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CAPITAL PUNISHMENT AND PENAL REFORM

Masayoshi OHNO*

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I. Preface

Nothing is the more ultimate idea of Criminal Law than one that achieves creating a society which does not include all kinds of punishment as well as Capital Punishment. It is self-evident that Capital Punishment is an undesirable penalty system in the society, therefore, one which is to be abolished. Even people who support Capital Punishment recognize impartially the undesirableness of it. They give opinions that now is not the time to abolish the Penalty, judging objectively from today's social situation, even though it is called "a dying punishment", and they also insist that it is necessary to hold on to Capital Punishment¹⁾. That is to say, they take the position to maintain Capital Punishment. But we cannot find that they believe in the absolute necessity of it or that they positively admire it.

Capital Punishment is the oldest and the most cruelly uncivilized penalty system in history. The way of the execution has been changed in various historical patterns as the world has made progress, while the essen-

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1) TAKEDA Naohira, Capital Punishment on Legislation, *Konan Hogaku* (Konan Law Review) Vol. 1, No. 1, pp. 31, 39. The same, Capital Punishment, *Keiho Zasshi* (Journal of Criminal Law) Vol. XI, No. 1=2, p. 109. UEMATSU Tadashi, Outline of Criminal Law, Vol. I, p. 351. FUWA Takeo, On Capital Punishment, cit. by "Problems of Criminal Law", p. 138.

tial significance, which Capital Punishment holds, that a state takes the criminal's life by exercising its right of inflicting punishment, has never changed. It need hardly be said that taking a person's life as an exercise of just infliction, even if there is a reason, is not desirable. But on the contrary, whenever we face the villainous murder case, it is natural that the simple question comes out, "Can it be allowed that he should not receive Capital Punishment in spite of killing a person?"²⁾ In the case of a cruel murder, for the first time we have strong sympathy for the victim. The more cruel the case is, the stronger subconsciousness of obedience to law we wake up. We hate the anti-social behavior of the criminal to the utmost. Accordingly, Capital Punishment can be thought of as the most successful penalty system in terms of giving satisfaction to the general public's sense of social ethics and subconsciousness to obey law. Therefore, what supporters describe is as follows: Capital Punishment is destined to disappear with future social and cultural development or at least it is desirable to abolish it. But, in fact, as long as there is an environment in which cruel murder occurs, we are compelled to maintain Capital Punishment³⁾.

As Dr. Takikawa pointed out, however,

Is there even the slightest research being done to justify the necessity of Capital Punishment? No, not the least. Is there even one man supporting Capital Punishment who changed his opinion? No, there is none. When a supporter said, 'the opposition is fighting with the enemy under the rays of the sun and the glory of culture,' he was doomed to be defeated⁴⁾.

On another side, arguments for the abolition of Capital Punishment have had a long history since Beccaria authored "Dei delitti e delle pene" in

2) HIRANO Ryuichi, Capital Punishment, (A Series of Legal Theory Vol. 127) p. 5.

3) OHNO Masayoshi, A History of Capital Punishment (I), Handai Hogaku (Osaka Law Review), No. 52, pp. 23-24.

4) TAKIKAWA Yukitoki, A Contribution to the Problem of Capital Punishment, cit. by "A Phase of a History of Criminal Law", p. III.

1764.

It is indeed the fact that our simple feeling of opposition and a sense of subordination to law combine with a desire to protect society by a penalty system and this public belief lays the foundation for our affirming Capital Punishment as a system. A penalty system cannot exist apart from a crime. A crime represents a social phenomenon. Similarly, the penalty system also should be understood as a social phenomenon. When the penalty system is understood as a social phenomenon, the penalty system itself cannot be an abstract idea, but becomes a concrete system⁵⁾.

Capital Punishment is one of the penalty systems. This is why Capital Punishment is the object of the argument deduced from the substantial argument. However, it is difficult to make it clear whether Capital Punishment is good or not by grasping the facts of it through deduction. Dr. Kimura described in the opening of his work "Capital Punishment" how to grasp the problem of Capital Punishment.

Capital Punishment is a problem for a theologian in the Middle Ages of Europe. In the modern age, especially in the 18th century, it is for a problem for scholars of politics and philosophy. After the 19th century it is mainly for scholars of criminal law. But it is not for criminal law, but for historical social, philosophy and for culture. The problem of Capital Punishment cannot be fully grasped until it is not reviewed by judging from these various stand points⁶⁾.

Dr. Masaki insisted as well, "It is not simply that this is the problem of culture, morality and religion, but never the responsibility of criminal law. It is more that this difficult problem has been solved in various countries."⁷⁾

Today there are not a few countries that have abolished Capital

5) Rusche and Kirchheimer, *Punishment and social Structure*, 1939, p. 5.

6) KIMURA Kameji, *On Capital Punishment*, p. 3.

7) MASAKI Akira, *Capital Punishment*, p. 246.

Punishment and that carried its abolition into effect⁸⁾. But the Capital Punishment is considered a kind of penalty system in our existing criminal law. And it also exists in a draft of the penal law reform which should be the basis of future criminal law. Although the general public approve that Capital Punishment is an undesirable and uncivilized system, it has a long historical tradition, which it is not easy to break with. On the contrary, it is easy to maintain the present condition at any time. The reality of the existence of Capital Punishment makes the system firm in society. But it shows that the tendency of the times is to abolish it. We will have to fight with traditional views more than before in order to realize the abolition of Capital Punishment. "For the hundreds, thousands of years that tradition has lasted, most people may have been able to reject Capital Punishment, but it is not easy for them to completely exterminate it. We do not have to keep away from fighting with this tradition⁹⁾".

II. The Reason for the Abolition of Capital Punishment

The positive reason that the idea of the abolition of Capital Punishment comes out of the fact that this is a relic of an uncivilized penalty system in ancient times and in the middle ages, and that this is against humanism and today's public conscience. And as a negative reason, Capital Punishment does not act as a deterrent to crime. Also, in the case of misjudgement, this is an irrevocable system. These arguments have been made for a long time as reasons for abolition.

The idea of abolition based on humanism has been derived from religious thought. "Thou shalt not kill.", the fifth of the Ten Commandments given to Moses, has become the basis for this humanism, and this moral sense that life is respectable and murder is wrong has been with us through

8) Criminal Affairs Bureau of Ministry of Justice, *The System of Capital Punishment of Countries of the world* (Sep., 1963), pp. 8—10. After publication of this material, Great Britain abolished Capital Punishment in 1965.

9) TAKIKAWA, *op. cit.*, p. 110.

a long history. It must be said under such consciousness, that both murders by the government and murders between nations (war) fall under the category of vice. Capital Punishment is the system that man judges man to take his life in the name of a state and it is nothing but a result that man produced in the uncivilized times, which is evidently against humanism¹⁾.

In fact the phrase "Thou shalt not kill" in the Ten Commandments, itself does not directly forbid the existence of Capital Punishment, because this commandment signifies "unjustified murder". It needs to be examined whether Capital Punishment justifies murder or not, but at least from the historical point of view this commandment itself would not indicate a direct basis for it²⁾. It is rather meaningful that such religious commandments from the moral sense of human beings. Then the concepts of humanism that originates in religious thought differ from a question of whether religion has a direct connection with the abolition of Capital Punishment. We can affirm this because there are some among religionists who agree to maintain Capital Punishment from a religious point of view. Especially, it is worth notice that a great Christian theologian in the 13th century, St. Thomas Aquinas put emphasis on the justness of Capital Punishment from an organic totalitarian standpoint. In a word, he insisted that it is rather instructive and praise worthy to kill a criminal for the purpose of the safety and welfare of the public in general.

All supporters without exception admit that Capital Punishment is the system that denies respect of man and that is inhumane. They have believed that the reason why we have to maintain such a penalty system is based on the reality of social desires and on racial belief. However, according to supporters, they make the comment that the idea of abolition based on humanism is romanticism apart from reality and is a kind of sentimental argument. According to Prof. Uematsu,

1) TABATA Shinobu, A Study of Important Subjects on the Constitution of Japan, p. 195.

2) MIYAZAWA, A Tentative Draft of Abolition of Capital Punishment (Essays by Reformative Institution), p. 277.

The argument that Capital Punishment runs counter to humanism is important but sentimental. The idea that Capital Punishment is opposed to humanism not only arises from the dogmatism that states that we should not take a companion's life without asking why the criminal committed the crime, but also promotes humanism aimed toward only criminals. And then they forget to have humanism for good citizens who are exposed to danger of crime. If the lives of atrocious criminals are secured, they will stride along the street fearlessly. The more free a criminal is, the more danger a policeman and a prison officer assuming charge will be exposed to. What's worse, good citizens have to hide from a dangerous man walking around whose life is guaranteed by the government.³⁾

Against Prof. Uematsu's opinion, "On what authority do they say that it is impossible to prevent many of the some kind of cruel crimes from occurring?" Prof. Miyazawa who is on the side of abolishing Capital Punishment offered this question which is worth listening to. That is,

I do not think supporters of Capital Punishment intend to put criminals to death in order to prevent villainous crimes from occurring, but do they believe that the Abolitionists intend to allow criminals to roam around by taking advantage of the police negligence after the abolition of Capital Punishment? No, they do not. The Abolitionists are doubtful of the possibility of preventing crime even if we have Capital Punishment. I think it meaningless that the government itself is stained by killing a criminal in order to punish him for his crime who is bloodthirsty. The government should stop killing each other which causes a vicious circle⁴⁾.

3) UEMATSU, *op. cit.*, p. 346.

4) MIYAZAWA, *op. cit.*, p. 281.

It is not proper to reject the abolition of Capital Punishment based on humanism because it is sentimental. The healthiness of national feelings is the basis of legislation and it is impossible for the theory of law to come into existence in disregard of man's feelings. Prof. Uematsu himself approved this, and with a preface that man's feelings are also a basis of legislation, in regard to the abolition or maintenance of Capital Punishment, he stated, "The so called sentimental theory of humanism does not represent healthy man's feelings."⁵ If we go beyond theory, we see that Capital Punishment is not good. People's emotions determine the national thought which is the basis of Criminal Law. It stands to the theory of law to agree to national feelings when people want to abolish Capital Punishment." He says that if national feelings based on humanism produce the result of abolishing Capital Punishment, it becomes a case where the theory of feelings overwhelms reason⁶. Therefore against the opinions of those who favor keeping Capital Punishment that sentimental theory based on humanism does not represent healthy national feelings, their feelings are not always based on healthy national feelings. Nothing is a more effective penalty system than Capital Punishment which can satisfy the bereaved family's desire for retaliation on the criminal, but can we really say retaliation dyed in blood represents healthy national feelings today when one fourth remains of the 20th century.

The main negative reason for the abolition of Capital Punishment is that it is not a deterrent to crime, in other words, it does not restrain vice. In modern countries, most capital crimes provided by the criminal law are mainly murder, or so called homicide. When discussing the deterring power of Capital Punishment, we assume that a criminal is so prudent that he thinks about what kind of punishment will be inflicted for his crime. But in the case of murder, there are many criminals carried abruptly away by passion, so the effect of restraint is said to be hopeless

5) UEMATSU, *op. cit.*, p. 345.

6) *Ibid.*, *op. cit.*, p. 347.

for the following reasons.

- (1) Among murderers there are many psychotics who have no ability to understand the seriousness of their offences and to be aware of fear of Capital Punishment. And they are not punished because they are persons without the mental capacity to take the legal responsibility. Accordingly they are not threatened by Capital Punishment.
- (2) A murderer does not respect his own life any more than he does the lives of others and in almost all cases he tries to commit suicide.
- (3) A murderer is a kind of offender who loses his reason and commits crimes of passion, especially due to the sex urge. Sexual love is sometimes stronger than death, in point of this, Capital Punishment does not threaten a murderer who does not dread death.
- (4) A composed, cautious murderer takes action, believing that the crime will never be found out. To him who does not keep in mind what he would be after the crime is found out, this threat is ineffective even if it is displayed in front of him as a motive in order to hold the crime in check⁷⁾.

That is to say, most murderers are psychotics who do not fear Capital Punishment, men who make up their minds to commit suicide, violent men who lost their reason, and cool-headed men who do not believe that their crimes will come to light in spite of being aware of the existence of Capital Punishment. It is clear and accurate that Capital Punishment is not expected to menace people such as these.

Against this reason brought out by the theory of abolition, Prof. Takeda in the standpoint of supporting Capital Punishment presents a dissenting opinion as follows.

If a man such as a psychotic who cannot use his reason commits a crime, any rules, Capital Punishment and other punishments are ineffective to him. The national institution or his guardian has to

7) KIMURA, A Statement, *The Kaizo* (April, 1954), pp. 151ff.

preserve him from a criminal behaviour. In the case of a man who does not believe any possibility that his crime will be found out, the government has to adopt a policy to strengthen police force and to teach that he will be punished if he offends against law in order to restrain his motive to commit the crime. On the contrary that can not be reason to must abolish Capital Punishment and other punishments⁸⁾.

In short Prof. Takeda approves that Capital Punishment and other punishments do not have deterrent power to a murderer, but that does not give a good direct reason to abolish Capital Punishment. He, however, also admits that Capital Punishment is an undersirable penalty system⁹⁾. Then if we do not have positive reasons for the existence of Capital Punishment we might as well abolish it. In this regard Prof. Uematsu, taking the same position as Prof. Takeda said, "If Capital Punishment cannot suppress crime, there is evidently no need to maintain it.", but he put emphasis that to deny the deterrent power is to put the theory on the desk for the following reason.

On statistics of crimes quoted by Abolitionists although the fact that an increase of criminals after abolition of Capital Punishment is not seen, it does not prove that Capital Punishment cannot hold the crime in check. Because in the first place after the abolition of Capital Punishment there are cases in which villainous crime has increased; secondly, increase and decrease of crime is not caused mainly by the existence of Capital Punishment. In general, the tendency of the times when Capital Punishment can be abolished usually requires stability and a peaceful social situation, so it is the course of nature not to increase crimes by abolishing Capital Punish-

8) TAKEDA, Capital Punishment (op. cit.), Vol. XI, No. 1=2, p. 115.

9) *Ibid.*, p. 112. Prof. Takeda describes that everybody wish all punishments useless, of course including Capital Punishment.

ment. It is not strange. Take this example as a comparison: If a sick person stops taking his medicine, yet his condition does not get worse, we cannot necessarily say that the medicine was an ineffective antidote for his illness.¹⁰⁾

To be sure, the phenomenon of the increase and decrease of crimes after abolition which we read on statistics of crime is not connected with the problem of the deterrent power of Capital Punishment. It would rather show different phenomenon on each level of life, each national, social culture, and also the character and circumstances of a criminal. We cannot judge easily. However, as Prof. Uematsu pointed out, the reason why abolition of Capital Punishment does not produce increase in crime is that generally it is to be abolished when there are good social conditions. Therefore, restating in Prof. Uematsu's standpoint, if it should be possible to estimate that the stability of the social situation will give rise to an increase in villainous crimes, even if Capital Punishment has strong psychological authority, I think we may abolish Capital Punishment.

Parallel to the problem of deterrent power, one reason to abolish Capital Punishment is that the execution of the death penalty through misjudgement is irrecoverable. Misjudgement is never avoided when the case is judged by a man who is not God. If a death sentence is passed and executed through misjudgement, we kill an innocent man, who cannot come to life. Consequently in a criminal trial which is not guaranteed to have no misjudgements, we Abolishnists insist that we absolutely avoid executing an irrecoverable sentence of death.

Indeed, a judge, a prosecutor, a barrister and a witness, each of who has limited ability as far as he judges by the authority of memory and of experience, cannot guarantee the absence of misjudgement. Those who favor keeping Capital Punishment without exception approve that to some extent, misjudgement is unvoidable, but they oppose that misjudge-

10) UEMATSU, *op. cit.*, p. 348.

ment as a reason for the abolition of Capital Punishment. In a word, we have to agree that the possibility of misjudgement occurs in case of Capital Punishment as well as in perpetual imprisonment. But since modern justice has become scientific and the way of proving crime has been rationalized, if a judge has only a little doubt about proof, he refrains from executing the death penalty. Accordingly, it is rarely the case of a death sentence or execution. Specifically, Prof. Uematsu emphasizes that it is not right that only misjudgement be the reason for abolition of it, so long as Capital Punishment alone is not irrecoverable because of the reality that a man placed under restraint for a given period of time will never return, including the truth of unchangeable life¹¹⁾. But in this respect Prof. Miyazawa made a definite point from the standpoint of Abolition. "Between dying and living there is a deep rever over which a bridge is not built."¹²⁾ As compared with Imprisonment, Capital Punishment is merely one heavier rank, what's more, it has more important significance so long as legal interest is the object. A living man keeps on appealing his innocence, but we can guess how serious the finality of Capital Punishment is.

According to Prof. Takeda, "Insisting on misjudgement as a reason to abolish Capital Punishment is similar to, nay, more unreasonable than that modern transport facilities such as trains, automobiles and airplanes, should be totally forbidden to run in order not to get into danger from traffic accidents which occur quite frequently."¹³⁾ But rapid transport facilities such as trains, cars, airplanes, are an essential factor in our daily life. Even if it brings danger to human life by accident, it belongs within the limits of danger permitted from the social necessity and the contribution to economic, industrial development. Besides the definite point is that the character of Capital Punishment is wrong so long as it takes a person's life, even if objections to Capital Punishment are given. On the contrary, there

11) UEMATSU, *op. cit.*, pp. 343-344.

12) MIYAZAWA, *op. cit.*, p. 300.

13) TAKEDA, *op. cit.*, pp. 116-117.

is no more than the possibility that rapid transport facility exerts danger on man's life. Judging from the *raison d'être* (the reason for being), its character is good. I suppose it is not appropriate to compare the two different qualities, putting them in the same category by comparing misjudgement to traffic accident in order to justify maintenance of Capital Punishment.

Dread of making a misjudgement and sympathy for the executed on a false charge are common instinctive feelings of people. Such people's sense is the very foundation of abolishing Capital Punishment and also the motivating power of the movement for abolition. As a matter of fact, behind the abolition in England¹⁴⁾, brought into existence in 1965, the fact should not be thrown aside that abolition was realized because of a misjudgement. That arose from the fact that in 1949 at a place in London a twenty-five years-old man, a van driver, named Timothy John Evans was suspected of killing his wife and his little daughter. The defendant, Mr. Evans was an illegitimate child. In his childhood he suffered tuberculosis besides injuring his leg, and he was compelled to be under medical treatment till twenty. Under such circumstances, his intelligence quotient was as low as ten, to say nothing of not being to read and write. His affidavit was awfully contradictory and he changed his statement five times from the first to the last, so that he destroyed the conviction of the judge and jury. In the following year, that is, in January 1950, he was sentenced to death for murder and in May of that year he was put to death by hanging. But at the end of 1953 when three years and a half had passed since Evans died, a court was held for a devilish homicide, John Reginald Harridy Christy who had frozen people's blood in London as a sex crime when the murderer of Mrs. Evans proved to be Christy who lived in the same apartment house with Mr. Evans¹⁵⁾. It became clear that Mr. Evans was innocent, but they

14) OHNO, *The Abolition of Capital Punishment in England (The Social Reform)*, Vol. X, No. 3 (Oct. 1966), pp. 4ff.

15) J. A. Joyce, *Capital Punishment*, 1961, p. 120. And on a devilish homicide, Christy, cf. Colin Wilson and Patricia Pitman, *Encyclopedia of Murder*, 1961.

could not compensate him after his death, In the sence of, at least, retrieving the honor of the dead from all quarters, people tried the case over again. It is indeed that, availing oneself of this case of misjudgement, public opinion for abolition was aroused. Because of this kind of case, the movement for the Abolition of Capital Punishment gathered momentum. A member of the Labour Party, Sydney Silverman of Jewish descent who had kept the movement for the abolition of Capital Punishment alive throughout his political career for thirty years, introduced a bill to abolish Capital Punishment, which was carried to Parliament on 28th of October in 1965.

III. Penal Reform and the Abolition of Capital Punishment

In this century the great point at issue in the work of Penal Reform which we have been dealing with was the theory of abolishing Capital Punishment. In our country before the existing criminal law came into existence under a full reform of the old criminal law, as soon as a bill revision was presented to the sixteenth Imperial Diet in January of 1902, Dr. Shigejiro Ogawa, Dr. Takuzo Hanai, and others advocated abolishing Capital Punishment. In the Imperial Diet, active discussion of the bill occurred. But the existing criminal law established in 1907 approved Capital Punishment as part of the penalty system.

After World War II, under the ideology of democracy and of liberalism, no sooner was a new constitution established than provisions of the ex-criminal code which conflicted with the new constitution came to be recognized except that Capital Punishment has remained up to the present. But there are some powerful reasons that Capital Punishment should be abolished, because it is against the Constitution of Japan. That is the theory of Dr. Kameji Kimura. He is of the opinion that in Article 31 of the Constitution, to deprive one of life does not seem to be unconstitutional as a punishment according to procedure established by law. But in Article

9 of Chapter 2 which provides renunciation of war there is essential thought that denies the sovereign right of the nation but that approves superiority of the individual. It stands to reason to conclude that Capital Punishment should be abolished. A principle of Article 13 that all of the people shall be represented as individuals is naturally inconsistent with deprivation of individual life, even in the case of inflicting punishment. And the Article provides that "people's right to life" shall, to the extent that it does not interfere with public welfare, be the supreme consideration in legislation, but since "Public Welfare" is not only a benefit for the majority but also a common benefit for all people, depriving one of life, be he a criminal or not, is contradictory to public welfare. In conclusion Capital Punishment has to be abolished. Lastly Article 36 of the Constitution absolutely forbids cruel punishment, and Capital Punishment means cruel punishment that deprive people of their lives, which the Constitution, as a matter of course, forbids. By such reason it is right to understand that Capital Punishment is absolutely forbidden by the Constitution, because it is contradictory to the spirit of renunciation of war, to the principle of respect for the individual and to respect for the right of life, and is a cruel punishment, even if Article 31 of the Constitution says; nor shall any other criminal penalty be imposed, except according to procedure established by law. Capital Punishment is unconstitutional. The provision of criminal law which provides for Capital Punishment should be understood to come to naught, according to Clause 1 Article 98 of the Constitution¹⁾.

In opposition to this, common opinion is understood as follows; the Constitution of Japan upholds the existing system of Capital Punishment. Article 31 of the Constitution approves the criminal penalty which deprives life, according to procedure established by law. Moreover, cruel punishment provided by Article 36 does not mean punishment itself, but cruelty

1) KIMURA, A Reader of The New Criminal Law (A Revised Edition), pp. 286—287. A detail expression of this phrase will be found in the passage from his work of "The New Constitution and the Criminal Law", pp. 130 ff., pp. 163ff. pp. and pp. 189 ff.

of an extra measure.²⁾ The decision of March 12 in 1948 by the Supreme Court made it clear that the provision of Capital Punishment provided by criminal law is not unconstitutional, considering the existence of Capital Punishment in Japan.

So long as the Constitution of Japan provides that criminal penalties shall be imposed, according to procedure established by law, Capital Punishment cannot be understood to be unconstitutional. At the same time, so long as an Article regards Capital Punishment as a criminal penalty, we have to interpret it that the Constitution of Japan does not regard Capital Punishment itself as unconstitutional. In this sense that theory of unconstitutionality lacks persuasive power to the theory of interpretation, according to Dr. Kimura. However Article 31 leaves room only for Capital Punishment, but it does not provide that Capital Punishment should be definitely established as a penalty system. Accordingly, even if the provision of Article 31 exists, it is all right to revise the criminal law to abolish Capital Punishment. In a word, to provide Capital Punishment by the existing law of crime is not against the Constitution of Japan, but at the same time neither is the abolition of Capital Punishment by the criminal law. "To abolish Capital Punishment by the people's accord and not to maintain it is the spirit of the Constitution." Dr. Shinobu Tabata emphasizes³⁾. Dr. Tabata lays emphasis that abolition of Capital Punishment is the very spirit of the Constitution, grounded upon; "The Constitution of Japan approves of Capital Punishment by exercising the authority of the nation, despite a thorough foundation of Human rights provided by Article 10 or 40 and absolute pacifism provided by Article 9." "In this respect the Constitution of Japan involves contradiction. It provides renunciation of war, while it affirms Capital Punishment, in the same way that Kant does." "Anyway we consider it, it is a great fault that the Constitution of Japan leaves room

2) TAKIKAWA, *An Lecture on Criminal law (Keiho Kowa)*, p. 289. ONO Seiichiro, *Outline of Criminal Law*, p. 161. HIRANO Ryuichi, *Capital Punishment*, pp. 33—35.

3) TABATA, *op. cit.*, p. 194.

for Capital Punishment under Article 31 without positively abolishing it.”⁴⁾

Dr. Masaki comments on the contradiction in the Constitution of Japan.

The government compels people to sacrifice themselves for their country when war breaks out, while forbidding murder. Accordingly, war can deprive people's lives in the name of authority. That is war. The government forbids murder, on the other hand it cuts criminal's life off. That is Capital Punishment. Therefore war has something in common with Capital Punishment in the point of justifying deprivation of life in the name of authority. But of two common problems in the Constitution of Japan, to realize renunciation of war is a more difficult problem than the abolition of Capital Punishment. It need hardly be said that Capital Punishment has to be abolished so far as the Constitution of Japan is concerned. Nevertheless Article 31 of the Constitution leaves the provision “No person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, except according to procedure established by law.” That is to say, only if it is provided by law, may you take someone's life.

When it comes to Capital Punishment, it is legally recognized. On the one hand, it renounces war and renounces using life for the sake of war, on the other it recognizes, the authority to take life.

In theory isn't there a contradiction?⁵⁾

However, even if the Constitution does not provide for the abolition of Capital Punishment with excellent reasoning, it is possible to revise the criminal law and to abolish Capital Punishment, which indeed serves the spirit of the Constitution.

On the 20th of December in 1961 “the preparatory draft of criminal law reform” which should be the basis of the draft of the criminal law re-

4) TABATA, *op. cit.*, pp. 192-194.

5) MASAKI, *op. cit.*, pp. 79-80.

form in order to establish the future law of crime was made known to the public, planning to completely revise the existing law of crime. In May of 1963 the Ministry of Law put a question to the Legislative Council whether the existing law of crime should be revised or not. In July of the year the legislative Council formed a special committee of criminal law reform in which members have repeated to examine, concentrating on the preparatory draft of criminal law reform which was announced before, with Dr. Seiichiro Ono (an honorary professor of Tokyo University), a special adviser to the Ministry of Law, as a chairman. As the result, in March of 1972 the special committee issued "the draft of criminal law reform". But to my regret, this draft still provides the continuing Capital Punishment. According to a poll conducted by the government in June, 1967, it is said that 70% of the Japanese people hope for the maintenance of Capital Punishment. The cogent argument that it is not proper to entirely abolish Capital Punishment at once under such circumstances occupied the meeting. It was decided to maintain Capital Punishment.

However, as for this draft, the limit which a capital crime is applied to was drastically reduced. Capital Punishment was eliminated for six crimes which are capital crimes provided by the existing law of crime as follows. They are "setting fire to dwellings actually serving as a human habitation or in which persons are actually present", "damage to structures by inundation", "death resulting from overturning or destroying of trains, electric cars and vessel", "death resulting from addition of poisonous material to watermains", "death through robbery", and "killing an ascendant". Consequently, capital crimes are restricted to the seven crimes in the draft, as follows; "insurrection", "inducement of foreign aggression", "assistance to the enemy", "homicide", "robbery and murder", "robbery and rape: death resulting therefrom", and "blasting an explosive". What's more, "inducement of foreign aggression", according to the existing law of crime, has to be punished by Capital Punishment by all means, but according to

the draft, it is approved to choose a punishment other than Capital Punishment. About the application of Capital Punishment to these crimes, Article 48 of the draft provides, "We have to take an especially cautious attitude toward the application of Capital Punishment."

The reason why maintenance of Capital Punishment was decided in the draft is that most members of the special committee of criminal law reform of the Legislative Council of the Ministry of Law took the position of relative maintenance. Relative maintenance, in other words, means making gradual progress to abolish Capital Punishment. It is worthy of attention to take a step forward to abolish Capital Punishment, because the revision of criminal law required reduction of the number of capital crimes and cautions application of Capital Punishment.