have a bill for the abolition of capital punishment and a bill for life imprisonment initiated by the Diet members. (120 members as of July 2002; Chairman, Shizuka Kamei)

2. While making efforts to support the winning of acquittal from the miscarriages above, JFBA and local bar associations have been studying the capital punishment system itself from the viewpoint of bar associations' missions such as the protection of fundamental human rights and the improvement of the legal system. Summary of the researches are as follows:

- ① In 1991, JFBA formed the capital punishment system study sub-committee within the Human Rights Protection Committee and the sub-committee has started research;
- ② Since the restart of executions in 1993, the chairmen of JFBA have repeated the following comment almost every time execution is carried out: "Executions should be suspended, since national discussion on the issue of whether to retain or abolish capital punishment should be developed. Besides, the rights of those facing capital punishment are not sufficiently guaranteed, which may violate ICCPR and the U.N. resolutions."
- ③ At a symposium of a regular convention of the Kanto Federation of Bar Associations and in a declaration of the convention in 1995, problems of capital punishment which both of Retentionists and Abolitionists could recognize in common were pointed out and a resolution came to be adopted, stating that discussion shall be promoted, information be disclosed on capital punishment and execution of death sentences be stayed;
- ④ A request, which was addressed to the Prime Minister and the Justice Minister based on the resolution of JFBA Board of 1997, demanded that considering that the present conditions of death row prisoners violates ICCPR and the U.N. resolutions, how the rights of those facing capital punishment are secured, executions should be suspended until these illegal conditions are resolved;
- ⑤ In a lecture and a symposium at "Capital Punishment West and East: the Present and Future of the Capital Punishment System in Japan and the United States" hosted by the capital punishment system study sub-committee of JFBA's Human Rights Protection Committee in 1998, JFBA addressed and called on the public for further discussions on the capital punishment from the viewpoint of the above JFBA request;
- ⑥ In "JFBA's alternative report to respond to the 4<sup>th</sup> Periodic report by Japanese government under Article 40 Paragraph 1(b) of ICCPR (1998), JFBA clarified its stance, stating "executions of death sentences should immediately be suspended and the Japanese government should promptly start to consider ratifying the Second Optional Protocol, in light of the "inhumanity of execution procedures"

and “lack of due process of law in capital cases.” The federation submitted the report to the U.N. Human Rights Committee.

Besides these activities, JFBA formed “the liaison council on the capital punishment problems” to set to consideration on whether to retain or abolish capital punishment in 1993. The council submitted a report dated March 3, 1994<sup>(8)</sup> that was taken over by “the liaison council for measures on the capital punishment problems” formed on August 9, 1994, for the purpose of preparing the recommendations of JFBA. Since then, the council continued to search for appropriate recommendations in consideration of the movements of related committees within JFBA and bar associations while discussing whether or not to abolish capital punishment and whether and how to reform the existing laws.<sup>(9)</sup> The Council prepared “the interim report” dated August 21, 1995, that presents the bar associations’ issues to consider on the capital punishment system and requests discussion of conditions of both abolishing and retaining the system.<sup>(10)</sup> In addition, while collecting opinions and summing them up, referring to each bar association’s discussions and report, in accordance with the above-mentioned “Interim Report,” for preparation of recommendations representing JFBA, the council compiled “the draft proposal for recommendations on the capital punishment system” and submitted it to the chairman on March 18, 1996 to activate and complete discussion. But the draft proposal did not gain approval of related committees of JFBA as a whole and was virtually not made public to general members since it only presented the policy of abolition of capital punishment and, its possible alternatives to the death penalty, e.g. life imprisonment without parole and life imprisonment with parole which is prohibited until 20 years have been served.<sup>(11)(12)</sup>

Later in February 1999 the structure of the council was renewed and discussions have been repeated on the basis of comments from related committees to newly plan recommendations on the capital punishment system, which led to this recommendation.

3. In relation to the issue of capital punishment, there have been differing points of view. Especially on the issue of whether to retain or abolish capital punishment, opinions have been divided just into an argument of the retentionists and that of the abolitionists, conflicting with each other, for a long time.

As is generally known, a lot of polls and surveys show there is a divergence in opinions among retentionists and abolitionists and there still exist strong proponents of retention of the capital punishment system. Reasons for retention include<sup>(13)</sup>:

“Since there are cases of heinous crimes for which there is no choice other than

capital punishment, penalty cannot be complete unless criminals are executed;”  
“Immediate abolition of capital punishment is premature in light of national sentiment, according to results of polls;” and

“It is only natural that public sentiment should be the basis of the punishment system and it is not permissible to ignore this.”

Also, the recent increase in heinous crimes tends to raise support for the capital punishment system.

Globally, on the other hand, the Second Optional Protocol has come into effect and there are currently more abolitionist countries than retentionist countries still retaining it. To respond to this trend, steps toward the abolition of capital punishment and accession to the convention are required of Japan.

At the same time, the capital punishment system is a matter linked with views of society, life and value and principle. That may be one of the reasons why forming a consensus among associations within JFBA has been difficult.

However, as long as capital punishment is one of the punishment systems and a matter always linked with human rights, it is obligatory as well as possible for bar associations, which are responsible for the protection of fundamental human rights and the improvement of the legal system, to make recommendations on the way the capital punishment system should be.

The point of the recommendations is: that the capital punishment system in Japan needs immediate and overall review since it contains serious problems from the viewpoints of international human rights standards, fundamental human rights, prevention of mistaken rulings, humanity and due process; that public discussion on the issue of whether to retain or abolish the capital punishment system should be developed and that executions should be suspended by legislation for a limited period of time for overall review of the capital punishment system, including its abolition, since it is a killing, irremediable and irretrievable once executed.

These recommendations on the capital punishment system attempt to clarify tasks that JFBA should currently launch in consideration of basic viewpoints and efforts of JFBA and bar associations. The whole JFBA should tackle these tasks from both the perspective of the retentionist and the abolitionist.

Notes:

(7) Menda case in 1983, Saitagawa case in 1984, Matsuyama case in 1984, and Shimada case in 1989.

(8) The summaries of the report were as follows: 1. Research into measures necessary for

the abolishment of capital punishment, including a maximum punishment in place of capital punishment, the system of parole, and the system of compensation for the bereaved families; 2. Investigate the process of abolition of capital punishment and the actual conditions of maximum punishment operations by compiling international regulations on the capital punishment system; 3. Research into the abolition or suspension of capital punishment on a trial basis and the postponement of death sentences or executions; 4. Consider the improvement of the defense of capital cases, the system of death sentences and the treatment of those facing death penalty; 5. Conduct standardized surveys among bar associations; 6. Promptly compile recommendations on the capital punishment system and necessary steps.

- (9) Meanwhile, many surveys were actively conducted about the capital punishment system in bar associations. The summary of the result is shown in a table of the "Proposal Outline." According to these surveys, votes for abolition or conditional abolition were more than those for retention or conditional retention in ten associations, and less in four associations.

The Kanto Federation of Bar Associations held a symposium "Think about Capital Punishment" in September 1995 and in a regular general meeting adopted a declaration that the government and the Diet should be willing to provide the public with information on capital punishment and promptly review the future of the capital punishment system while executions should be suspended during that period.

- (10) "Liberty and Justice," November 1995 issue

- (11) "The Proposal Outline" received comments from committees that:

- Agree to the proposal;
- Revise the present proposal that only considers the conditions in the case of abolition into a new one that might also take into consideration the improvement in case of retention, including reduction of crimes to which capital punishment may be applied and review of existing laws to strengthen the right to defend;
- Exclude from the proposal life imprisonment without possibility of parole because it is cruel.

- (12) In March 1998, the liaison council for measures on the capital punishment problems again submitted a "Proposal outline (revised)" arguing that it is impermissible for JFBA to postpone a conclusion on the issue of capital punishment in light of the fact that capital punishment had been carried out every year for years and the international trend of requesting efforts to abolish capital punishment.

- (13) According to the survey report of the Tokyo Bar Association published in June 1994, of 1,264 answers collected, 19.8% favored conditional retention of capital

punishment and 12.5% supported unconditional retention. Meanwhile, 18.4% favored abolition and 42.7% supported conditional abolition. The number of those who supported conditional and unconditional abolition was greater than that of those who favored conditional and unconditional retention.

### **III. Problems of the Capital Punishment System**

#### **1. Basic Problems of Capital Punishment**

Considering the studies, recommendations and declarations on capital punishment that JFBA has accumulated, the basic problems of capital punishment that are basically agreed among local bar associations are as follows:

These can be pointed out as objective problems from the viewpoint of both abolitionists and retentionists. <sup>(14)</sup>

##### (1) International trends and capital punishment

The first problem of the capital punishment system is that the abolition of capital punishment is an international trend and that its retention in Japan is divergent from this trend.

The number of abolitionist countries has recently increased to exceed that of retentionist countries. Japan is one of the few industrialized countries which has not yet abolished the death penalty: with the exception of the USA, all other members of the "Group of Seven" largest industrialized nations have abolished the death penalty. The U.N. General Assembly adopted the Second Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR), aiming at the abolition of the death penalty in 1989, it took effect in July 1991. In 1993 and 1998, the United Nations Human Rights Committee recommended the Japanese government to improve its capital punishment system, including taking "steps toward the abolition of capital punishment." In June 2001, the Council of Europe passed a resolution urging the United States and Japan to temporarily suspend executions and immediately take steps towards abolition of the capital punishment system.

Since there is no doubt that international trends are moving towards the abolition of capital punishment, its continued retention in Japan is contrary to this trend. <sup>(15)</sup>

##### (2) Miscarriages of justice and capital punishment

It is impossible to recover lives taken away by executions resulting from a

miscarriage of justice. Rulings on four capital punishment cases, which had become final under the new Constitution and the existing Code of Criminal Procedure, which came into force after World War II, were overturned to “not guilty” after retrials. This proves that miscarriages of justice may inevitably exist even in final rulings of capital punishment cases. From the nature of things, it is difficult for the judicial system to remove the possibility of miscarriage of justice. In Japan, miscarriages of justice are further likely to take place because of compulsory investigation with the use of arrest on separate charges and substitute prisons (daiyo kangoku), forced confessions, judicial findings of facts with an emphasis on confessions, insufficient rights to defense legal representatives of suspects and defendants, and the difficulty to correct miscarriage of justice by means of retrials.

Miscarriage of justice may take place not only in the fact-finding process but also in the sentencing. There is an absolute gap between capital punishment and life imprisonment. The possibility of mistakes in sentencing is undeniable, and it is also undeniable that selection between capital punishment or life imprisonment could depend on subjective views of judges, including their views of the world. <sup>(16)</sup>

### (3) Capital Punishment and Its Deterrent Effects on Crime

Although retentionists argue that capital punishment is meaningful as a criminal policy due to its threatening power and deterrent effects on crime, there has been no scientific evidence for this argument. Various empirical studies have been carried out on this issue of capital punishment; most results show negative conclusions regarding the deterrent effects, while very few prove positive. In countries that have abolished capital punishment, such as the United Kingdom and France, there has been no confirmation that the number of heinous crimes has increased since abolition of capital punishment. Deterrent effects on crimes to which capital punishment can be applied arise from pursuing the causes of crime, preparing and implementing effective measures to prevent crime, and ensuring the arrest, prosecution and punishment of criminals.

### (4) Cruelty of capital punishment

Although the Supreme Court rulings say that capital punishment is not cruel, its cruelty nonetheless is undeniable.

Capital punishment definitely and inevitably takes away human life and dignity. No matter how it may be carried out, capital punishment itself can be said to be cruel. Many death-row inmates are mentally disturbed in fear of execution. In their

treatment, the authorities emphasize “the mental stability of the prisoners,” however the human dignity of prisoners is largely ignored. They are forced to just wait for their executions, for which they are told just before the capital punishment is carried out, isolated from society by strict limitations placed on contact with the outside world. Executions also have a significant effect on the human body: some executions by hanging, which is practiced in Japan, show great damage to the human body. It can hardly be said that current means of execution by hanging has been verified not to correspond the definition of “cruel punishment”, which is prohibited by the Constitution. The fact that observers of executions are seriously shocked such that they become neurotic in some cases, and never want to observe again, shows the cruelty of capital punishment.

#### (5) Crime victims and capital punishment

The bereaved of victims who were killed in crimes are especially in deep sorrow and tend to be occupied with strong retributive feelings. In addition to direct damages by the crime itself, insensitive intrusion by media-persons, people involved in the judicial procedure and by some members of the public may hurt them. Furthermore, it is possible that given the lack of victim support net, a sense of isolation made worse by the government and society ignoring them, the bereaved are further damaged, turning their feelings into yet more hatred.

From the viewpoint of retributive feelings and wishes to impose the ultimate penalty on criminals held by the bereaved of victims, especially those killed, it is not easy to discuss and review the capital punishment system. However, this important viewpoint should not be disregarded.

Such damages cannot, however, be resolved even if criminals are executed. It's also important to note that offenders of crimes to which capital punishment can be applied are not always sentenced to death. Merely retaining capital punishment does not solve the problems of the victims. Efforts to prevent recurrences by studying the causes and background of crimes and preventive measures as well as supporting victims by giving economic assistance, mental care and appropriate involvement in criminal justice procedures will possibly mitigate the sufferings of the bereaved and open a way to ease their feelings, including retributive and revengeful feelings.

#### (6) Capital punishment and public opinion

According to various polls, it is reported that the proponents of the retention of capital punishment account for a fair proportion of the population. In the latest poll

released by the Prime Minister's Office on November 27, 1999, retentionists account for 79.3% of the population while abolitionists 8.8%. However, there is some criticism of the poll conducted by the government on the ground that sufficient information was not provided and those who support abolition under certain conditions are orientated to support the retentionist side. There are only three multiple-choice answers, with no mention of alternative punishment or the possibility of miscarriage of justice: "Capital punishment should be abolished in any case" (8.8%), "Capital punishment is unavoidable in some cases" (79.3%), and "Do not know/Cannot generalize" (11.9%). Of those who answered "Capital punishment is unavoidable in some cases," 56.5% answered "Capital punishment should not be abolished even in the future", and 37.8% answered "Capital punishment could be abolished in the future if conditions change." The result of this poll incorporates conditional or potential abolitionists into the retentionists. Abolitionists, including those who affirmed conditional abolition, not necessarily remain in the minority. Therefore, one cannot conclude that the majority of the public are retentionists. If the possibility of introducing alternative punishment or the issue of miscarriages of justice were included in the questions, it is thought that the results would change.<sup>17)</sup>

National sentiments supporting the retention of capital punishment cannot be ignored. However, past polls did not give respondents enough information beforehand and there is a tendency to incorporate various opinions toward capital punishment, including support for future abolition, into support for retention. In the meantime, there has been a diversification of opinions on capital punishment. Information on the application of capital punishment is not sufficiently available. The issue of capital punishment should be discussed on the condition that the government proactively provides the public with sufficient information.

Additionally, some commentators state that the issue of capital punishment is that of human rights and should not be decided by public opinion.

#### (7) Capital punishment and its alternatives

Many of the abolitionist countries adopt life imprisonment that does not permit a release on parole for at least 15 to 30 years as a substitute for capital punishment. There are countries that had adopted life imprisonment without parole, but many of them later shifted to systems that permit parole after a certain period.<sup>18)</sup>

In Japan, there is a wide gap between capital punishment and life imprisonment with parole, which can be permitted after ten years. The issue of the capital punishment system should be discussed, taking into consideration its alternative such

as life imprisonment without parole and life imprisonment with parole that can be permitted only after a certain period of time. <sup>(19)</sup>

As an alternative to capital punishment, some argue that life imprisonment without parole or imprisonment with parole that can be permitted after about 20 years should be newly adopted.

Thus far, we have pointed out the objective factual problems of the capital punishment system. But it can hardly be said that they have been sufficiently discussed inside JFBA or at the public level, including the Diet.

Notes:

(14) As mentioned above, the Kanto Federation of Bar Associations held the symposium "Think about Capital Punishment" in September 1995 and issued a report. The system of capital punishment was reviewed as a fact, not in a manner of debate between retentionists and abolitionists, but in a manner of searching for factual common ground of retentionists and abolitionists. A declaration concerning capital punishment was adopted. Basic problems of capital punishment pointed out in this paper are almost all based on the declaration and the report of the symposium. Refer to Issue 11, Volume 46, of "Liberty and Justice" for the declaration and "Think about Capital Punishment" by Kanto Federation of Bar Associations for the report.

(15) Amnesty International reports the number of retentionist countries or areas as 84, surpassed by the 111 abolitionist countries or areas as of January 1, 2002.

(16) "The Assessment of the Sentencing in Capital Punishment Cases," Issue 10, Volume 42, "Liberty and Justice." P. 404 of "Think about Capital Punishment."

(17) The surveys on the capital punishment system conducted in 14 local bar associations from 1993 through 1996 indicated that the number of votes for abolition and conditional abolition surpassed that for retention and conditional retention in 10 associations and the opposite was true in four associations.

(18) "Study Reports on Abolitionist Countries (Europe)," the Subcommittee on the study of the capital punishment system of JFBA's Human Rights Protection Committee. Life imprisonment means imposing the penalty until prisoners are dead. It does not mean that only the penalty without parole is called life imprisonment.

(19) A survey of retentionist States in the United States shows that the number of those who support capital punishment reduces by half if life imprisonment without parole or life imprisonment without parole with the addition of monetary compensation for families of victims is adopted in place of capital punishment ("Life Imprisonment in Place of Capital Punishment: Current Situations in the United States," Kikuta, Koichi September 2000

issue of “Horitsu Jiho”).

## **2. Institutional and Operational Problems Concerning Capital Punishment in Japan**

In addition to basic problems of the capital punishment system itself as mentioned above, institutional and operational problems can also be pointed out; such as an insufficient guarantee of the rights of those facing capital punishment (including suspects and defendants of crimes to which capital punishment can be applied, and convicted death-row prisoners), the lack of a system to prevent miscarriages of justice, and the inhumanity of executions and treatment of those on death row.

These problems violate the following international standards of human rights:

- ① International Covenant on Civil and Political Rights (Adopted at the 21<sup>st</sup> session of the U.N. General Assembly in 1966. Ratified by Japan in June 1979. Hereinafter referred to as “ICCPR ”);
- ② Resolution on the Safeguards Guaranteeing Protection of Those Facing the Death Penalty (Passed at the U.N. Economic and Social Council on May 25, 1984. Hereinafter referred to as “Council Resolution.”);
- ③ Resolution on the Implementation of the Safeguards Guaranteeing Protection of Those Facing the Death Penalty (Passed at the 44<sup>th</sup> session of the U.N. General Assembly in 1989. Hereinafter referred to as “General Assembly Resolution.”);
- ④ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Ratified on July 29, 1999. Hereinafter referred to as “Convention against Torture.”).

### **(1) Guarantee of rights for those facing capital punishment**

#### **A. Guarantee of rights to defense and counsel**

Article 14.3 of ICCPR states that everyone shall be entitled:

- (b) To have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing;
- (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.

The Council Resolution refers to the need to give “all possible safeguards to ensure a fair trial, at least equal to those contained in article 14 of ICCPR, including the right of

anyone suspected of or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings.” (Annex 5)

The General Assembly Resolution requires member states to afford “special protection to persons facing charges for which the death penalty is stipulated, by allowing time and facilities for the preparation of their defense, including the adequate assistance of counsel at every stage of the proceedings, above and beyond the protection afforded in non-capital cases.” (“General Assembly Resolution” 1(a))

However, in Japan:

a. At the stage of investigation

To those who cannot obtain counsel for reasons of poverty, legal assistance is not actually available, since Article 36 of the Code of Criminal Procedure does not permit assigning state-appointed defense counsel to those other than defendants. Even in cases where private counsel is obtained, free and sufficient contact with counsel is not guaranteed in reality, pursuant to Article 39.3 of the Code of Criminal Procedure, which allows the designation by investigative authorities of the date, place, and time of a defense counsel’s interview with a suspect, and substitute prison system.

As a result: “Almost half of the death-row inmates were never interviewed by counsel at the stage of investigation before prosecution. Even in case of those who had interviews by counsels, about half of them did so three times or less. The time allocated for interviews is less than 10 to 15 minutes, while its relation to frequency of interviews is unknown. Two thirds of them make denials of the accusations totally or partially. However, they are not highly conscious of the right to counsel most death row-inmates are not and half of them do not think they can employ lawyers, due to reasons including financial difficulties. In fact, many cannot receive legal assistance because they hesitate to exercise their rights in light of their having committed to a serious crime or the investigative authorities lack understanding of suspects’ rights. Accordingly, those who think that different rulings would have been given if they had received sufficient legal advice and assistance account for nearly 80%.”<sup>(20)</sup>

b. At the stage of trial

Just after indictment or appeal and before a new court-appointed attorney is assigned by appellate court after the district courts’ ruling, there is a period of time without counsel. As a result in some cases defendants withdraw their appeals before court-appointed counsels are assigned and the death sentences become final.

c. After the conviction

Article 30.1 of the Code of Criminal Procedure, only providing for the right to counsel of suspects and defendants, does not permit the right after the conviction. That means convicted prisoners are not guaranteed opportunities to have legal assistance. The Prison Law also does not provide for a system relating to the appointment of counsel.

Also in case of requests for retrials, opportunities to have legal assistance are not guaranteed. Since Article 36 of the Code of Criminal Procedure does not permit state-appointed counsel for those other than defendants, it is extremely difficult for those without financial means to have legal assistance in retrials.

In addition, Article 39 guarantees the right to confidential communications with counsel only for suspects and defendants, meaning the right to confidential communication of those on death row with their counsel is not guaranteed. In reality, they are deprived of opportunities for access to counsel in relation to requests for retrials, as their contacts with the outside world, both meetings and correspondence, are extremely limited. Confidential communications with counsel necessary to prepare for requests are not guaranteed.

d. At the stage of executions

Article 476 of the Code of Criminal Procedure provides that capital punishment shall be carried out within five days after the order of execution, and an opportunity for defense against the order of execution is not guaranteed. Furthermore, due to lack of a system of prior announcement of the execution date, prisoners do not know when they will be executed until they are taken up to the place of execution on that very day. They are absolutely deprived of the opportunity to prepare a defense against an execution order.

The above mentioned incomplete condition of rights to defense and counsel violates Articles 14.3 (b) and (d) of ICCPR, the Council Resolution and the General Assembly Resolution.

B. Mandatory appeal, pardon system and retrials

Article 6.4 of ICCPR says, "Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases."

The Council Resolution states:

"Anyone sentenced to death shall have the right to appeal to a court of higher jurisdiction, and steps should be taken to ensure that such appeals shall become

mandatory,” (Annex 6)

Concerning pardon or commutation; “Anyone sentenced to death shall have the right to seek pardon, or commutation of sentence; pardon or commutation of sentence may be granted in all cases of capital punishment,” (Annex 7) and “Capital punishment shall not be carried out pending any appeal or other recourse procedure or other proceeding relating to pardon or commutation of the sentence.” (Annex 8)

The General Assembly Resolution requires member states “to provide for mandatory appeals or review with provisions for clemency or pardon in all cases of capital offence.” (1(b))

However, in Japan:

a. Concerning appeals:

The Council Resolution demands mandatory appeals for capital cases (Annex 6) and the General Assembly Resolution requests states to provide for mandatory appeals (Resolution 1(b)). It can be understood that both resolutions demand a system of mandatory appeal that makes appeals effective regardless of defendants’ thoughts. The purpose of these resolutions is to avoid conviction of death sentences and executions based on only the first trial, since capital cases should be examined with great caution to absolutely avoid miscarriages of justice in such cases.

In Japan, however, as Articles 372 and 405 of the Code of Criminal Procedure provide appeals and final appeals as optional, a mandatory appeal system that regards death sentences as causes of appeals or final appeals is not authorized. In addition, causes of appeals and final appeals are also limited.

The appeal system in Japan does not meet the requirements of the Resolutions. Meanwhile, most of the retentionist states in the United States, (also a retentionist country), adopt an automatic appeal system.

b. Pardon system

The Amnesty Law only permits the application for amnesty or pardon and does not consider the application as a cause of the suspension of execution. Therefore, the system allows execution even with amnesty or pardon pending. Pardon for capital punishment is extremely rare: the last pardon by a Cabinet order was granted in April 1952 and the last pardon to an *individual* prisoner was granted in June 1975 (only three death-row prisoners were granted individual pardon after the World War II). Cabinet order standard also totally excludes the capital cases from the objects of pardon.

c. Retrials

Article 435 of the Code of Criminal Procedure and other regulations significantly place limitations on petitions for retrials. Procedures for the petition are clearly insufficient in terms of speed and remedy for the innocent, with many faults and defects pointed out. The court-appointed counsel system for the petition for retrials does not exist and it can hardly be stated that rights to defense are substantially guaranteed as mentioned above. Prosecutors can suspend the execution when a petition for retrial is filed (Article 442 of the Code of Criminal Procedure), and the petition is not regarded as a necessary cause of suspension of an execution. The request for retrial and the application for pardon are not given the effect of suspension in Japan, though the Council Resolution demands that capital punishment should not be carried out prior to a decision about procedures for retrials, pardon or commutation.

The lack of a mandatory appeal system and incompleteness of the pardon and retrials systems, as mentioned above, violate Article 6.4 of ICCPR, the Council Resolution and the General Assembly Resolution.

C. The limitation on executions of juveniles, the aged and the mentally disabled

Article 6.5 of ICCPR provides, “capital punishment shall not be imposed for crimes committed by those under age of 18 and shall not be carried out on pregnant women.”

The Council Resolution provides, “those under the age of 18 at the time of the commission of the crime shall not be sentenced to death, nor shall the death sentence be carried out on pregnant women, on new mothers, or on those who have become mentally ill.” (Annex 3)

The General Assembly Resolution demands member states “to establish a maximum age beyond which a person will not be sentenced to death or executed” (1(c)) and “to eliminate the death penalty for a person with mental disability or extremely limited mental competence, regardless of the stage of sentence or execution.” (1(d))

However, in Japan:

a. Concerning juveniles;

Article 51 of the current Juvenile Law meets the above-mentioned condition of “those under the age of 18” and also does not violate Article 37 of the Convention on the Rights of the Child that took effect in May 1994 in Japan. However, Article 7-1 of the U.N. Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules, adopted at the U.N. Congress on the Prevention of Crime in September 1985 and approved at the General Assembly in November 1985) provides in the preamble of the Convention on the Rights of the Child that regardless of age of juveniles “Capital

punishment shall not be imposed on juveniles, no matter what crimes they may have committed.” It is not clear if Article 51 of the current Juvenile Law permits the imposition of capital punishment on juveniles of 18 years of age and above at the time of crime, in consideration of the aims of the above-mentioned rules and Article 6 of ICCPR (the right to life and guarantee of existence and development), the provision of the existing Juvenile Law defining persons under 20 years of age as juveniles, the relation with Article 41 of ICCPR (guarantee of existing rights), and the international trend of abolition of capital punishment based on the ratification and enactment of the Second Optional Protocol to ICCPR.” The ban on capital punishment for juveniles should be demanded regardless of their age.

In Japan, however, there have been a few examples of imposing capital punishment on juveniles who were 19 years old at the time of the commission of the crimes such as the Norio Nagayama case.

**b. Concerning the aged**

Article 479.2 and 3 of the Code of Criminal Procedure provide that executions of pregnant women shall be suspended and in that case mothers who delivered should not be executed without the order issued by Minister of Justice. However, there is absolutely no system which prohibits executions of the aged and no provision concerning a maximum age beyond which a person will not be sentenced to death or executed.

**c. Concerning the mentally handicapped**

There is no provision that prohibits the death penalty for persons with mental disability or extremely limited mental competence, at the time of sentencing, though Article 39 of the Criminal Code eliminates the death penalty for those who were insane or quasi-insane at the time of committing the crime and Article 479.1 of the Code of Criminal Procedure provides for the suspension of an execution in the case of an insane person. No system exists that mandatorily requires examination or diagnosis of a defendant’s mental condition by an expert witness in public trials. At the time of an execution, there is no provision other than the ban on executing the insane, and also there is no system of a mandatory examination of a prisoner’s mental condition or diagnosis equivalent to an examination. Even effective confirmation of conditions of mental disability for those on death row is impossible due to a lack of guarantee of their right to counsel and communication with the outside world, prior notification of execution date to the prisoners and their family members, and disclosure of

information on a prisoner's mental condition.

Lack or incompleteness of restrictions on executions of juveniles, the aged and the mentally handicapped as mentioned above violates Article 6.5 of ICCPR, the Council Resolution and the General Assembly Resolution.

(2) Lack of a system to prevent miscarriage of justice

In Japan, from 1983 through 1989, four death-row inmates were exonerated following retrials (Menda, Saitagawa, Matsuyama and Shimada cases). These cases uncovered the risk of miscarriage of justice even for capital punishment cases.

Capital punishment is an irrevocable penalty that takes away human life; therefore there can never be room for miscarriages of justice in capital punishment rulings.

There are, however, structural risks of a miscarriage of justice in the criminal justice system and its operation in Japan. These include lack of state-appointed defense counsel at the stage of investigation and an insufficient court-appointed counsel system, forced confessions in substitute prisons based on assumptive investigation, trials that are over-dependent on confessions and investigation records due to judges' unreasonable trust in investigators, strong disbelief in defendants, lack of ability to find facts, and the manner of administrating hearings leaning towards prosecutors, nondisclosure of evidence that prosecutors possess, existence of false expert testimony, and difficulty of retrials. The criminal justice system in Japan involves structural risks of miscarriage that cannot tolerate the retention of the capital punishment system, as well as insufficient guarantee of the rights to defense and counsel as mentioned above.<sup>(21)</sup>

It is, therefore, necessary to eliminate the structural risks of miscarriages of justice by carrying out drastic reviews and improvements in the prevention of such miscarriages. Current criminal procedures for death sentences and retrials in Japan violate Article 14 of ICCPR, the Council Resolution and the General Assembly Resolution. It is no longer permissible to retain capital punishment and continue executions.

Structural causes of miscarriages of justice can be eliminated by taking the following points into consideration:

- ① Appointing counsel at the stage of investigation for suspected cases of crimes to which capital punishment may be applied. If private counsel is not available, a counsel should be appointed by the government.
- ② Stop the use of substitute prisons as the place of detention of suspects for crimes to which capital punishment may be applied.

- ③ Appoint more than one lawyer for suspected cases of crimes for which capital punishment may be applied.
- ④ Secure a system to record the interrogation process by means of audiotape and video recording.
- ⑤ Impose an obligation of advance disclosure of all the evidence that prosecutors possess and guarantee access of counsel to the evidence, for suspected cases of crimes to which capital punishment may be applied.
- ⑥ Require death sentences to be given by a unanimous vote of judges.
- ⑦ Ban prosecutors' appeal demanding capital punishment.
- ⑧ Introduce a system of mandatory appeals by defendants sentenced to death at the first or second trial. Require three trials for capital punishment cases.
- ⑨ Require the Supreme Court to make its own decision without sending cases back to lower courts when it reverses death sentences while finding defendants guilty.
- ⑩ Minimize the limitations on communication of those on death row with the outside world.
- ⑪ Improve the retrial system (e.g. ease the requirements for opening of retrials) and guarantee the right to have free confidential communication with counsel and remove obstructions to prepare for retrials and other lawsuits proceedings. To guarantee the right to appoint counsel and to introduce the state-appointed counsel system in retrials.

### (3) Inhumanity of the treatment of those on death row

Although Article 9 of the Prison Law stipulates that communication of condemned prisoners with the outside world shall follow the provisions applied to other criminal defendants, the communication can be limited if there is the possibility that it may threaten their custodial conditions, raise social unrest, disturb their mental stability, or cause trouble in managing the facilities. This limitation is based on the circular by the Director General of the Correction Bureau dated March 15, 1963, stating, death row prisoners "should be separated from society, and restrictions on their communication should be a logical obligation from a viewpoint of securing their custodial conditions and preventing social unrest." (Currently, this circular is put into practice more restrictively. In principle, death-row prisoners may only communicate with their immediate family members, lawyers involved in their petitions for retrials, those who are considered by the prison authorities to contribute to their mental stability or to be necessary to protect their rights.)

Therefore, meetings and correspondence with only very limited family

members are permitted, while those with others are prohibited. This practice of extremely limited communication does obstruct the exercise of the rights of death-row prisoners such as petitioning for retrials.

This inhumane treatment of death row prisoners, which the United Nations Human Rights Committee pointed out to be improved, violates Article 7 of ICCPR and falls under “torture and other cruel, inhuman or degrading treatment or punishment,” provided by the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

#### (4) Inhumanity of execution procedures

A. No prior notification of the execution date is given to both death-row prisoners themselves and their family members.

In Japan, notification of an execution date is given to prisoners about an hour before their execution. Previously, the notification was given no later than the day before the execution, which made it possible for the prisoners to write their last words or have final meetings with their families. However, it is said that, since January 22, 1976, when an execution was carried out in Tokyo Detention Center notification came to be given the morning of the very day of execution.

Prisoners face the fear of execution every morning as executions are generally carried out in the morning. This sudden notification contradicts the general comment 7(16) of the United Nations Human Rights Committee (adopted on July 17, 1982).

Prior notification of an execution is still not given to the prisoner’s family. They are only informed of an execution after it is carried out and only asked if they will receive the body or let the prison authorities cremate the body.

The United Nations Human Rights Committee recommended in the third and fourth examination of the periodical reports by the Japanese Government, that the lack of prior notification of execution to family members is considered as conflicting with the Covenant. Despite this recommendation by the Committee, the Japanese government has not taken any steps to change this procedure.

The treatment of notification about an hour before the execution without advance notification to those facing death penalty themselves and their family members is inhumane and takes away chances of remedies, including retrials, suspension of execution, and petition for pardon. It is vital to at least guarantee a period necessary for legal procedures, exercise of the right to defense and humanitarian care, and to notify convicts themselves, their families and counsel.

B. All the remedies for execution are deprived.

Lack of advance notification given to those irrevocably sentenced to death and to their family is extremely cruel. In addition, combined with the excessive limitation on their communication with the outside world, it also proves that the possibility to adopt remedies for execution by convicts, their family and counsel is totally deprived.

The above-mentioned procedure of execution is cruel and inhumane and violates articles 7 and 10 of ICCPR, the Convention against Torture, the Council Resolution and the General Assembly Resolution.

C. The issue of the number of crimes to which capital punishment may be applied

In Japan, the existing Criminal Law and other related regulations provide for as many as 17 crimes for which capital punishment may be imposed, including many political crimes.

The Human Rights Committee stated in the advice of their third review, “the committee is bewildered by the number and quality of crimes for which capital punishment may be imposed under the Criminal Law in Japan”; “the committee reminds that capital punishment should only be applied to the most serious crimes in the countries that have not abolished capital punishment”; and “the committee advises that ... capital punishment should be limited to the most serious crimes before it is abolished.” The committee also stated in the fourth review, “The committee is seriously concerned about the fact that the number of crimes to which capital punishment may be applied has not decreased as the delegation of the government explained in the third review on Japan. The committee again recalls that the words of ICCPR, aiming at the abolition of capital punishment, stipulating that capital punishment should only be applied to the most serious crimes in the state parties that have not yet abolished it. The committee advises that Japan should take steps to abolish capital punishment and that in the meantime the application of capital punishment should be limited to the most serious crimes pursuant to Article 6.2 of ICCPR.”

It is against Article 6.2 of ICCPR that the existing Criminal Law and other related regulations provide for as many as 17 crimes for which capital punishment may be imposed, including many political crimes. The government should immediately amend the related regulations to decrease the number of crimes stipulated for capital punishment.

The government has made no efforts to decrease the crimes to which capital punishment may be applied, let alone to abolish it. Though the Criminal Law was revised into colloquial style in 1995, the crimes stipulated for capital punishment were not substantially decreased except for those declared unconstitutional by courts in

terms of the application of capital punishment.

Notes:

(20) The Capital Punishment System Study, JFBA's Human Rights Protection Committee, "Research on Meetings of Those Irrevocably Sentenced to Death with Counsel at the Stage of Investigation," Issue 5, Volume 45, "Liberty and Justice"

(21) The Kanto Federation of Bar Associations. Refer to Chapter 6, "The Reality of Criminal Courts and Capital Punishment: Inevitable Miscarriage" of "Think about Capital Punishment" for the death penalty and the structural possibility of mistaken judgments.

### **3. Problems Concerning Information Disclosure of the Capital Punishment System**

#### (1) Capital Punishment and Information Disclosure

Capital punishment is the ultimate penalty that takes away human life, and so it is important to discuss whether the capital punishment system is to be retained, abolished or reformed. There should also be constant verification on the existing capital punishment system adopting appropriate procedures. To carry out reforms and verification, it is essential that information is provided to promote common understanding of the capital punishment system.

However, it is nearly established as a regular practice that those facing death penalty are informed of their execution in the morning of the day of execution, which means no information is provided in advance to their families or counsel, who are preparing certain legal procedures, let alone to the public. After executions were carried out, for a long period of time the public were officially informed of executions only by the annual number of executions in "the Yearbook of Correction Statistics" and "the Yearbook of Prosecution Statistics" issued by the Ministry of Justice<sup>22)</sup> until 1998 when the fact and the number of executions started to be announced by the ministry on each day of execution.

The following important information is rarely provided:

- When, by whom, and on the basis of what standards and resources (e.g. court records, physical and mental conditions) is the decision of execution made?
- How the execution is carried out? (e.g. tasks and psychological state of mind of those in charge of execution; physical and mental conditions, pain and conditions of the bodies of those executed)
- How those facing death penalty are treated after final judgments until the

execution is carried out? What is their psychological state of mind like during that period?

- How do the bereaved of victims lead their lives and feel after rulings of capital punishment?

In the United States, related parties, including the bereaved of victims, are said to be generally allowed to observe executions. Information disclosure may also have to be discussed from the viewpoint of the bereaved of victims.

(2) Information to be disclosed

A. To determine whether the existing capital punishment system (capital rulings, execution and treatment of convicts) follows appropriate procedures, it is necessary that information about reasons for the decision of execution including documents on the convict, and final wishes, health conditions and execution conditions of those on death row should be provided, even after execution, not only to counsel and the bereaved of those facing death penalty (executed) but also at least to a certain group of people, including bar associations and scholars<sup>(23)(24)</sup>.

To determine whether the existing way of execution is appropriate in light of technological and social conditions (whether it is a cruel way or not), it is necessary that information is provided about the structure of the place of execution, specific execution procedures and physical and mental conditions (including those of the bodies) of those on death row.

Besides the above-mentioned information, to review whether to retain or abolish the capital punishment system itself, information about the international trends of capital punishment systems (including criminal trends after abolition and maximum penalties replacing capital punishment) and how to care for victims needs should be provided. In particular, if public opinion is taken as one of the grounds to determine whether to retain or abolish the capital punishment system, it is obvious that correct information should be provided to the public and in turn the public opinion to be relied on is one based on this information.

As mentioned above, a wide range of information about the capital punishment system should be widely provided for in the discussion of the capital punishment system not in the abstract but as a concrete legal system.

B. Information that should be provided may be listed as follows:

a. Information about capital punishment issues

- i. Conventional argument over the rights and wrongs of the capital punishment

system

- ii. Criminal trends and the number of death sentences and executions in Japan
  - iii. International trends of capital punishment systems, including the number and names of abolitionist and retentionist countries, adoption of the Convention against Capital Punishment and advice from the United Nations.
  - iv. Findings about deterrent effects of capital punishment on crime
  - v. Treatment, life and psychological state of mind, including its formative process, of those facing death penalty
  - vi. Psychological state of mind of those involved in executions such as prison officers
  - vii. Remedy and care system for crime victims in each country
  - viii. Criminal trends, the maximum penalty and its application in abolitionist countries
  - ix. Criminal procedures prior to death rulings<sup>25)</sup>
  - x. The structure and mechanism of execution sites and specific description of execution
  - xi. Costs of maintaining the capital punishment system
- b. Specific procedures for capital punishment
- i. Dates and places of executions and persons executed
  - ii. Information about rulings on capital punishment--criteria for the decision to carry out capital punishment on that point<sup>26)</sup>
  - iii. Procedures of execution---especially, when, where, how and by whom those facing death penalty were informed
  - iv. Information about execution itself<sup>27)</sup>
  - v. Information about intention to serve time and final opinions of those facing death penalty<sup>28)</sup>

### (3) How to disclose information about capital punishment

The Ministry of Justice points to protection of the privacy of those facing death penalty and their families as a reason not to disclose information about capital punishment. The issue of privacy is of course of primary concern. However, the main problem of Japan's capital punishment system is that hardly any information is released, regardless of whether the information is considered to directly violate privacy or not.

For information disclosure about capital punishment, needs for information disclosure, standards and scope should be reviewed as a first step.

Specifically:

- ① Why information needs to be disclosed or provided
- ② To whom and how information should be provided, and what kind of information<sup>29)</sup>
- ③ Which institution decides disclosure of information
- ④ How to file complaints
- ⑤ How the commitment of those facing the death penalty or victims' families to the authority to control information should be
- ⑥ Privacy issue

Reviewing these issues will help establish a system for information disclosure.

However, these considerations have hardly even been reviewed. This is one of the important tasks concerning the capital punishment system.

Notes:

(22) Recorded in "the Monthly Report of Judicial Statistics" until December 1990. Thereafter the number appears in the yearbooks.

(23) The Ministry of Justice should, at least right before execution, record how it evaluated the health conditions of those facing death penalty, whether it made an appropriate examination of their mental disability, whether it sufficiently understood their intention about the procedures for retrials and pardon, and whether they had causes to appeal complaints, so that convicts and their related parties may obtain such information by following certain procedures.

(24) From the standpoint of guaranteeing the rights of those facing capital punishment, the U.N. General Assembly resolution of 1989, the U.N. Human Rights Commission resolution of 1997 to request the abolition of capital punishment, and the U.N. Human Rights Commission resolution of April 1998 require retentionist countries to disclose information about the application of capital punishment, including about the degree of necessary guarantees of human rights provided by domestic laws, as long as they carry out execution.

(25) Insufficient guarantee of the right to counsel with lack of an official counsel system at the stage of investigation; actual conditions of defense efforts; the possibility and degree of miscarriages of justice in consideration of past cases where those on death row were found not guilty after retrials; and the criteria for assessment of penalties.

(26) The decision of execution begins with the preparation of reports by the superintendent public prosecutor or the head of prison and substantially ends with orders signed by the minister of justice. It is thereafter left to the superintendent prosecutor's command of execution, based on an execution order document. Information

to be provided may include:

- Materials that the superintendent prosecutor refers to for preparation of reports;
- Attested copies of rulings, court records, records which have not been submitted to courts, personal information reports, and health reports;
- Records during the period of waiting for execution in prison;
- Records on the evaluation of “mental stability”; and
- Records on listed causes of the decision of execution and the criteria for the decision).

(27) May include the place of execution, the starting and finishing time of execution, time taken for execution, contents of what doctors confirmed, observers, autopsy findings, the presence of accidental events, and behavior and mentality of those about to be executed.

(28) May include the health, mental and living conditions of those facing death penalty, the condition of preparation for remedies such as retrials, pardon and filing complaints, last feeling of the convicts, communication with related parties, wills for their families, and intention for the treatment of bodies.

(29) Contents of information and timing of its disclosure may vary, depending upon the relationship of those to whom information is to be provided to those facing death penalty (including families of convicts, the bereaved of crime victims, scholars, members of the legal community and the general public) and the purpose of disclosure.

#### **IV. Tasks For JFBA Regarding the Issue of the Capital Punishment System**

##### **1. Efforts to Improve the Criminal Justice System Concerning Capital Punishment**

The Japanese capital punishment system lacks a system of preventing miscarriages of justice institutionally and operationally. It also violates ICCPR, Council Resolution and General Assembly Resolution. Moreover, the Japanese capital punishment system also violates the Convention against Torture, from the viewpoint of humanitarian issues regarding securing the rights of those facing capital punishment, their treatment and execution procedures.

In Japan, a capital punishment retentionist country, we must; establish a system of court-appointed attorneys for suspects, abolish substitute prisons, establish a system of discovery of evidence, establish a system of unanimous consent by all the judges in death penalty cases, establish a system to prevent miscarriage of justice, such as a system of automatic appeals, thoroughly secure rights to advocacy and defense during

all the procedures from investigation through trial, post-ruling, and execution, prepare and establish an amnesty system; and secure the rights for those facing capital punishment, including a limit on executions. We must also resolve the conditions violating the international human rights standards, such as improvement of humanitarian issues regarding treatment of those facing death penalty and execution procedures. Unless drastic improvements are made on these issues, the system is currently in a condition where execution of capital punishment is no longer permissible under international standards to which Japan is a state party.

JFBA should further strengthen the efforts to improve such a criminal justice system concerning capital punishment from the viewpoints of protecting basic human rights and improving the legal system as long as the capital punishment system exists in reality.

## **2. Activation of Discussion on Preservation or Abolition of Capital Punishment and Promoting Public Discussion**

Japan, as a retentionist country, is required by the international community including recommendations by the Human Rights Committee and resolutions by the U.N. Human Rights Commission not only to reform the capital punishment system and suspend executions but also to take measures toward the abolition of the death penalty as well as ratification of the Second Optional protocol to ICCPR, which was enacted in 1989. JFBA has a responsibility to directly respond to these international demands.

The Japanese government is not only opposed to ratification of the Second Optional Protocol to ICCPR at the United Nations but also has never carried out deliberations and review of the capital punishment system and presentation for domestic public discussions even after the Protocol was adopted. This played a role in avoiding a fully developed public discussion sparked by the Protocol and causing a divergence between international movements demanding abolition of capital punishment and Japanese public opinion which supports preservation of capital punishment. It can hardly be said that JFBA has developed internal discussions concerning the issue of preservation or abolition of capital punishment, including the issue of whether Japan should become a member of “the Convention against Capital Punishment” since it was ratified.

In order to respond to the international demands calling for the signing the Protocol and the abolition of capital punishment, JFBA should make efforts to aim for a society where heinous crimes do not take place, namely a society that does not need a capital punishment system. Activate discussion among JFBA, in reference to a variety of the above-mentioned problems concerning the capital punishment system, and full

commitment to discussions aimed at reaching a further agreement and decision by JFBA should take place. At the same time, JFBA should present public discussions concerning the issue of preservation or abolition of capital punishment, including whether Japan should become a state party to the Protocol, through conducting further research, making proactive proposals, publishing source materials, and holding symposiums and lectures, and encourage the government and the Diet to strengthen measures to respond to international demands for the country as a whole.

### **3. Disclosure of Information Concerning Capital Punishment**

Under circumstances where capital punishment matters are treated as government secrets, the public is rarely given information about the capital punishment system.

As a prerequisite for discussions on the capital punishment system among JFBA and discussions nationwide, disclosure of information concerning the capital punishment system is indispensable. By disclosing information on the capital punishment system to the public, national sentiments on capital punishment could change and the issue of the capital punishment system should be discussed with enough information provided to the public. The government should promptly provide basic information on capital punishment to the public.

While JFBA should demand the Japanese government to disclose enough information on the capital punishment system, it should compile the various information on capital punishment it can obtain and promote active discussion on capital punishment among JFBA and nationwide by providing the information not only to JFBA but also to the public.

### **4. Recommendations for a Maximum Penalty in Place of Capital Punishment**

As a prerequisite for discussions of the capital punishment system, research on a maximum penalty in place of capital punishment (the alternative to capital punishment) and concrete proposals are urgent tasks. In Japan, the wide gap between capital punishment and life imprisonment has been regarded as a problem. While capital punishment is the ultimate penalty of taking away the lives of convicts, for indefinite imprisonment parole could be possible after 10 years. There exists a clear gap between them and this existence of the gap could be said to distort discussions of the capital punishment system. It is considered that public sentiment on capital punishment could be changed, if discussions on the issue of the capital punishment system are carried out along with recommendations for a maximum penalty in place of capital punishment, which are fully persuasive.

Concerning the alternative, first, life imprisonment without possibility of parole can be considered. However, some point out that the penalty is as cruel as capital punishment and a penalty against humanity should not be selected for the sake of pursuit of abolition of capital punishment. Meanwhile, some contend that if the penalty can realize the abolition of capital punishment, the abolition should be considered the priority goal and life imprisonment without possibility of parole should be adopted as a transitional second best policy. There is also an opinion that besides indefinite penalty under the current law, indefinite imprisonment with a limitation on parole limited in excess of 20 years should be newly adopted.

It is an urgent task to launch research and recommendations on a maximum penalty in place of capital punishment which can acquire national consent or setting up a new indefinite penalty to fill the gap between capital punishment and the current indefinite penalty after further discussions of the issues. The discussions on whether to retain or abolish capital punishment should be carried out based on these recommendations.

#### **5. Efforts to Support, Recover and Establish the Rights of Crime Victims**

The damage to the bereaved of victims of heinous crime such as capital crime is unreasonable and their feelings are seriously damaged. The retention of capital punishment does not solve the problems of the bereaved of victims. JFBA is making efforts to aim for a society where heinous crimes will not take place, namely a society that does not require the capital punishment system. This coincides with the wishes of the bereaved of victims that similar damages should never be repeated.

To achieve this, it is necessary to research causes of heinous crimes and measures to prevent such crime. JFBA will make efforts for this research itself as well as in cooperation with other institutions.

From the viewpoint of the capital punishment system, establishing measures for crime victims is important. Support comprising of financial support for crime victims, mental and psychological considerations and support, appropriate involvement in criminal justice procedures and establishment of victim's rights, are all important considerations as a way to ease the damaged feelings of the bereaved of victims

Concerning this point, on October 22, 1999, JFBA announced "proposals concerning overall support for crime victims," including efforts aimed at the enactment of legislation of a basic bill for crime victims. With this as momentum, on November 19, 1999, it set up "a committee to support crime victims" and has launched several measures designed for damage recovery and support of crime victims. Although in the government and at the Diet there has been some progress for protection of crime

victims, such as revision of the law on payment of compensation for crime victims, the country's measures to protect crime victims are still insufficient, compared with the United States and European countries.

JFBA is committed to continue to further promote measures to establish rights, recover damages and support crime victims.

## **V. Suspension of Executions by the Law to Suspend Executions**

### **1. Need to Suspend Executions**

#### **(1) Discussions of whether to retain or abolish capital punishment and the need to suspend executions**

As discussed above, the capital punishment system has many problems. The basic issue is whether to retain the capital punishment system from now on. Such discussions on the basic issue have been insufficiently carried out at the Diet, in the government and amongst the public.

With the Second Optional Protocol to enacted and put into effect, Japan has been requested by the international community, including the Human Rights Committee and the U.N. Human Rights Commission, to ratify the convention and to launch measures to abolish capital punishment. Under these circumstances, what is important today is to make efforts to discuss the issue of whether to retain or abolish capital punishment at the Diet, in the government and among the public, considering the basic problems in capital punishment, and to reach a conclusion of whether to ratify the Protocol.

As long as the death penalty is an absolute unrecoverable penalty that definitely take away lives, to retain the system without public discussion on the basic problems of capital punishment is impermissible. Executions should be suspended until public discussions on the issue of whether to retain or abolish capital punishment are carried out.

#### **(2) Danger of miscarriage of justice, violations of human rights, humanitarian issues and suspension of executions**

The Japanese capital punishment system lacks a system for preventing miscarriages of justice institutionally and operationally. Securing the rights of those facing the death penalty is deficient in all the stages or is in an extremely insufficient condition. Treatment of those facing death penalty and procedures to execute capital punishment is also inhumane. Basically, no improvement has been made to these institutional and

operational problems despite repeated international requests for improvement.

This means that there has been no basic improvement in the danger of miscarriages of justice in capital punishment cases, especially, the danger of miscarriages of justice originating in a structural cause distinctive to Japan.

From the viewpoint of securing the rights of those facing capital punishment, it means there exists a condition violating the basic human rights concerning life.

Furthermore, under the current condition where information concerning application of capital punishment is not disclosed and executions are carried out secretly, it is impossible for the public to check and inspect human rights violations or humanitarian issues.

These dangers of miscarriages of justice, conditions of human rights violations, and humanitarian issues are urgent tasks that require improvement and as long as these issues are not improved, retention of execution of capital punishment is impermissible and capital punishment should be promptly suspended.

### (3) Violation of international human rights standards and suspension of execution of capital punishment

The condition where executions have been continued without any improvement in danger of miscarriages of justice of capital punishment, human rights violations and humanitarian issues violates ICCPR and resolutions of the U.N. Security Council and the General Assembly as well as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

Japan has ratified ICCPR on Civil and Political Right and there is no dispute that it is effective as a domestic law. This is also true for the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which Japan ratified in 1999. Resolutions by the U.N. Security Council and the General Assembly indicate human rights standards universally required in international society are norms to interpret and operate ICCPR and can be interpreted as resolutions with legal binding power through ICCPR. Japan violates articles 6, 7 and 14 of ICCPR concerning capital punishment institutionally and operationally. It also violates the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and in addition, violates resolutions by the U.N. Security Council and the General Assembly. It is no longer permissible to continue executions of capital punishment without improving the conditions of violations.

Considering the above-mentioned fact, JFBA has called for a moratorium of the death penalty through comments by the chairman and announcement. On November

19, 1997, JFBA also passed a request at a board meeting stating:

“The Japanese government, following ICCPR and resolutions of the United Nations concerning those facing capital punishment, should promptly launch measures to guarantee the rights of those on death row, including preparing for enactment of a law guaranteeing rights of those people and launching disclosure of information on capital punishment. Meanwhile, considering those on death row are in conditions violating ICCPR and resolutions of the United Nations, executions of capital punishment should be at least suspended for the time being.”

JFBA has already submitted this request to the prime minister and the justice minister.

Executions of capital punishment should be immediately suspended and drastic deliberation, review and public discussion on capital punishment should be carried out.

## **2. Movements for Suspension of Executions**

In a concurring opinion by Judge Masao Ono to a ruling at the third petty bench of the Supreme Court on September 21, 1993, he mentioned suspension of execution of capital punishment by a law effective for a limited period. He suggested that correlations of any increase of crime be monitored while experimentally suspending execution of capital punishment by law for a certain period of time, in order to harmonize the international trend towards the abolition of capital punishment with Japanese public sentiment supporting its retention.

The U.N. Human Rights Committee has requested retentionist countries to suspend execution of capital punishment with the prospect of completely abolishing capital punishment, raising “resolutions on the abolition of capital punishment” several times, including a resolution in April 1997. Although at the U.N. General Assembly, a resolution calling for the abolition of execution of capital punishment by 2000 has been proposed in 1994, it was not adopted, failing to reach a majority vote. At the Eighth U.N. Congress on the Prevention of Crime and the Treatment of Offenders (1990) a resolution calling for suspension of execution of capital punishment for five years was proposed. Although a majority voted for the resolution, it was not adopted due to failure to reach two thirds of the vote cast.

In June 1998 the Council of Europe passed a “Resolution on the Capital Punishment System and the Realization of Suspension of Executions Worldwide” and in June 2002 adopted a resolution suggesting abolition of capital punishment in Japan, South Korea and Taiwan, requesting immediate abolition of capital punishment or suspension of

execution of capital punishment. In June 2001, the Parliamentary Assembly of the Council of Europe passed a resolution urging the United States and Japan to promptly suspend execution of capital punishment.

In Poland in June 1995, a law to suspend execution of capital punishment for five years was enacted as a transitional measure toward abolishing capital punishment.

In February 1997, the board of the American Bar Association (ABA) adopted a resolution to advise each state's judiciary division to suspend execution of capital punishment until the judiciary division that sentences people to the death penalty complies with ABA's policies and procedures. ABA does not take any side with supporting the abolition or the retention of capital punishment, as the resolution of the board makes a point of stating in the last section that the association confirms that it is not in a position to either calling for the abolition or the retention of capital punishment. However, concerning capital cases, in order to guarantee appropriate procedures and minimize the danger of executing the innocent, ABA requests suspension of capital punishment until certain measures and procedures are implemented. This resolution to suspend execution of capital punishment by ABA had a great impact on retentionist states and from 1999 through 2000 many states submitted to state assemblies bills to suspend execution of capital punishment, which stipulate suspension for two to three years and establishment of a special committee to research all aspects of capital punishment during that period. In late January 2000 the Illinois governor declared a moratorium on execution of capital punishment, stating that all execution of capital punishment in the state will be suspended until it can be made absolutely sure that the innocent will not mistakenly be executed. A review committee comprised of 14 members was set up and overall reviews on the capital punishment system have been started.<sup>(30)</sup>

As mentioned above, suspension of execution of capital punishment has been widely advocated as a powerful and effective measures to realize review of the pros and cons of the capital punishment system, revision of the system and formation of a consensus on the issue of whether to abolish or retain capital punishment, not only from the viewpoint of requesting the abolition of capital punishment but across the viewpoints of abolition and retention.

### **3. System for Suspension of Executions**

The system for suspension of executions is a system to maintain the capital punishment system itself, while uniformly suspending all executions for those irrevocably sentenced to death.

Besides this system, as a system to prevent the execution of capital punishment intermediately, a system of deferred death sentences<sup>(31)</sup> and a system to suspend execution of capital punishment<sup>(32)</sup> could be considered. However, these are systems that judges should adopt for each case and they are not appropriate as measures to uniformly suspend execution of capital punishment and accommodate a drastic review of the capital punishment system during a suspension period. <sup>(33)</sup>

Concerning suspension of execution of capital punishment, there are thought to be suspension of executions carried out on the authority of administrative power, <sup>(34)</sup> including suspension of execution orders by the justice minister, and suspension of executions by enacting a law effective for a limited period to suspend executions, including a suspension of executions law. There was a period of no execution of capital punishment carried out because the justice minister did not issue an order for execution for three years and four months since an execution in November 1989 until executions were resumed in March 1993. This, in hindsight, can be called a virtual suspension of execution of capital punishment. However, considering that executions were resumed without full discussions on the capital punishment system, suspension of executions under the current laws is merely at the discretion of the justice minister and is insufficient as the system to suspend executions. Therefore, suspension by the legislative process is required.

#### **4. Relation to Separation of Powers**

There is possible criticism that suspension of the execution of capital punishment by legislation means legislative power violates judicial power, which could violate separation of powers, a basic principle of the Constitution. <sup>(35)</sup>

The issue of whether suspension of executions by legislation violates judiciary power and disturbs the balance of power is related to many arguments, including how to interpret balance of power stipulated by the Constitution, the range that judiciary power has authority over, and how to interpret stipulation of the Code of Criminal Procedure. While some views state that “because the system of balance of power is a technique to properly control execution of the state power and check abuse, for abolition of executions, a condition of self-restraint of the state power, a revision of a final ruling by legislation cannot be said to violate the order of the Constitution, <sup>(36)</sup> some views contend that “to intend to maintain the utilitarian usage of state power toward the right to life, the most basic of human rights, by apparent aid of the balance of power (denying suspension of executions), which is a principle of an administrative system to guarantee basic human rights is preposterous.”<sup>(37)</sup> It can be said that since

the balance of power stipulated by the Constitution is a principle aiming at guaranteeing human rights, a measure or legislation to suspend execution of capital punishment, a serious limitation of human rights, does not contradict the goal of the balance of power. Also, considering that highly universal human rights values can be recognized in suspension of executions, it is appropriate that the legislation is understood as constitutionally acceptable as a function of the Diet, which is the highest institution of sovereignty.

There are some views, concerning the range of jurisdiction of judiciary power and stipulations of the Code of Criminal Procedure:

“Judiciary power can extend its power until rulings become final. However, once the rulings become final, execution of the rulings leaves the hand of judiciary power and is entrusted to administrative power. Therefore, concerning timing, judiciary power has authority until rulings become final and once the rulings become final, except for cases of retrials, judicial power can no longer extend its power over executions. The power is entrusted to the administrative institution.” “The rulings are merely a ground to execute a penalty and execution of penalties is entrusted to administrative power. This is also acceptable, according to stipulations of the current Criminal Procedure Law.”<sup>(38)</sup>

The legislation to suspend execution of capital punishment merely suspends execution of penalties for a limited time and does not revise the core of judicial judgment, such as authorization of each fact, evaluation of evidence and legal interpretation. The legislation also does not revise the contents of final rulings. Judging from stipulations of the Code of Criminal Procedure, it is thought that the power of penalty execution is entrusted to administrative institutions. Article 471 of the Code of Criminal Procedure stipulates a clear separation between final rulings and execution of penalties. Article 472, stipulating supervision of executions, states that the right to execute belongs to public prosecutors of the administrative government, while concerning capital punishment, it stipulates that an execution order by the justice minister is required. The Code of Criminal Procedure provides authority of not only penalty execution but also suspension of execution, with the justice minister in case of capital punishment, and with public prosecutors in case of incarceration. It also stipulates necessary suspension of executions, such as in a case “when those sentenced are in a condition of mental loss,” or discretionary suspension of executions. (Article 479 and 482, the Code of Criminal Procedure)

The amnesty system and the parole system are entrusted to the authority of the administrative government. The issue of suspension of execution can be said to be an issue that belongs to the power of penalty execution of the administrative government

as in a case with executions, suspension of execution, amnesty and parole of penalty, such as incarceration. To stipulate by a law passed by the Diet concerning executions of penalties by the administrative power should be permissible as a control of the administrative power by separation of powers. From this standpoint, it can be said that such legislation does not violate the system of balance of power stipulated by the Constitution. <sup>(39)</sup>

## **5. Outline of the Law to Suspend Executions**

Considering the above-mentioned discussions, JFBA advocates suspension of execution by enactment of the law to suspend execution of capital punishment for those facing death penalty for a limited time period (the law to suspend executions). The federation should make efforts to realize suspension of executions based on this law to suspend executions.

The outline of the law to suspend executions is as follows:

### **(1) Purpose**

This law aims at improving the criminal judiciary system and promoting basic human rights by suspending execution of capital punishment for those facing death penalty for a limited time period in order to drastically review the issue of whether to retain or abolish and revise, in reference to the problematic situation of the capital punishment system and by stipulating tasks for the government and the Diet to carry out during the period.

### **(2) Suspension of execution of capital punishment**

In order to accomplish the above-mentioned goals, the government will suspend execution of capital punishment for those facing death penalty for a limited time period.

### **(3) Tasks for the government and the Diet to carry out during the period of suspension**

① The government launches maximum disclosure of information related to capital punishment.

② Set up special committees at both the House of Representatives and the House of Councilors or set up an extraordinary research committee within a government division. At these committees, make utmost efforts to thoroughly review and deliver on the problematic issues of the current capital punishment system, including the following items, by holding public hearings, convening expert witnesses, and sending research groups. Make efforts to form a consensus on the issue of whether to retain or abolish the capital punishment system, acquire conclusions and carry out necessary tasks for improvement.

- a. Trends of the international capital punishment system
- b. Investigation and review of the effect of capital punishment on crime prevention, changes of crime conditions during the suspension period and correlation with the suspension
- c. Maximum penalty in place of capital punishment
- d. Measures of support for crime victim families, including those of murder cases, damage recovery and rights establishment
- e. Cut the number of capital crimes
- f. A criminal justice system that prevents miscarriages of justice concerning capital cases
- g. Measures to resolve the conditions violating ICCPR , the advice of the Human Rights Committee, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the U.N. resolutions, the U.N. Human Rights Committee's resolutions, concerning the guarantee of the rights of those facing capital punishment, treatment of those facing death penalty and procedures for capital punishment executions

#### (4) Suspension period for capital punishment executions

The suspension period for capital punishment executions should be enough time necessary to carry out the above-mentioned review, revision and public discussion.<sup>(40)</sup>

Two cases can be considered: Upon completion of the suspension period of capital punishment executions, abolish the capital punishment system, according to the results of the review and revision of the system as well as national discussion; After reviewing and making improvements, retain the capital punishment system and resume executions.<sup>(41)</sup> Therefore, when starting execution suspension, special humanitarian concern for those facing death penalty are required upon implementation of the Law to Suspend Execution of capital punishment, by fully informing those facing death penalty of the system's purpose and concerning adoption of amnesty.<sup>(42)</sup>

#### Notes

(30) There is a report that nearly 70% of U.S. citizens support capital punishment, while 63% support suspension of executions, according to a U.S. census. Non-government organizations supporting suspension of executions, including

“Moratorium Now” and “Moratorium 2000,” and activities of their networks are spreading. The movement was spreading further in 2001.

(31) The system to defer death sentences is a concept that enables judges to sentence a criminal the death penalty after a certain period of time. However, some point out flaws of a system that contradicts the need for speedy trials and makes criminal trial procedures unstable.

(32) The system to suspend the execution of capital punishment is a system to suspend execution of capital punishment for a certain period of time and to decide whether to execute the death penalty or reduce sentences to incarceration, including life imprisonment, depending on the convicts’ behavior during the suspension period. The Chinese system to suspend execution of capital punishment is famous. In Japan introduction of the system as “postponement of execution of capital punishment” was reviewed in a process of operations to revise the criminal laws. It is thought that this system should be fully reviewed as a transitional measure.

This system contains the possibility of reducing execution of capital punishment. There is some criticism pointing out that the existence of this system could allow thoughtless sentencing to the death penalty and that there are many flaws.

(33) Besides those mentioned above, a law effective for a limited time period or a tentative suspension, as in the case when the British abolished capital punishment, can be possible.

(34) Fukuda, Masaaki, “Does the Justice Minister Bear Responsibility for Execution of Capital Punishment? — In Reference to Preliminary Research Concerning Suspension of Executions” (p. 112, No. 1, Volume 35, Criminal Law Magazine)

Concerning the issue of whether issuing an order of executions is obligatory for the justice minister, the professor contends that the reason and grounds for intervention of the justice minister’s order for executions between capital sentence and executions is an intention to allow highly humane, political and extralegal judgment, concerning executions. He states that the justice minister, not only bears conventional responsibility for executions, but also bears responsibility to suspend (avoid) executions politically and legally, in response to strong demands for abolishing executions by the international community, including the United Nations.

(35) In 1994, “the Diet Members League for the Abolition of the Death Penalty” was established by cross-party Diet members. As they started reviewing submission of a bill to suspend capital punishment initiated by the Diet members in 1995, it is said that the Legislative Bureau of the House of Representatives, which was asked for cooperation by the league, indicated that the bill might violate the Constitution.

(36) Aoki, Hitoshi, "Comparative Approach to Discussion of Whether to Retain or Abolish Execution of Capital Punishment," p740, No.4, Volume 115 Hitotubashironso, 1996

(37) Fukuda, Masaaki, p. 122, No. 1, Volume 35, Criminal Law Magazine

(38) Adachi, Masakatsu, "Legal Characteristics of Effect of Ex Post Facto in 'the Law to Abolish Capital Punishment,'" p. 380, Niwayama Koki Shukuga, "Popular Justice and Criminal Law," Gendaijinbunsha

(39) "The Bill to Abolish Capital Punishment" delivered at the Committee of Judicial Affairs of the House of Councillors in 1956 states that the effect of the abolition of capital punishment is not retroactive, stating that "concerning ...execution of penalties for those sentenced before the enforcement of this bill, they should still follow the previous cases." Professor Adachi, in the above-mentioned thesis, affirms the retroactive effect of abolition of capital punishment, concerning the range of judicial power's jurisdiction and interpretation of the Code of Criminal Procedure by practically understanding the system of balance of power and contends that the retroactive effect does not violate the system of balance of power.

(40) Plans of about five years or about 10 years for the suspension period could be considered. Without setting up any specific period, suspension until resolving violations of international human rights standards, resolving possible miscarriages of justice or completing a thorough national discussion on the capital punishment system, could also be considered.

(41) In case of retaining the capital punishment system and resuming executions, it is possible to have discussions on whether it is appropriate after review and revision of the system to execute those irrevocably sentenced to death under the criminal justice procedure prior to the review and revision of the system.

(42) Concerning content of the Law to Suspend Executions (treatment of those facing death penalty during a suspension period, the way rulings of cases comparable to capital cases should be, tasks for the Diet, the government and public, contents of humanitarian concern for those facing death penalty, suspension period, measures after the period and compliance with the Code of Criminal Procedure and the Criminal Law), it is thought that further review is necessary.

## **VI. Conclusions**

As mentioned above, the current capital punishment system contains numerous serious flaws, which should be corrected immediately. It is also necessary to have

sufficient discussion on the issue of whether to retain or abolish the capital punishment system and to form consensus. To achieve these:

First, JFBA advocates enactment of the Law to Suspend Executions for a limited time period.

Second, JFBA recommends efforts, concerning the capital punishment system:

- (1) To improve the criminal justice system regarding capital punishment.
- (2) To activate a discussion of the issue of whether to retain or abolish capital punishment among the association and promote public discussion.
- (3) To realize disclosure of information on capital punishment.
- (4) To recommend a maximum penalty in place of capital punishment.
- (5) To support crime victims and their families, recover damages and establish rights.

### ***List of Materials***

1 Declaration at a conference of the Kanto Federation of Bar Associations in 1995

2 Edited by the capital punishment issue study committee, the Human Rights Protection Committee, JFBA, "Capital Punishment West and East: The Present and Future of the Capital Punishment System in Japan and the United States," minutes of lectures and symposium, attached documents to the minutes

- ① JFBA and JFBA's Human Rights Protection Committee, "Committee Research Report on Cases Concerning Executions," November 19, 1997
- ② The Resolution by the U.N. Economic and Social Council, May 25, 1984
- ③ The Resolution by the 44<sup>th</sup> U.N. General Assembly, December 15, 1989
- ④ The Final Opinion of the U.N. Human Rights Committee, 1993
- ⑤ The U.N. Human Rights Committee, "the Resolution on the Abolition of Capital Punishment," April 3, 1997
- ⑥ ABA Board, Recommendation 107 and Reason for the Proposal

3. ICCPR and its second optional protocol

4. JFBA, "Substitute Capital Punishment Prison: Tasks to Realize the Final Opinion of the U.N. Human Rights Committee and the Final Opinion of the Committee, 1998

5. Chapter 4, JFBA report to respond the 4<sup>th</sup> report submitted by Japanese government, based on ICCPR on Civil and Political Rights (rights to freedom)

6. The Convention against Torture and Other Cruelty, Inhuman or Degrading Treatment or Punishment, (so-called Convention Against Torture)

7. Research reports by the Council of Europe and its resolutions

8. The capital punishment issue study committee, the Human Rights Protection Committee, JFBA, "Research Report on Countries Abolished Capital Punishment

(Europe), August 2001

9. The capital punishment issue study committee, the Human Rights Protection Committee, JFBA, "Minutes of Report Meeting on the Capital Punishment Issue in Europe," September 27, 2001