Resolution Calling for the Abolition of the Death Penalty

Many people in Japan have felt conflicted over the question of whether criminals who deprive others of their precious lives should pay for the crime with their own life, and whether it is acceptable for a State to maintain the death penalty and carry out executions, and have sometimes hesitated to discuss these issues at all.

On the other hand, if we look beyond our national frontiers, after World War II the international community created the United Nations on the basis of the United Nations Charter (hereinafter the "UN Charter"), and recognizing that respect for human rights and international peace are indivisibly connected, adopted the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (hereinafter the "ICCPR") and its Second Optional Protocol (hereinafter the "Protocol on the Abolition of the Death Penalty") as international standards for the respect of fundamental human rights and call on States to strive for the abolition of the death penalty.

Under these circumstances, the Japan Federation of Bar Associations (hereinafter the "JFBA") adopted, at the Annual Conference for the Protection of Human Rights held in October 2016 in Fukui City, a "Statement Calling for Reform of the Entire System of Criminal Punishment, Including the Abolition of the Death Penalty".

In addition, since 1996, our Association has issued statements from our President protesting the execution of the death penalty, and has called for a moratorium on executions until nationwide discussion is exhausted. Further, since 2011, it has also endeavored to examine the propriety of the death penalty and to disseminate information on the issue, including a series of symposia on the system of the death penalty with the participation of citizens and in particular four similar symposia held in 2019. Our Association has also launched a project team in charge of examining issues related to the death penalty, including the maintenance and abolition thereof, tackling squarely the question of the death penalty.

On the basis of these activities over many years, our Association adopts, as an association of lawyers composed of attorneys-at-law whose mission is to protect fundamental human rights and to achieve social justice (Attorney Act, Article 1), the following:

The Main Points of the Resolution

Our Association calls on the government and the Diet to

1. Abolish the system of the death penalty,
2. Introduce life imprisonment as an alternative sentence, and
3. Place a moratorium on executions until the abolition of the system of the death penalty is achieved.

Reasons for the Resolution

I. Reasons for calling for the abolition of the system of the death penalty

1. The right to life

The right to life is an inherent right deriving from human dignity and is a fundamental human right constituting the foundation of all human rights. Restricting the right to life means depriving a person of his or her life, and in contrast to the case of other human rights, once the right to life is restricted, it can never be recovered. Also, the right to life is a right to existence as a human being, and there must not be a difference in value for each life. Hence, the right to life of all persons must be equally respected to the maximum and be inviolable.

As described above, the right to life, among all fundamental human rights, deserves special protection, and therefore, Article 13 of the Constitution of Japan proclaims that it requires the supreme consideration. The UN makes it clear, in Article 3 of the Universal Declaration of Human Rights, Paragraph 1 in Article 6 of the ICCPR, and the Protocol on the Abolition of the Death Penalty, that the right to life is inviolable.

Certainly, we cannot deny that, when we are faced with heinous, atrocious murder or indiscriminate mass-murder cases, disquiet and hesitation arises over whether we should guarantee the right to life to those who perpetrate such crimes. However, even in such cases, approving the death penalty would mean that we approve of the State selecting which human beings deserve to live and which deserve to die. Such an approval is equivalent to differentiating the value of each life, and thereby prevents the nurturing of the universal value that fundamental human rights, inter alia, the right to life must be respected. As a result, there is the danger that a mindset of treating human life lightly in the name of severe punishment will be nurtured among the population and also that grave human rights violations by the State such

as those perpetrated before World War II may reoccur.

Given that such dangers exist, the UN adopted instruments such as the Protocol on the Abolition of the Death Penalty in order to seek the realization of a society in which all people can share the value of respect for fundamental human rights, especially the value of the inviolability of the right to life.

Our Association, recalling the words of Cesare Beccaria (1738-1794) in his *On Crimes and Punishments* ("The death penalty is not useful in that it gives an example of cruelty to people. … It seems unreasonable to me that law, representing public will, abhorring and punishing a murder, commits exactly a murder itself and orders it publicly in order to protect citizens from a murder."), makes it a goal to realize the abolition of the death penalty and to create a society in which people can share the value of respect for fundamental human rights, especially the value of the inviolability of the right to life.

2. Risk of false convictions from erroneous judgments

Due process of law (Article 31 of the Constitution) has prevailed in Japan since the end of World War II, but particular examination is needed to know whether miscarriages of justice exist in the death sentences that have been handed down in criminal proceedings under this Article.

The death penalty is imposed through criminal proceedings, and the procedures (the stages of investigation, trial, and reevaluation such as review trial) are carried out by human beings. As humans are not infallible, we cannot completely exclude the risk that mistakes may happen during these processes. This fact has been demonstrated in numerous cases in Japan, including four cases in the 1990s in which death row inmates were acquitted as a result of review trials (the *Menda* case, the *Saitagawa* case, the *Shimada* case and the *Matsuyama* case), and the *Office Lady of the Tokyo Electric Power Company* case, the *Koto Hospital* case and the *Higashi Sumiyoshi* case in which, while the death penalty was not demanded by the prosecution, the accused were convicted of murder and acquitted by review trials thereafter.

In addition to these cases, there are numerous other cases we cannot overlook, such as the *Nabari Poisoned-Wine* case and the *Hakamada* case in which a decision to open a retrial was made (although not confirmed), as well as the *Iizuka* case, the *Fukuoka* case and the *Kikuchi* case in which death sentences were executed amongst concerns about possible miscarriages of justice.

Further, there is not only the problem of judging whether or not a person

is guilty, but also the problem that, when deciding on the sentence, the borderline between the death penalty and a life sentence is unclear. While the Supreme Court set out the so-called *Nagayama* standard as the standard of judgment in this respect, it cannot dispel all ambiguity. There is also a risk of erroneous judgment in respect of the facts which form the basis of sentences, and we cannot totally dispel the uncertainty of sentencing decisions caused by variation of those who make them (judges etc.).

It is not acceptable to leave the current unjust situation as it stands, in which people may be deprived of their life as result of false convictions based on erroneous judgments and unjust sentencing decisions.

We the attorneys, having experienced that, no matter how criminal proceedings are improved, we cannot totally exclude this social injustice through our criminal defense activities, are conscious of the fact that we are in a position in which we can advocate for such injustice to be corrected.

3. International human rights law and the responsibility of the UN member States

(1) International standard-setting and its prevalence

The international community, taking the lesson that grave human rights violations such as the deprivation of numerous lives were perpetrated and totalitarian States appeared as a result of leaving human rights protection up to individual States and turning a blind eye to human rights violations in certain nations before World War II, created the UN by concluding the UN Charter. The UN has set international standards for the respect of human rights by adopting the international bill of rights, including the Universal Declaration of Human Rights, the International Covenants on Human Rights, the First Optional Protocol to the ICCPR, and the Protocol on the Abolition of the Death Penalty.

These international standards for the respect of human rights set forth, among others, the right to life as follows: The Universal Declaration of Human Rights provides that “Everyone has the right to life, liberty and security of person” (Article 3), and the ICCPR provides that “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life” (Paragraph 1, Article 6), making it clear that the right deserves special protection.

It is true that Article 6 of the ICCPR includes provisions that tolerate the existence of the death penalty to some extent for those countries which have

not abolished the death penalty (paragraphs 2 to 5). However, this article, at the same time, added paragraph 6 stating that "Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant", and was adopted on 16 December 1966. Thereafter, the international community, in the belief that the abolition of the death penalty contributes to the advancement of human dignity and progressive development of human rights, adopted the Protocol on the Abolition of the Death Penalty on 15 December 1989, making it clear that all States should aim at the abolition of the system of the death penalty.

This means that, recognizing that the content and degree of the respect for fundamental human rights may not be varied depending on States, the international community called on States to abide by international standards set forth at the UN especially with regard to the right to life, instead of relying on interpretations of human rights that may differ from State to State, so that the general and universal nature of the right may prevail in all States.

After the adoption of the Protocol on the Abolition of the Death Penalty, the UN has continued to adopt resolutions at the General Assembly, calling for a moratorium on executions with a view to abolishing the death penalty, for a total of seven resolutions as of 17 December 2018. Also, in the course of Universal Periodic Review (UPR) at the Human Rights Council, retentionist States have constantly received recommendations, from the States in charge of review, that they should take actions aimed at the abolition of the death penalty. Japan has also received recommendations from treaty bodies, including the Human Rights Committee's concluding observations that it "should favorably consider abolishing the death penalty" (October 2008) and the Committee against Torture's concluding observation urging Japan to "Consider… the possibility of abolishing the death penalty" (May 2013).

The UN and related bodies thus strive to disseminate to all States international standards aiming at the abolition of the death penalty.

(2) The responsibility of UN member States and developments in the international community

The member States of the UN that signed the UN Charter "pledge themselves to take joint and separate action in co-operation with the Organization" (Article 56 of the UN Charter) for the achievement of the purposes of the UN set forth in Article 55, including "universal respect for, and observance of, human rights and fundamental freedoms for all". And, through the activities of the UN and related bodies for the abolition of the

death penalty as described above and the cooperation of UN member States who pledged themselves to take action for human rights as required in the UN Charter, the number of abolitionist States (*de jure*, or *de facto* abolitionist States which have not carried out executions for more than ten years) has continued to increase. As of the end of December 2019, 142 States (accounting for 70 percent of the UN member States) are abolitionists, and the number of States that have ratified the Protocol on the Abolition of the Death Penalty has reached 88.

Amid such developments in the international community, and given that Japan became a member of the UN on 8 September 1951 by signing the San Francisco Peace Treaty and declaring that it would observe the principles of the UN Charter, Japan has assumed the responsibility to take joint and separate action in co-operation with the UN for the universal respect for, and observance of, human rights and fundamental freedoms (Articles 55 and 56 of the UN Charter). Also, discharging this responsibility conforms to the principle of the Constitution setting forth internationalism (Preamble and Article 98, paragraph 2). In light of the fact that the UN adopted the Protocol on the Abolition of the Death Penalty and that it has been engaged in activities including the adoption of General Assembly resolutions calling for a moratorium on executions with a view to abolishing the death penalty and recommendations for the abolition of the death penalty in the Human Rights Council, it is obvious that the promotion of universal respect for, and observance of, human rights and fundamental freedoms (Article 55 of the UN Charter) encompasses the abolition of the death penalty.

Therefore, the government and the Diet, regardless of whether or not Japan has ratified the Protocol on the Abolition of the Death Penalty, has the responsibility to take actions, in cooperation with the UN, with a view to abolishing the system of the death penalty (such as promotional activities in Japan, a moratorium on executions and amending the law on the system of criminal penalties, including the abolition of the death penalty), and, in the long run, to take actions with a view to ratifying the Protocol.

II. Toward the realization of the abolition of the system of the death penalty in Japan

1. The Constitution and the judgment of the Supreme Court

The Supreme Court, in its judgments in 1948 and 1993, held the system of the death penalty to be constitutional based on the wording of Article 31 of the Constitution. It also held that death by hanging does not constitute a

cruel punishment prohibited by Article 36 of the Constitution. However, Article 31 of the Constitution only provides that "No person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, except according to procedure established by law", and does not actively support the system of the death penalty. Also, in a supplementary opinion to the 1948 judgment, it was pointed out that the death penalty would possibly be excluded as unconstitutional, depending on restrictive interpretation of Article 31 supported by the cultural development of the nation. In a supplementary opinion to the 1993 judgment, too, a justice pointed out the possibility of a moratorium on executions and the introduction of a different type of life sentence to the current one (by which an inmate may be subject to parole after ten years) in order to narrow the huge gap between the trend toward abolition of the death penalty in the international community and public opinion in Japan while it belonged to the matter of legislation. Although the content of this different type of life sentence was not explained, we may consider that it was the aggravated life sentence or life sentence without parole proposed by the Union of Parliamentarians for Abolition of the Death Penalty.

In terms of the interpretation of the Constitution, evaluation of the system of the death penalty (especially its cruelty) is thus not immutable, and is subject to change according to developments in the international community and changes in the situation in Japan in relation to such developments. Rather, it is strongly implied that the move toward the abolition of the death penalty is desirable.

2. Public opinion (social sentiments) and the death penalty

The government refuses to accept a follow-up to the recommendation to Japan calling for actions with a view to abolishing the system of the death penalty issued in the UPR of the UN Human Rights Council since 2008, maintains the death penalty and continues executions, for the reason that "the government considers that it should deal with the discussion on the system of the death penalty while observing trends in public opinion. As a majority of Japanese people think that the application of the death penalty for extremely vicious, heinous crimes cannot be helped, the government does not intend, for the time being, to make a forum for the purpose of discussing the question of the death penalty".

It seems that "the trends in public opinion" invoked by the government here refer to the result of opinion polls conducted by the Cabinet Office.

However, in the opinion poll conducted by the Cabinet Office in

November 2019, out of 1,270 people (representing 80.8 percent of 1,572 valid answers) who agreed with the choice "the application of the death penalty cannot be helped", 691 answered that they "would not abolish the death penalty" while 507 answered that they "would accept the abolition of the death penalty in the future if circumstances change" to an additional question (whether they support maintenance of the death penalty also in the future or, if circumstances change, they would accept the abolition of the death penalty in the future). Consequently, out of 1,572 valid answers, the percentage of those who are against the abolition of the death penalty both at present and in the future is approximately 44 percent (691 out of 1,572).

On the other hand, the percentage of those who answered that "the death penalty should be abolished" (142 people) and who answered that they "would accept the abolition of the death penalty in the future if circumstances change" (507 people) is approximately 41 percent (649 out of 1,572).

Therefore, neither those who choose the maintenance of the death penalty in any case nor those who choose the abolition of the death penalty or the possibility thereof reach a majority, and the percentage of each group is very close.

In such a situation, the interpretation of the government, that public opinion supports the system of the death penalty to the extent that we do not need any discussion, is not correct. On the contrary, about 40 percent of the Japanese people are either for the abolition of the system of the death penalty depending on the circumstances or, at least, are faced with a dilemma regarding whether we should maintain or abolish the death penalty.

A quintessence of parliamentary democracy is that issues are thoroughly debated in the parliament and, depending on the content and procedure of such debates, conclusions drawn by parliamentarians and people may change. In spite of that, we have not experienced any such debates in the Diet nor national debates on the question of whether we should maintain or abolish the death penalty. Under such circumstances, there are serious doubts regarding the attitude of the government claiming that even discussion is not necessary.

3. Alternative sentence to the death penalty

In the opinion polls conducted by the Cabinet Office in 2014 and 2019, there was a question asking: "If life imprisonment without parole is introduced, do you think it is better that the death penalty is abolished? Or do you think we had better not abolish the death penalty even if life imprisonment without parole is introduced?" In response to this question,

37.7 percent of people in 2014 and 35.1 percent of people in 2019 answered that it is better to abolish the death penalty.

This means that, as a supplementary opinion to the Supreme Court judgment in 1993 mentioned above, the introduction of life imprisonment without parole may be a measure to fill the gap between international standards and domestic public opinion.

However, there is a risk that the introduction of life imprisonment without parole is in conflict with contemporary theories of penalties based on the idea of social inclusion as well as with the UN Standard Minimum Rules for the Treatment of Prisoners ("the Mandela Rules").

Therefore, the JFBA proposed, in its "Basic policies on the abolition of the death penalty and the accompanying introduction of an alternative sentence and the creation of a system of mitigation of penalty" issued in October 2019, that "while introducing life imprisonment without parole as the maximum penalty, a procedure permitting the mitigation of sentence to life with the possibility of parole on an exceptional basis is to be created".

Our Association basically agrees with the proposal of the JFBA, in view of reconciling the realization of abolition of the system of the death penalty as an international standard and the UN Standard Minimum Rules for the Treatment of Prisoners while calling for the introduction of an alternative to the death penalty. But, depending on the measures for mitigation of penalty, questions may arise as to whether the mitigated penalty can be sufficiently severe as an alternative to the death penalty or whether social inclusion is really possible. Consequently, conditions for the mitigation measures procedure (such as who can apply, who will judge applications, and the period of sentence) need to be fully examined with care by the government and in the Diet.

4. The power of the death penalty to deter crimes

An apprehension is sometimes expressed that, if we abolish the death penalty, heinous crimes involving the infringement of life may frequently occur. However, the UN and the Council of Europe, as a result of scientific and statistical research such as the comparison of the tendencies of crimes in abolitionist States and retentionist States and the comparison of the tendencies of crimes before and after abolition in an abolitionist State, report that they cannot prove that the death penalty has a special deterrent effect on crimes as compared to other penalties. The government also states, in a reply paper dated 12 February 2008 to a question by a parliamentarian, that "it is difficult to prove the power of the death penalty to deter crimes scientifically

and statistically".

In relation to this, the government claims, on the basis of the result of the opinion polls by the Cabinet Office that those who agreed that "heinous crimes will increase if we abolish the death penalty" reached a majority, that the death penalty, distinct from other penalties, has a special power to deter crimes. However, while the power to deter crimes in question here relates to heinous crimes that correspond with the demand for the death penalty by the prosecution, it is said that the power of deterrence with regard to those who commit such crimes cannot be scientifically and statistically proven. The sentiment of security and apprehension of people who may be victims cannot replace scientific and statistical proof of the power to deter crimes. Moreover, we cannot expect that the threat of penalties will have a deterrent effect on terrorists and those who commit crimes with firm conviction in the first place.

Consequently, we need to develop scientific and reasonable social and criminal policies based on actual crime statistics. Unproven, "the power of threat of the death penalty" cannot be a ground for maintaining the system of the death penalty.

5. Support for the families of victims

We attorneys have constantly been confronted with the various harms caused by crime through our activities as counsels in criminal defense as well as our activities as counsels of victims in the course of the system of victim participation.

When we call for the abolition of the death penalty under such circumstances, there is an important question of how to come to terms with the harm suffered by victims or bereaved families.

As the JFBA states, in its "Proposal concerning the question of the system of the death penalty" dated 22 November 2002, that "the harm incurred by bereaved families as a result of heinous crimes such as those corresponding to the death penalty is truly unjust, and while the sentiment of victimization held by bereaved families is serious, the maintenance of the system of the death penalty alone cannot resolve the question of bereaved families", the sentiment of victimization held by bereaved families not only encompasses the sentiment desiring the punishment of perpetrators but also other sentiments such as feelings of loss and emptiness to which penalties cannot respond.

Moreover, the harm caused by crime includes social damage such as loss of belonging to a community and economic damage such as losing an economic pillar and the place to rely on.

Therefore, there is a need to promptly design a system through which we can sincerely face the anger and pain of victims and the unjust harm they have suffered and to extend moral, economic and social support to bereaved families (including the expansion of administrative mechanisms for response such as the establishment of a Crime Victims Agency, extending the scope of the system of allowances for crime victims to cover more people as well as increase of its amount, the expansion of multifaceted support mechanisms through the establishment of a coordination system between the central and municipal governments, training expert counsellors, and so on) and budgetary measures for them, thereby supporting bereaved families on a society-wide basis. The need for such measures exists, regardless of whether we call for the abolition of the death penalty and of what kind of penalty system is realized as a legal system.

Therefore, our Association, on the basis of our mission to protect human rights and to achieve social justice, calls for reform of the system of penalties including the abolition of the death penalty, and at the same time, declares our determination to work on the issue of support for bereaved families.

III. Conclusion

For the above reasons, our Association calls on the government and the Diet to abolish the system of the death penalty, introduce life imprisonment as an alternative sentence, and place a moratorium on executions until relevant bills for the abolition of the system of the death penalty are passed and put into effect.

18 September 2020
Fukuoka Bar Association