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European Perspectives on the Death Penalty — EU, The Council of Europe and Japan

European Union Institute in Japan (EUIJ), Kansai

On the 28th October 2006, the EUIJ Seminar on the Death Penalty was held in Osaka University under the auspices of the Centre Franco-Japonais Alliance Francaise d'Osaka (director: Mr. Christophe Gigaudaut) and the Goethe-Institut Osaka (director: Ms. Petra Matusche).

The European countries have one by one abolished the capital punishment since the end of the World War II, and now Europe has become a free zone from the death penalty. The Council of Europe and the EU have made the rejection of the death penalty an obligatory requirement for membership and make a great influence towards the abolition not only inside but also outside of Europe. Contrary, Japan retains the institution and continues to execute death sentences.

In this seminar, commemorating the 25th anniversary of the death penalty abolition in France, three reporters from Europe, namely prof. Stefano Manacorda (Second University of Naples, Italy), prof. Jurgen Martschkat (Erfurt University, Germany), Ms. Renate Wohlwend (deputy member of the Council of Europe), presented the European perspectives on the Death Penalty respectively from the judicial, historical and political points of view. In response to the each report, three Japanese reporters, prof. Kenji Nagata (Kansai University), Mr. Tadashi Nishiki (Mainichi Newspaper), Mr. Taketsugu Kaneko (Japan Federation of Bar Association) explained the actual situation around the death penalty in Japan.

On the basis of these reports, a lively discussion was developed mainly on the legal, social and political situation around the capital punishment both in Europe and Japan, and the condition of abolition of the death penalty in Japan. The seminar was coordinated by prof. Johannes Kinmmeskamp and prof. Takeshi Matsuda of Osaka University, and resulted in fruitful exchange of information and opinions.

The Abolition of Capital Punishment in Europe: Achievements and Perspectives

Stefano Manacorda

As clearly stated by the European Court of Human Rights in a recent case, the territories encompassed by the member States of the Council of Europe have become a zone free of capital punishment[1]. Such a result arises from a thick weaving of mutual interrelationships among the several normative levels coexisting in Europe, and case law both at national and international level -is one of the main vectors of exchange. Nonetheless, it is doubtful that this process works perfectly1: even if nobody is 'legally executed' in democratic Europe at the beginning of the third millenary, some dangers arise from war crimes, traditionally excluded from the prohibition, and from the mechanisms allowing one person to be transferred to a retentionist country as a result of a judicial or administrative order. I will first present the legal dynamic of the abolitionist movement in Europe (I) and then the risks of rupture of this process (II).

1. Legal Dynamic of the Abolitionist Movement in Europe.

The common European criminal 'legal space' (espace juridique) against the death penalty is the result of a complex normative structure. Indeed, the multilevel dimension of European law generates a very sophisticated network of relations, bringing about one of the most interesting laboratories of regionalization of the law in the world[2].

More precisely, the restraints on the death penalty in Europe have resulted from a legislative process which has followed a circular movement: starting from the internal level, rising up to the regional level, and then coming back to domestic law.

a. Abolition at the National Level and European context.

The starting point of this process in Europe[3] can traced back to the democratic constitutions adopted by some countries at the end of the Second World War, namely Italy (in a legal enactment in 1944, applying to the 1930 Criminal Code and

1) European Court of Human Rights, First Section, Ocalan v. Turkey, 12 March 2003, para. 191.

2) M. Delmas-Marty, Pour un droit commun (Paris : Editions du Seuil, 1994), 223-253.

3) Concerning the abolitionist movement in Europe see W.A. Schabas, The Abolition of the Death Penalty in International Law3 (Cambridge: Cambridge University Press, 2002) 259-309 and R. Hood, The Abolition of Death Penalty: a Worldwide Perspective3 (Oxford: Oxford University Press, 2003) 23-27.

then in the 1948 Constitution) and the Federal Republic of Germany (in the Grundgesetz of 1949), the first one affirming the abolition of the death penalty except in the case of war (Article 27 para. 4 Constitution), the second one recognizing the right to life (Article 2 para. 2 Grundgesetz) and the abolition of capital punishment (Article 102). Abolition as a reaction to totalitarian or authoritarian past will become a constant feature of the abolitionist movement in the years to follow.

Over the same years, the European Convention of Human Rights, meant at reintroducing freedom and fundamental rights in Europe following the Nazi-fascist barbarism, did not forbid capital punishment. Following article 3 of the Universal Declaration of Human Rights ('Everyone has the right to life, liberty and security of person'), the ECHR strongly proclaims in its Article 2 the right to life, protecting the individuals unless otherwise provided. Nevertheless, it does not include a ban of the death penalty that is instead expressly mentioned in para. 1, admitting 'the execution of a sentence of a court following its conviction of a crime for which this penalty is provided by law'.[4)]

In the following decades (1960s and 1970s), article 2 of the ECHR gradually ceased to adequately reflect the situation attained in regard to the death penalty in the in national legal orders, as the abolitionist movement quickly gained new ground. Without undertaking a detailed comparative analysis, an increasing number of States either took the radical decision of removing the death penalty (previously admitted by their law or constitution) or decided to maintain it de jure introducing a moratorium, or finally just decided to restrict its use as a punishment for the most serious offences.

b. Regional Level and Domestic Enforcement.

The second phase of the abolitionist process started in 1983 at the regional level, when the Sixth Protocol to the European Convention of Human Rights was adopted, abolishing the death penalty in peacetime.[5)] This historical text -adopted several years before the Second Optional Protocol to International Covenant on Civil and Political Rights (1989) -represents the very first text stating at the international level the prohibition of death penalty and makes of Europe a

4) Article 2 ECHR, see J. Velu. R. Ergec, La Convention europeenne des droits de l'homme (Bruxelles: Bruylant, 1990), 183-184.

5) Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty, 28 April 1983: see W.A. Schabas, The Abolition of the Death Penalty, supra note 3, 279-299.

forerunner in the abolitionist field.[6)]

The Sixth Protocol, that entered into force in 1985, has been signed and ratified by all the members of the Council of Europe, with the notable exception of Russia which only signed the text. The European Union adopted many years later an abolitionist position. One has to wait until 1997 for a Declaration annexed to the European Treaty of Amsterdam clearly stating such a rejection from the 'small Europe'. The Summit held in Nice in December 2000 introduced the Charter of the fundamental rights of the European Union, whose Article 2 lays down the right to life without exceptions and the banning of death penalty, although the legal force of such text is widely discussed and the text is probably not enforceable. This text prohibition has been incorporated into the new Constitutional treaty prepared in 2005 but this reform never entered into force.

A third phase concerns again the national level. As mentioned above, the boundaries of Europe have been permanently changing in the last decades, so that the field of application of the abolitionist position has increasingly gained importance. When the post-communist countries joined the Council of Europe after the fall of the Berlin's wall, the need for national legislation to change accordingly emerged rapidly. Quite soon, the willingness of these countries to incorporate the democratic principles into their domestic legal systems, made them move towards either an abolitionist position or towards a moratorium. Azerbaijan, Bulgaria, Estonia, Georgia, Lithuania, Poland, Bulgaria, Latvia, Turkmenistan. to mention the most important -abolished the death penalty for all crimes during the 1990s. Ukraine abolished it in 2000 after a decision of its Constitutional Court.

In conclusion, starting from the national constitutions of Italy and Germany, passing through the ECHR, descending in some national legislations, re-climbing at the regional level with the Sixth Protocol and the EU instruments, finally redefining the legislation of some western and eastern European countries, we witness a circular movement of the abolition in Europe. The coexistence in Europe of several institutional mechanisms aiming at banning the death penalty has drawn concentric and partially tangential circles, the bigger one encompassing the activity of the Council of Europe, the smaller one encompassing the European Union. Paradoxically, the larger circle has been more effective than the smaller one, but this can be explained by referring to the different fields of intervention of the

6) Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty, 15 December 1989: see R. Hood at al., The Death Penalty-Abolition in Europe (Council of Europe, Strasbourg 1999), namely H.C. Kruger, 'Protocol No. 6 of the European Convention on Human Right's.

Council of Europe and the European Union.

Nevertheless, this process is far from perfect and some risks of retrogression appear nowadays.

2. Risks of Rupture of the Abolitionist Process

Capital punishment has not been completely eradicated in the European continent and limited derogation have been accepted both at the international and national level. The danger is even stronger today since, under the vague notion of terrorism, illiberal criminal policy strategies are now re-legitimised. The risks of a break in the abolitionist circle are concrete, both concerning extradition and war crimes.

a. Extradition and Retentionist Countries.

The risk of death penalty in the case of extradition, and more broadly in all cases where individuals, via either an administrative or penal procedure, are delivered to countries which have not yet abolished capital punishment, has often arisen.[7] With the aim of reducing this risk, since the ninety-fifties written rules and judicial decisions have been passed at national and international level,

The first efforts aimed at restricting the extradition mechanism at the European and international level appeared in 1957, when the European convention clearly stated that extradition can be submitted to the condition by the requested State that the defendant will not be executed (conditionally extradition).

Successively, national and international courts have developed stricter remedies. Starting from the leading case brought before the European Court of Human Rights in Soering Starting from the leading case brought before the European Court of Human Rights in Soering v. United Kingdom and Germany in 1989,[8] several decisions have confirmed that, under certain circumstances, sentencing to death penalty could amount to a violation of Article 3 of the ECHR, prohibiting inhumane and degrading treatments, on account of the damages which can arise from the 'death row'.[9] This doctrine had been followed before by some national courts, as in

7) J. Dugard . C.Van den Wyngaert, 'Reconciling extradition with human rights', 92 AJIL (1998) 187.

8) European Court of Human Rights, Soering v. United Kingdom and Germany, 7 July 1989, Series A, vol. 161, 11 EHRR, 439. F. Sudre, 'Extradition et peine de mort. Arret Soering de la Cour europeenne des droits de l'homme du 7 juillet 1989', RGDIP (1990) 103 ; C. Van den Wyangaert, 'Applying the European Convention of Human Rights to the Extradtion: Opening Pandora's Box?', ICLQ (1990) 575.

9) W.A. Schabas, The Death Penalty As Cruel Treatment and Torture (Boston: Northeastern

the well-known Short case, when the Netherlands had refused the extradition of an American soldier asked by the United States.[10)]

In other cases insurances were to be provided by the requesting authorities. The Italian Constitutional Court in 1996 in Venezia ruled that conditional extradition has to be considered as being contrary to the Italian Constitution which prohibits capital punishment. As a matter of fact the executive cannot engage the judiciary (principle of separation of powers) and the degree of reliability and effectiveness of the guarantees depends on the country applying for extradition.

Some recent cases were brought before the ECHR[11)], concerning the refusal to grant political asylum in European countries when the defendant risks to be sent back to countries where his life is in danger seem to extend the legal solutions originally devised in relation to extradition to similar problems arising from expulsion, Many of these cases have been struck out as a consequence of an agreement between the defendant and the host country.

All these positive achievements are counterbalanced by recent applications of the 'de facto expulsions' from European countries, which seriously threaten the right to life. We refer to the well-known extraordinary renditions which clearly show the risks of rupture of the abolitionist movement and the new problems arising from the anti-terrorist strategy.

b. State of War and Capital Punishment.

Relevant limits arise as well from the general admissibility of capital punishment in relation with the state of war, since several instruments leave open the possibility of introducing such an extreme sanction in this state.

Until recently, the universal rules happened to be more stringent on this point than the regional ones. The Second Protocol admitted a reservation in time of war under a double restrictive condition: the severity (serious) as well as the nature (military) of the crime (Article 2, para. 1). At the European level, the Sixth Protocol allowed the death penalty to be introduced or maintained in national legislations even in case of threat of war and without any mention of the seriousness and the nature of the offence.

University Press, 1996), 97; P. Hudson, 'Does the Death Row Phenomenon Violate a Prisoner's Human Rights under International Law?', EJIL, 2000, 833-856.

10) Short, Hoge Raad, 30 March 1990, N.J. 249, translated in 29 ILM (1990) 1375.

11) See for instance Abdurahim Incedursun v. the Netherlands, European Commission of Human Rights, Application No. 33124/96 and European Court of Human Rights, Application No. 33124/96, Judgment (struck out of the list), 22 June 1999, concerning the expulsions from Netherlands of a Turkish citizen.

Only in March 2002, a new (Thirteenth) Protocol to the ECHR was signed, expressly referring to the 'abolition of the death penalty in all circumstances', and admitting no derogation and no reservations (Articles 2 and 3). It banned death penalty at the regional level also in case of war.[12)]

The Protocol entered into force on July 1st 2003, but some important countries, like Spain, France and Italy, have not yet ratified the text.

Concluding Remarks

The main factor that has enabled the abolitionist movement to grow in Europe is the convergence of different constitutional and regional systems protecting human rights.

The dynamics of the European legal context arise from its complexity. Its plurality of languages and traditions and its inconsistencies, can be seen at the same time as a source of both weakness and strength of the European legal 'space' (espace juridique)[13)]. This weakness stems from the absence of a supranational law imposed by the top on this issue, implying that every single step is hard to achieve due to the specificity of national legal orders. This is, at the same time, a strength because the 'ordered pluralism' in a democratic context among States with equal rights allows a continuous comparison among the various systems and brings about dynamic law-making processes, where a prominent role is played by the human rights implemented by the judiciary.

In order to defend Europe as a capital-punishment free area, democratic lawyers will have to engage in two battles over the next years.

One the one hand, the challenge is inside Europe. The exception related to the state of war, that one could consider as belonging to the past, is regaining dramatic importance as a consequence of the 'fight against terrorism'. Under the same umbrella, one finds today cohand, the challenge is inside Europe. The exception related to the state of war, that one could consider as belonging to the past, is regaining dramatic importance as a consequence of the 'fight against terrorism'. Under the same umbrella, one finds today cooperation with retentionist countries via extradition, expulsions or unofficial procedures. Both dangers are concrete and must be strongly contended.

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12) Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty in All Circumstances, Vilnius, 3rd May 2002.

13) M. Delmas-Marty, Le relatif et l'universel : les forces imaginantes du droit (Paris, Seuil, 2004).

On the other side, the challenge is outside the European border, towards third retentions countries, via political pressure, amicus curiae and diplomatic assistance[14]. Only if the 'virtuous circle' of the European countries will be able to embrace other regions of the world, transforming a continental achievement into a universal one, we can hope that the fight against the death penalty will be in the end victorious.

14) Very recently such an intervention has been made in the American case Atkins v. Virginia, on 20th June 2006 concerning a defendant suffering from a severe mental illness.

The History of the Death Penalty in Europe from the Enlightenment to the 21st Century

Jürgen Martschukat

When in 1977 Amnesty International convened a conference on the death penalty, only sixteen countries had abolished capital punishment for all crimes. Roughly a quarter century later, at the beginning of the third millennium, this figure stands at more than eighty – and it increases year by year. On top of that, since almost ten years the United Nations annually passes resolutions calling on retentionist states to establish a moratorium on executions. In the worldwide fight against capital punishment, specifically Europe is a leading force, and the European political institutions have adopted an uncompromising policy with regard to the death penalty. The Council of Europe as well as the European Union have made the rejection of the death penalty an obligatory requirement for membership. The strict position with regard to capital punishment accelerated its widespread abolition in Eastern Europe since the 1990s after the dissolution of the former Soviet bloc.

In today's debates about capital punishment, Europeans like to trace their strictly abolitionist stance back to the enlightenment of the 18th century and its achievements. However, if we take a closer look at history, we can see that the rigid abolitionist position of Europeans with regard to the death penalty is a comparatively recent development. Even after World War II, when the Council of Europe and the European Convention of Human Rights declared the protection of humanity and the right to life as their mission, this did not include lawful death sentences. Furthermore, two of Europe's core countries with regard to the history of democracy and enlightenment, Great Britain and France, still had the death penalty. They kept it until 1965 in Great Britain, (executions were conducted until 1964, and the death penalty was permanently abolished in 1969) and even until 1981 in France (last execution in 1977). Taking this into account, we have to acknowledge, that it was not before the 1980s, that European institutions began to unfold their uncompromisingly abolitionist position. So the question I raised at the beginnings remains unanswered so far: How can the role of the European enlightenment and its relationship to the punishment system and specifically to the death penalty be understood and grasped? Let's move back to the 18th and 19th centuries and to the changes in the conceptualization of punishment and its practices, before we return to the 1980s and today's abolitionist movement.

Until the 18th century, before the enlightenment changed Europe, its culture and societies, punishment was mostly directed at the human body. Death was the

ultimate means of retribution for those crimes considered a threat to the divine order of society. We have to note that, in those pre-modern days, the idea of the death penalty was not simply to kill the felon, but to make him physically suffer in proportion to the crime. Different execution styles caused a different measure of pain, and moreover, they were related to a different amount of shame. Thus, execution styles in 17th- and 18th-century Europe were decapitation, hanging, breaking with the wheel, or burning at the stake, and these execution styles reflected a huge number of different capital felonies, such as treason, counterfeiting, witchcraft, murder, robbery, theft, sodomy, or fornication – to give you just a few examples. Death penalties were executed in public in the local communities, and large audiences of men, women, and children gathered around the scaffold to watch. In cases of extraordinarily grave crimes, such as the murder of a parent or theft from a church, the punishment was compounded by either inflicting more suffering and pain (for instance by torturing the condemned with hot pincers), or by publicly exposing the dead body for weeks, months, or even years after the execution.

This extremely corporal system of crime, punishment, and public retribution changed with the enlightenment. To understand the transformation of the 18th century, it is significant to note that in those years the idea of society – and how it was held together – was modified. It was not God who was considered the origin of society and its structure any longer, but a social contract created by the members and for the members of society. The general idea was that every human being was furnished with natural rights, and that they gave some of these natural rights and power away to the ruling classes with the intention of gaining and maintaining peace and social stability. Within this new theoretical context, the ruling classes were not invested with power by an almighty God, but they were dependent on the consent of the governed.

How was the death penalty, its idea and practice, influenced by this conceptual framework? An intense debate was set off, and some philosophers, law experts, and politicians argued that the death penalty was unlawful within this new context – and this was a really revolutionary position in those days: Their argument was that no sensible person would voluntarily grant the power to take his or her life away to the representatives of the state. Yet, on the other hand, it was often argued by proponents of the death penalty that in cases of a severe breach of the social contract, death as punishment remained inevitable. And, after all, this was obviously the most compelling argument to most contemporaries. Consequently, in the late 18th and 19th century, the death penalty was almost nowhere completely

abolished (exceptions were Russia and Tuscany for a short while). However, most European states gradually limited capital felonies to those crimes that seemed to endanger the social order at its very core. By and large, only murder and high treason remained on the books as capital crimes.

To sum up: The focal point of the enlightened system of punishment was not the human body any longer, but the human soul and the creation of virtuous, productive, and law-abiding citizens in disciplinary institutions – such as the penitentiary. From that time on, only the gravest crimes were to be punished by death – but still, the death penalty had not been abolished.

Part of this conceptual conversion, of this "modernization" of the death penalty, was also a change in execution styles. In moderate and modern states, it was said, the gravest loss people faced was the loss of their lives. Therefore, it was no longer necessary to cause a whole avalanche of pain in the execution of a death penalty (because, after all, it could not make the punishment worse). To the contrary, modern and enlightened states had to execute as quickly and as painlessly as possible. In nineteenth century Europe, with the exception of Spain (garrotte), only decapitation and hanging at the gallows remained as execution styles. The French Guillotine was emblematic of this transformation. Introduced in Paris in 1792, it soon spread over large parts of Europe. It sounds ironic or even sarcastic, but the Guillotine was the incorporation of the new concept of an egalitarian, enlightened, and modern society: It promised a unified, efficient, rational, and painless mode of dying which was to be employed without regard of crime, class, or status of the condemned.

Moreover, in the 19th century, even these seemingly non-gruesome execution styles led to disgust and confusion among the enlightened and bourgeois members of society. The open display of violence in the name of the state had to be strictly avoided, and, please recall, that death penalties were still executed in public. But, again, European authorities did not abolish the death penalty, but started to hide executions behind prison walls. This began in most German states around 1850, England transferred its gallows into the penitentiary yard in 1868, Spain followed in 1897, and only France continued to behead criminals in public until 1939.

Thus, if we take a look at the European history of the death penalty and its abolition in the long run, prior to 1900 almost none of the European states had officially abolished the death penalty (the very few exceptions were the tiny state of San Marino in 1848/1865, Portugal in 1867, the Netherlands in 1870). In the first decades of the 20th century, only the Scandinavian countries Norway (1905), Sweden (1921), Iceland (1928), and Denmark (1933) followed, and in 1942

Switzerland abolished the death penalty, too. It is significant to note that even after the Nazi regime in Germany, after the horrors of the Shoa and World War II, besides Finland only the former fascist states Germany and Italy abandoned of the death penalty. The West German parliamentary assembly abolished the death penalty in the new democratic constitution, the so-called Grundgesetz in 1949. Major arguments of the Parliament against the death penalty included a "general rejection of any means of violence by the German people" after the Nazi experience, and the "huge number of death penalties and executions within the Nazi years." However, it is important to note that this decision was obviously not carried by the majority of the German public, since about 75% of the German people still supported the death penalty in 1949.

Thus, we might say that Europe has not had a history of abolition since the enlightenment, but a history of reform at most. The death penalty was not abolished, but modified and adapted to a different concept of state and society – in fact, it was modernized as it still is today in many states in the U.S. The whole system of punishment had changed, the whole "punishing reason", as the French philosopher Michel Foucault called it, but Europe still had the death penalty – and in England, for instance, in the 1950s and 1960s several efforts to eliminate capital punishment failed. In France, it needed the change to the socialist government of Francois Mitterand and his longtime abolitionist Minister of Justice, Robert Badinter, to finally get rid of the death penalty in 1981. To put this into perspective, let's keep in mind that the United States had an execution-free period from 1967 to 1977, and from 1972 to 1976 the death penalty was even constitutionally forbidden in America. So from the 1960s to the 1980s, there was obviously a worldwide abolitionist trend, which is also indicated by the fact that, since 1977, also in Japan the number of annual executions dropped steadily and substantially, and between 1990 and 1992 no executions were carried out at all. As far as I am informed, reformers even started to talk about de-facto abolition.

Getting back to the European history, and trying to understand how the prospects for worldwide abolition are, we have to consider that it took the Council of Europe until the 1980s to develop an uncompromisingly abolitionist position. The Protocol No. 6 to the European Convention on Human Rights was signed in March 1985, and this was the first international treaty that demanded the abolition of the death penalty. As I mentioned at the very beginning of my talk, since 1994 the adoption of the protocol has been made an obligatory requirement for the acceptance of new members to the Council. Since 1999, the same is true for the European Union, which has made a worldwide execution moratorium one of the

major pillars of its human rights policy. So after all, it was hardly the European enlightened tradition, but much more the political and economic pressure that convinced many Eastern European countries, seeking closer ties to the European Union, to abolish the death penalty in the 1990s. Consequently, we have to see that the striving for a death-penalty free world and the seeming united European stand against the death penalty, is less related to long established traditions since the age of enlightenment, but a more recent development (if we, for instance, take a look at the American history of the death penalty, we will see that the development in the U.S. and Europe was quite similar until the 1970s). And if the Council of Europe expressed in 1999 its firm conviction "that capital punishment, therefore, has no place in civilised, democratic societies governed by the rule of law," we have to acknowledge that the European history of civilization is, obviously, a very short one, not starting before the 1980s.

We also have to put the notion of a long-standing widespread opposition to the death penalty among the European people into perspective. As sociologist and death-penalty-expert Christian Boulanger recently argued, today, without doubt the overwhelming majority of Europeans opposes the death penalty. Nevertheless, this has hardly been the cause for abolition, but is one of its consequences. It is well known that the opposition against the death penalty increases with its abolition in the long run. From this perspective, Europe's united stand against the death penalty is probably an effect of what is called "the normative force of the fact."

However, by critically contextualizing the European anti-death penalty history, I don't mean to say that Europe should not be taken as an example in the fight against capital punishment. To the contrary: Understanding the current European human rights discourse and the united European opposition against the death penalty as relatively recent phenomena shows that it does not necessarily need a two-hundred-year tradition of reform and enlightened agitation to abolish the death penalty now.

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Europe, a Continent without the Death Penalty

Renate Wohlwend

1. Introduction

My thanks - first of all - to the organizers of this important event for inviting me to speak before this illustrious audience here in Osaka, in a country for whose ancestral culture I have the greatest admiration. Be assured that it is a great honour for me to participate in a discussion about one of the most important struggles, in my opinion it is by far the most important, in the field of human rights and human dignity.

I would like to present to you a summary of my latest report on that issue discussed by the Parliamentary Assembly of the Council of Europe in its June part session. By that you will get some idea of the topicality in Europe and its neighbouring countries.

In view of the situation in both member and observer states, I felt that it was vital to continue the work begun half way through the nineties.The purpose of the report was to take stock of the current situation as regards the death penalty in Council of Europe member and observer states, and, something which was a first for me, in the states in geographical proximity to the Council of Europe with which the Council of Europe and its Parliamentary Assembly engage in, or have recently engaged in, political contacts.

Over the last twelve years the Parliamentary Assembly has held no fewer than five debates on the abolition of the death penalty, ceaselessly reaffirming its absolute opposition to capital punishment, which it regards as an act of torture and an inhuman and degrading punishment, and undeniably the most serious of all human rights violations.

The fight for abolition of the death penalty in Europe has been one of the Council of Europe's greatest successes. The battle is unrelenting and will come to an end only when capital punishment has been eliminated once and for all from the continent, as well as from other parts of the world. Within Europe, only one of the Council of Europe's 46 member states has still not officillay abolished the death penalty, and that is Russia.

2. The situation in the Council of Europe member states

(1) Signatures and ratifications of the elevant legal instruments

36 member states have ratified Protocol 13 to the European Convention on

Human Rights on the abolition of the death penalty in all circumstances, and eight have signed it. It came into force on July 1, 2003. Azerbaijan and the Russian Federation are the only member states that have neither signed nor ratified it.

45 member states have ratified Protocol 6 to the European Convention on Human Rights on the abolition of the death penalty in peacetime, leaving only the Russian Federation, which has signed but not yet ratified it; thus the only country within the Council of Europe to retain the death penalty in its legislation. But, it has to be said that Russia placed a moratorium on the death penalty ten years ago,under a presidential decree of May 1996. Moreover, in February 1999, the Constitutional Court decided that the courts could no longer pass death sentences until the jury system had been established throughout the country for trials relating to crimes punishable by the death sentence.Courts with juries have been gradually introduced in various parts of the country since July 1, 2002; this reform is due to be completed by January 1, 2007, when it is to be extended to the Chechen Republic. Accordingly, if the 1996 moratorium were lifted, the Constitutional Court's 1999 decision would prevent death sentences until 2007, only.

In practice, certain Russian politicians, regretably also parliamentarians of the delegation to the Council of Europe's Parliamentary Assembly, still regularly advocate publicly the lifting of the moratorium and the reinstatement of the death penalty, particularly for the instigators of terrorist acts.

Finally, it is understandable, that certain events, as the Beslan tragedy, weigh very heavily on Russian public opinion.

(2) Attempts to restore the death penalty

Russian politicians are not the only ones to err in this way. On April 8, 2004, 48 members of the French National Assembly tabled a bill aimed at restoring the death penalty for terrorists. I personally reacted strongly to this idea, and many members of the Parliamentary Assembly of the Council of Europe joined me in publishing a declaration.

In October 2004, the Polish Diet, by a tiny majority (194 members in favour, 198 against, 14 abstentions, rejected a proposal made by the Law and Justice Party, which at the time was in opposition, but –as you know – is now in power, for the reintroduction of the death penalty. Just a couple of months ago, President Lech Kaczynski pronounced that he was very much in favour of the restoration of the death penalty in Poland.

(3) The situation in separatist territories

I speak of these territories which are subject to the direct influence of the Russian Federation, and no decisive progress seems likely until such time as Russia sets an example.

In its June - debate the Assembly also noted with concern that the internationally not recognized separatist territories in Abkhazia, South Ossetia and the Dnestr Moldavian Republic do not observe the abolition of the death penalty by Georgia and Moldova respectively. The Assembly is of the view that the death penalty should be abolished in these territories and that the sentences of all prisoners currently on death row in Abkhazia and the Dnestr Moldavian Republic should be immediately commuted to terms of imprisonment in order to put an end to the cruel and inhuman treatment of those who have been kept on death row for years in a state of uncertainty as to their ultimate fate.

3. The situation in the Council of Europe observer states, other than Japan

I exclude my host-country as I understand, that others will present the situation here.

Of the states which hold observer status with the Council of Europe, only Japan and the United States retain the death penalty. The Assembly has twice, in 2001 and in 2003, asked Japan and the US to establish an immediate moratorium on executions and to take all the necessary steps to abolish capital punishment. These appeals have gone unheeded.

Mexico, where the death penalty had not been carried out since 1937, officially abolished capital punishment on March 17, 2005. In the United States sixty convicts under sentence of death were executed in 2005 (19 in Texas), 59 prisoners had been executed in 2004 (23 in Texas), while the figure had been 65 in 2003 and 71 in 2002.

Beginning of this year, some 3400 convicted prisoners were on death row. Another twelve executions took place in the first quarter of the year; shocking figures!

38 states in the United States still have criminal legislation which provides for the death penalty, and capital punishment is still applicable under federal military and civil legislation as well. Some major steps have nevertheless been taken towards abolition. Not only have NGOs and civil society as a whole campaigned extremely actively for abolition over the past five years, but the US Supreme Court has also moved the law forward decisively. In a leading case of March 2005 (Roper v. Simmons), the Supreme Court held that death was a disproportionate punishment

for under-age criminals and declared unconstitutional the sentencing to death of persons who had been under the age of 18 at the time of the offences for which they were on trial, in pursuance of the 8th Amendment prohibiting cruel and unusual punishment. According to statistics, between 1977 and 2003, the United States executed 22 persons who had been minors when they committed their offences. Around 70 under-age offenders were still on death row in 2004, over a third of these in Texas.

In June 2002 (in the Atkins case), the Supreme Court declared unconstitutional the sentencing to death of mentally retarded persons. Individuals with serious mental illness nevertheless continue to be sentenced to death; according to Amnesty International three were executed in 2004 and 2005.

Moreover, in March 2004, the International Court of Justice handed down a judgement in the case between Mexico and the US concerning Mexican nationals. The Court held that, by sentencing 51 Mexicans to death without informing their country's consular authorities, the US had violated the Vienna Convention on Consular Relations. It demanded a review of the convictions and the sentences imposed.

Yet several cases have received wide media coverage and mobilised both American and international opinion: Among them is that of Frances Newton who had always proclaimed her innocence, but nevertheless become the first black woman executed since 1977 when her death sentence was carried out in Texas in September 2005. Another is that of a former gang leader, Stanley Williams, who had changed his ways and became an advocate of non-violence, but was executed in California in December 2004 after the Governor rejected his plea for clemency. 77-year-old John Nixon became the oldest person to be executed in the US, when he was executed in Mississippi in December 2005.

4. The situation in the Council of Europe's neighbours

It is difficult to know exactly how many executions have been carried out in some countries: in Belarus and in the republics of central Asia this information is an official secret, with just occasional snippets of information getting through via convicted persons' families or NGOs.

Belarus is the only country in mainland Europe still passing the death sentence and carrying it out. In May 2002, the national Parliament held a hearing on the death penalty and subsequently made a number of recommandations to the government. Of course, the Council of Europe welcomed these efforts to begin a public discussion of abolition. For all that, the majority of members of the Belarus

Parliament were still opposed not only to abolition of the death penalty, but also to the immediate moratorium on executions for certain serious crimes.

In March 2004, the Constitutional Court, on a reference from parliament, issued a ruling on the conformity with the Constitution of those provisions of the Criminal Code which relate to capital punishment. It pointed out that it was for the head of state and parliament to place a moratorium on executions and to abolish the death penalty.

Outside Belarus, there is reason to welcome the progress achieved in other nearby counties of Europe: in February 2005, Tajikistan abolished capital punishment, the second republic of central Asia, following Turkmenistan in 1999, to do away with the death penalty.

In December 2003, Kazakhstan introduced a moratorium on executions.

In Uzbekistan on August 1, 2005, and again on January 1, 2006, President Karimov signed a decree abolishing capital punishment with effect from January 1, 2008, and replacing it with life imprisonment. This long wait of three years is, according to the Uzbek authorities, due to the need to build new prisons to hold long-term convicts.

Kyrgyzstan has extended by one year the statutory moratorium on executions decided in 1998. In October 2005, the President announced his wish to amend the Constitution in order to abolish the death penalty.

The Assembly ought also to pay more attention to the situation in the Maghreb countries, Algeria, Tunesia and Morocco, all three of which still have the death penalty in their statute book. Algeria has observed a de fact moratorium on executions since 1993, although its courts did pass 14 death sentences in 2003. However, the question is now a matter of public debate and various personalities have expressed their viewpoint via the media. In Tunesia, the last execution took place in 1996; legislation still foresees capital punishment. In Morocco, there are said to be some 150 prisoners on death row; the last execution took place in 1993.

On the subject of the Middle East, the Parliamentary Assembly of the Council of Europe raised this question in June 2005. It decided to enter into a dialogue with the Palestinian Legislative Council in order to support legislators in their endeavours to reinstitute a moratorium on executions and to abolish the death penalty, and to engage the opponents of abolition in an informed debate. It is for the Committee on Legal Affairs, in which I am an active member, to discuss the follow-up action to take on this resolution, inter alia by drawing up practical proposals. Clearly, the political situation in the middle East, and more specifically the recent developments, hardly augur well for a positive response to any co-operation

initiative taken by the Council of Europe.

5. Conclusions

It is taking a long time to bring about abolition of the death penalty. During the past years, there has been little true progress. Some advances in American case-law have, of course, been welcome, as has central Asia's move towards support for abolition. Another cause for huge satisfaction is the considerable number of ratifications of Protocol 13 to the European Convention on Human Rights.

However, the anxieties felt by the Parliamentary Assembly of the Council of Europe for the past decade remain: Russia has not yet officially abolished the death penalty and is the last member state still taking this reactionary stance, while Japan und the United States continue both to pass death sentences and to carry out executions.

In my mother tongue German we say 'Die Hoffnung stirbt zuletzt': one has to be optimistic, and I am very much hopeful, that our conferences, held in Tokyo and held here, today, are further steps towards the common goal we want to achieve. It will still be a hard stony way, but every small step brings us nearer and I am convinced that once in the future we may say: there are no executions anymore: We live in a world without the death penalty!

Thank you, I look forward to a lively discussion.

Comments on Prof. Stefano Manacorda's Report

Kenji NAGATA

In Manacorda's report, it was pointed out that the problem of death penalty to the war crime and the terrorism still remains though it seems us that the abolition of death penalty in EU is perfect. In addition, it was pointed out the way how the abolition of death penalty was expanded on the basis of the history in European countries.

To the contrary, as is generally known, Japanese criminal law retains death penalty for the some ordinary crimes. Courts are still sentencing to death. And the death penalty is often executed. Moreover, according to the public opinion poll, the ratio of the people who support death penalty has been increasing in this decade.

It is supposed that the increase was caused by two big incidents in 1995: a great earthquake attacked Kobe city near Osaka in January, and a sarin gas attack on the Tokyo subway system in March. First, the great earthquake in January made a lot of Japanese people understand victims' mental damages. It is said that this led to the promotion of the understanding of crime victims' mental damages. Second, the sarin gas attack on the Tokyo subway system in March was an unprecedented large-scale terrorism by the religious group. Most Japanese people actually feel the fear of the terrorism.

In addition, the increase of crimes and the decline of reliability on social security after the collapse of the 1990s' economic bubble had been tied to these two incidents. As a result the fear of crimes has been strengthened since 1995. It is assumed that it led to the request to retain the most "tough" punishment, that is, death penalty in Japan.

In Japan, people has paid much more attention to the sentencing standard between death penalty and life imprisonment than to the question whether death penalty should be abolished or not. But the sentencing standard had not changed greatly during this period. The leading case is the Nagayama case in 1983. The supreme Court, supposing that death penalty was constitutional, held that only when the crime was really serious, and death penalty was unavoidable in light of balance between crime and punishment and in light of general prevention, we can inflict death penalty. It required to take into account the nature, motives, means of the offence (especially cruelty of a means of murder), seriousness of the results (especially the number of victims), feeling of the victims' family, influences on society, age and criminal record of defendant, and all the circumstances after the

commission of the offences and so on. This standard was not clear. Nevertheless, courts have followed and concreted this standard.

Since 1983 courts have never sentenced to death if the public prosecutor didn't demand the punishment of death penalty and if intentional murder is not involved. Courts very often have sentenced death penalty in the case of no less than two victims. In addition, even in the case of two victims or one victim, courts sometimes have inflicted death penalty on the criminals purposing to get insurance or ransom, having murder record, being principal in conspiracy case, having premediated the crime, having committed also sex crime and so on.

Taking into consideration the conditions mentioned above, we see that it is difficult to discuss for the abolition of death penalty in Japan. However, nowadays many people pay far more attention to crimes and death penalty than they did before 1995. Therefore I suppose that now is a proper time to discuss whether death penalty is appropriate or not in Japan.

Debates and Recent Trends Concerning the Capital Punishment in Japanese Media

Tadashi Nishiki

I have worked for over 10 years as a journalist of Mainichi Newspaper, gathering news at the fore-front of city news reporting. Currently, as an editorial committee member, I mainly make comments on cases that occured in the Kansai region. From the experience as a journalist, firstly, I would like to explain the debates developed so far in the media on the capital punishment. Secondly, I would like to talk about recent drastic change of situation around death penalty, and finally I would like to pick up the points I myself consider important.

First of all, I would like to talk about how the media treats the capital punishment system. In the case of the Japanese media, notably in the newspapers, the editorials written by the editorial committee represent the way of thinking of the respective media, so I am going to give a typical example for that.

"Should we retain a capital punishment that permits to kill people in the name of the law? That is an extremely difficult question for us. We cannot, however, leave the people and the politicians ignorant. It is necessary to create a broad debate in public places such as the National Diet." This was the key passage of the Mainichi Newspaper editorial of March 1993 at a time when the execution of capital punishment had been restarted after a pause of more than 3 years.

At the same time, Asahi Newspaper, known for its liberal position, stated: "Taking into account the fact that the Western European countries, where levels of public safety are not as high as those of our country (i.e. Japan), have abolished the capital punishment, it is difficult to explain why our country, retains this institution indefinitely." However, in April 1998, on the occasion of the series of incidents caused by the Aum Shinrikyou cult and after some of the culprits had been sentenced to death, an editorial of the same media gives us the impression of stepping back: "How should we understand the meaning of judging someone. Say we abolish the capital punishment, what kind of circumstances and mechanism is required for that? To keep thinking about this question is the mission imposed on all of us."

If we put together the points of these editorials, we can say generally that the Japanese media, while accepting the existing capital punishment, is trying to follow global trends demanding the further discussion in public on the possibility of abolition. Several circumstances might be pointed out as a background of this position: the occurrence of strikingly vicious crimes such as those of Aum

Shinrikyo, mentioned above, or the kidnap-murder case of young girls in recent days; the increasing proportion of the people supporting the retainment of the capital punishment according to the results of various public opinion surveys, especially the one conducted by the Japanese government in 2004, where the percentage of supporters surpassed 80%. In addition, there is the persistent sense of justice among the public derived from the traditional perception of life and death: one atones for his mistakes with his life.

As far as recent trends go, I would like to focus on the strengthening tendency of the media to make public the anger of the family of the victim against the criminal as well as the crime itself. In my experience as a city news reporter, in vicious murder cases, intimate family members rarely showed their anger in front of the media maybe because the ethics "detest the crime but not the criminal" used to suppress the feelings inside.

In 1999, as to the murder case of mother and child in Hikari town, Yamaguchi prefecture, the father and husband of the victims said at the press conference that if the state was unable to hand down the death sentence, he will carry out revenge with his own hands, as a reaction to the Yamaguchi district court that sentenced the young criminal to life imprisonment. It was a big shock. It is still fresh in my memory how it generated a debate over the human rights of the victims of a criminal act.

Since then, the media has become more careful and prudent in gathering news and information concerning crime victimes. Instead, the victims began to express their feelings in the form of joint interviews or memoirs. In such a way, the anger against the crime and the offender could be presented vividly, and its implications for sparking up the demands of public opinion for rigorous punishment has become quite strong.

We can say that such public opinion has pushed judicial decisions towards stricter punishment. For clear examples, one can point out the reverse of the Hikari mother and child case to the Hiroshima High Court by the Supreme Court, or the sentence to death issued by the Nara District Court in the kidnap-murder case of an elementary school student in Nara town in 2004.

In conclusion, I would like to point out several problems to be discussed.

Our country (i.e. Japan) will introduce by May 2009 a lay judge system. I worked as a coordinator at a symposium on the system, organized in January in Osaka. In this occasion, many questions were voiced by the audience. They are not sure if it is really possible for them, ordinary people, to judge or what they should do if they participate in a trial where a capital punishment is highly anticipated.

An editorial of Yomiuri Newspaper of November 2005 says: "In order for citizens to understand well the latest situation around the capital punishment, to go to the trial without anxiety, the government and the judicial authority must give sufficient explanation. Nobody wants to sentence to death without being convinced." One of the panelists, an experienced professional judge explained that if one reflects his own viewpoint and feelings on genuine evidence and deepens the debate, this operation becomes a challenge and helps him to overcome the whole psychological burden. But it is not convincing enough. If the system is not clearly defined, it comes to the point where they say "for a vicious crime the death penalty is natural, but I personally don't want to hand down the sentence". I'm afraid this would undermine the lay judge system itself?

One more point of debate. The defendant who was sentenced to death in 2001 by the Osaka District Court for killing 8 children of an elementary school attached to Osaka Kyoiku University, withdrew his appeal, saying that he didn't want to live uselessly, and capital punishment was carried out finally in September 2004. The defendant in the kidnap-murder case of an elementary school student in Nara town also received a capital punishment sentence this year and, refusing an appeal, accepted the death penalty.

What these two examples have in common is the fact that in both cases the defendant himself is aware of his own tendency for crime and has admitted that even having served a long-term sentence the correction is impossible. In this sense, with no regret to the crime and no apology to the victim, the defendant has chosen to "suicide by the hand of the state." If ideas of desperation such as "I do whatever I like and I don't care if I get the death penalty" disseminated, wouldn't the retainment of the capital punishment result adversely in the multiplication of crimes and give rise to heaviest crimes?

I will be glad to hear later in the discussion the opinion of the western specialists on that matter and to have a discussion with our audience.

Recent Trends of the Death Penalty in Japan

Taketsugu Kaneko

Year	Sentenced District Court	Sentenced High Court	Sentenced Supreme Court	With-drawal etc.	Estab-lished	Exe-cuted	Established Accumulated
1991	3	4	4	0	5	0	51
1992	1	4	4	1	5	0	57
1993	4	1	5	2	7	7	56
1994	8	4	2	1	3	2	57
1995	11	4	3	0	3	6	54
1996	1	3	4	0	3	6	51
1997	3	2	4	0	4	4	51
1998	7	7	5	1	7	6	52
1999	8	4	4	0	4	5	50
2000	14	6	3	3	6	3	53
2001	10	16	4	1	5	2	56
2002	18	4	2	1	3	2	57
2003	13	17	0	2	2	1	56
2004	14	15	13	2	15	2	68
2005	13	15	10	1	11	1	78
2006[1)]	8	7	14	3	18	0	96

1991~96	28	20	22	4	26	21
2001~06	76	74	43	10	54	8

* The Number of the death sentences related to the Aum Shinri-kyo's Subway sarin gas attacks in 1995: 13 (Established: 2, Disputing at the High Court: 2, Disputing at the Supreme Court: 9)

1) Until the date of the seminar, 28th October 2006.

*The numbers of the death penalty sentences from 2001 to 2006 are reduced as follows, if the numbers of the sentences related to Aum Shinri-kyo is excluded. District Court: 76-6=70, High Court: 74-10=64, Supreme Court: 43-1=42, Withdrawal: 10-1=9, Established: 53-2=51

Considerations:

-The number of the death sentences doubled or trebled in every grade of the Court, because the judiciary rapidly moved to extremely severe punishments?

-The number of the death sentences in the High Courts and the Supreme Court seems to increase in the future.

-The number of the withdrawal of appeal doubled, because of the reduced expectations? Impacts of introduction of the statement of the victim's opinion?

-The number of the execution decreaed to one third, because of the political pressures in Japan and from abroad? Waiting the support by the public?

	Countries Retaining the Death Penalty	Countries Abolished the Death Penalty[2)]
1995	94	101
2005	74	122

2) The numbers include the ones of the countries that de facto abolished the death penalty.