

# £JAPAN

## @Debating abolition of the death penalty

"I first became an active advocate of the abolition of the death penalty when I was appointed to the Supreme Court where I took charge of cases involving capital punishment. ... My stand against capital punishment owes more to that experience than to anything else..."

"The fundamental [obstacle] is public opinion. The government seems to be using the passiveness of public opinion as an excuse. It is surprising that so many academic experts in criminal law are passive or do not positively support the abolition of the death penalty. Most of them are not retentionists but are advocates of 'it is too early' or of 'one should be cautious'. So I think we cannot say the era of 'why abolish the death penalty' is over. We still need to argue further 'why we ought to abolish the death penalty' in order to look for and deepen the ways how we can abolish the death penalty."

DANDO Shigemitsu

"I was Minister of Justice for ten months until [November 1991] and I am known to the public for not having apposed my signature to an execution order during my term of office. I am a Buddhist priest... and I refused to sign mindful as a religious person of the importance of human life. I also think that public opinion is gradually moving towards supporting the abolition of the death penalty..."

SATO Megumu

No executions have taken place in Japan for over two years and during that time the abolitionist movement has gained strength and generated a rigorous public debate of the issue. Among the people who have publicly expressed their support for abolition are a former Minister of Justice, a former Supreme Court Judge, a number of members of the *Diet* (Japan's Parliament) belonging to various parties, lawyers and academics. The Japanese authorities' main argument for retaining the death penalty is that public opinion supports it. Abolitionists reply that Japanese public opinion is not informed about the facts of the death penalty and that public opinion polls are biased.

Forum 90 was established in the early part of 1990 and consists of various organizations and individuals who campaign for abolition of the death penalty. In December 1990 it organized

its first major public event, a conference at which Dr DANDO Shigemitsu, former Supreme Court Justice from 1974 to 1983 and Professor Emeritus at Tokyo University, delivered a paper entitled *The Case Against Capital Punishment* (for the text of this speech see ASA 22/05/92, issued by Amnesty International in April 1992). On 7 March 1992 it organized Forum 90-II which was attended by 1,200 people. The conference was chaired by YASUDA Yoshihiro, a lawyer, and the speakers were SHIGA Setsu of the Liberal Democratic Party, KAGA Otohiko, novelist, Dr DANDO Shigemitsu, Ms DOI Takako, Social Democratic Party of Japan and Robert Badinter, who as Minister of Justice abolished the death penalty in France in 1981.

On 16 March 1992 the newspaper *Asahi Shimbun* devoted two pages to a debate on the death penalty between abolitionists Robert Badinter, Dr DANDO Shigemitsu and NAKAYAMA Chinatsu, a writer and former member of the House of Councillors, and retentionists UEMATSU Tadashi, Professor Emeritus at Hitotsubashi University, Chairperson of the Japan Death in Dignity Association and Chairperson of the Criminal Law Division of the Legislative Council of the Ministry of Justice (the Legislative Council is an advisory body to the Ministry of Justice), and MAEDA Hiroshi, former Prosecutor General, former Vice Minister of Justice and present Chair of the Japanese Correctional Association. The topics included: the experience of the abolition of the death penalty in France and the worldwide trend for abolition, whether the death penalty has a deterrent effect, miscarriages of justice, public opinion and political leadership. During his visit Robert Badinter also had discussions on abolition of the death penalty with members of the *Diet*.

This document seeks to reflect some of the opinions expressed publicly by prominent Japanese on abolishing or retaining the death penalty. Amnesty International has endeavoured to ensure that its translation of these opinions from the Japanese language is accurate and asks the readers of this document to read it as a reflection of opinions rather than verbatim quotes.

## **Facts about the use of the death penalty in Japan**

Japanese law provides for the death penalty for 17 offences but since 1967 it has been imposed only in cases involving murder, usually multiple murder or homicide caused by explosives. In recent years the courts appear to have applied criteria for the imposition of a death sentence put forward in July 1983 by the Supreme Court in a ruling in the NAGAYAMA Norio case. The court ruled as follows: "Under the present legal system which retains the death penalty, when various circumstances are considered such as the nature of the crime, its motivation and its mode, especially the persistency and the cruelty of the method of killing, the significance of the result, especially the number of victims, the impact on society, the offender's age, criminal record and circumstances after conviction, if its liability is considerably heavy and the death penalty is regarded as unavoidable from the point of view of proportionality as well as deterrence the imposition of the death penalty is allowed." Since the ruling in the NAGAYAMA case the

Supreme Court has finalized an increasing number of death sentences. In the five-year period 1986 to 1990, a total of 30 defendants had their death sentences finalized by the Supreme Court; all cases involved murder.

All death sentences can by law be appealed to a higher court. A retrial may be requested after appeals have been dismissed and a sentence has become final if new evidence is discovered or if evidence on which the original judgment was based has been proved false. In the years 1983 to 1989 four prisoners who had been convicted of murder in separate cases and sentenced to death in the 1950s were acquitted after they succeeded in obtaining retrials. Those acquitted were MENDA Sakae in 1983, TANIGUCHI Shigeyoshi and SAITO Yukio in 1984 and AKAHORI Masao in 1989. Before his acquittal MENDA Sakae had spent more than 34 years in prison during which time he had applied for retrial six times before his application was accepted. Since his acquittal MENDA Sakae has actively campaigned to raise public awareness about the death penalty and is an active campaigner for abolition.

Prisoners may also apply to the government for special amnesty or commutation of their sentences. Only three prisoners have had their death sentences commuted by individual amnesties, in 1969, 1970 and 1975. The amnesties were granted on the grounds of illness, old age, repentance, and forgiveness on the part of the victim's family. The last general amnesty that commuted death sentences was in 1952.

Among the 90 or so prisoners currently under sentence of death 53 people have had their death sentences confirmed by the Supreme Court. Fourteen of them have denied all or some of the charges against them and eight are either preparing an application for a retrial or have already submitted such an application.

No public announcement of impending executions is made and executions are not reported in the press. The authorities do not confirm the names of executed prisoners and only release statistics periodically, on the grounds that such secrecy protects the family of the prisoner from the shame of having it known that their relative has been executed. The fact that an execution has taken place becomes known months later through government statistics, and the prisoner's death is recorded in local registers. Fifteen executions took place in the period 1980-1989. The last execution was in November 1989.

Executions take place in one of the seven detention centres where prisoners sentenced to death are held; they are Hiroshima, Sapporo, Sendai, Tokyo, Nagoya, Osaka and Fukuoka. The death sentence is carried out by hanging. Under the provisions of the Prison Law of 1908, no executions are to be carried out on national holidays, the first or second of January and the 31st of December.

The Prison Law says that prisoners sentenced to death shall be treated like unconvicted prisoners. However the authorities have in recent years imposed restrictions on contacts with the outside world and some relatives by adoption have filed lawsuits alleging that they were prohibited from meeting prisoners under sentence of death. In its Third Periodic Report submitted in December 1991 under Article 40 of the International Covenant on Civil and Political Rights to the UN Human Rights Committee (ICCPR), the body of experts which monitors implementation of that treaty, the Japanese government stated: "The Prison Law provides that the warden of the institution decides whether the persons sentenced to death receive visitors on a case-by-case basis according to the purpose of the detention (Article 45, paragraph 1 of the Prison Law). In practice the persons sentenced to death are allowed to receive visitors such as their family members and lawyers in the presence of officials, except where there is a probability of obstructing the realization of the purpose of the detention such as jeopardizing the security of the custody."

## **What Japanese defence lawyers have said on the death penalty**

When Amnesty International issued the report *Japan: The Death Penalty and the need for more safeguards against ill-treatment of detainees* in January 1991, NAKABO Kimihara, then President of the Japan Federation of Bar Associations, said that: "Concerning the death penalty issue, the Japan Federation of Bar Associations (JFBA) has not yet taken an official position but at its human rights conference held in Asahikawa [in 1990] this issue was debated and it was decided that it should be discussed seriously within the Federation in connection with the question of [Japan's] accession to the Second Optional Protocol to the ICCPR. The Japan Federation of Bar Associations intends to discuss the issue further." (Under the Second Optional Protocol to the ICCPR aiming at the abolition of the death penalty, states parties to the ICCPR are bound not to carry out executions).

Between May and July 1991 Professor KIKUTA Koichi, Professor of Criminal Law and Criminology, Meiji University, conducted an opinion poll among members of the JFBA. He wrote to 7,132 lawyers, half of the Federation's members; replies were received from 2,745.

On their general position on the issue, 45.8% of respondents described themselves as abolitionists, 47.6% as retentionists, and 181 lawyers reserved their opinion. [Previous opinion polls conducted among lawyers showed a larger proportion of retentionists. In 1953, 61.7% of lawyers who took part in a JFBA poll supported retention, while 36% supported abolition; in a 1981 survey conducted by the Tokyo Bar Association the proportion of abolitionists had increased to 39.6% with 60.4% retentionists.]

On the question of how to achieve abolition, 20.7% supported immediate abolition, 34.9% supported gradual abolition and 39.4% rejected abolition at any time.

Asked whether they agreed that the death penalty should be retained for the sake of the victim's family, 43.7% agreed with this view while 48.6% felt that the argument was not compelling.

Asked what they thought the Japan Federation of Bar Associations should do, 38.4% supported the JFBA taking action to abolish the death penalty, 46.5% supported continuing interest in the issue and 10.1% thought that the matter should be left to public opinion.

The October 1991 issue of *Liberty and Justice*, the monthly publication of the JFBA, was almost entirely devoted to the death penalty, with articles and materials on this topic covering some 140 pages. The editorial comment explains that the issue was meant to provide readers with materials on the debate on the death penalty and the Second Optional Protocol to the ICCPR. The articles included an outline of the Second Optional Protocol and the history of its adoption by ABE Kokhi, a lecturer at Toyama International College and an article by SAITO Toshio, the Head of the First International Affairs Section of the International Division of the Criminal Affairs Bureau of the Ministry of Justice. This article reviewed the developments in the United Nations that led to the adoption of the Second Optional Protocol and explains the government's position on the treaty that it is a matter for each state to decide. An article by SUGITA Tokio, member of the Tokyo Bar Association, examines the arguments in favour and against the death penalty and advances the view that "since the death penalty allows states to legally deprive people of the right to live, it is the duty of the retentionists to argue to the public that there is a rational basis for punishment." WADA Mitsuhiro also examined the question of "Who should do what to abolish the death penalty?", as a lawyer. After citing the suffering and distress of those involved in death sentence cases including lawyers, prison officers and judges, he proposed to the JFBA "to face" and "to struggle with" the issue of the death penalty as its own business.

Other articles reflected the views of local Bar Associations. The Tokyo Bar Association sees a moratorium on executions as a "sensible step." The Second Tokyo Bar Association compiled an outline of some recent capital cases with comments on the sentencing and its Subcommittee on the issue of Capital Punishment contributed an article studying the criteria on which death sentences were imposed by the courts. The Subcommittee studied 40 cases where death sentences were imposed between mid 1983 and mid-1991, about half of all the capital cases dealt with by courts at all levels during the period, as well as five cases where a death sentence was imposed by courts of first instance before the July 1983 Supreme Court decision in the NAGAYAMA case (see above) but which were commuted to life imprisonment on appeal. The Subcommittee concluded that they could find no common and decisive factors distinguishing death penalty cases from life imprisonment cases and that the main factor distinguishing the sentences applied appeared to be subjective to judges.

In a report it submitted on 22 November 1991 to the United Nations Human Rights Committee, *Report of the Japan Federation of Bar Associations on the Application and Practice in Japan of the International Covenant on Civil and Political Rights*, the Federation commented in the following terms on Article 6 (the right to life); "As long as we see the reality of the Japanese court system based on such unreliable foundations [use of confessions etc] we should think seriously of abolishing the death penalty."

On 17 December 1991, 51 lawyers of the Sendai Bar Association submitted a letter to the Prime Minister, the Minister of Justice and the Minister of Foreign Affairs asking that executions be stopped and that the Japanese Government accede to the Second Optional Protocol aiming at the abolition of the death penalty.

## **What prosecutors and the Ministry of Justice have said on the death penalty**

An article written by SATOH Michio, the Director of the Sapporo High Public Prosecutor's Office, was published in the 27 December 1991 issue of *Shukan Asahi* under the title *No more sentimental feelings on the abolition of the death penalty*. Mr Satoh wrote that although he wished no cruel murders were committed and the death penalty be abolished, the reality was that cruel crimes were still taking place and that in such cases the death penalty was unavoidable.

One of the participants in the debate on the death penalty published by the *Asahi Shimbun* on 16 March was MAEDA Hiroshi who argued that half of the world was in fact still retaining the death penalty and he disagreed with the argument that it would be unjust to carry out executions shortly before abolition. He expressed his dissatisfaction about the lack of legal basis for the present situation where no executions are carried out. He agreed, however, that there is no convincing evidence that the death penalty has an immediate deterrent effect. He felt that the death penalty should be discussed from various aspects, not only its human rights dimension. As for miscarriages of justice involving death sentences, he admitted that there had been some in the past but he felt that judges are now very careful and that the risks of future miscarriages of justice are almost nil.

In April 1991 *The Japan Times Weekly* quoted an article from *Shukan Shincho* which quoted an (unnamed) former Minister of Justice: "The two reasons I did not stamp my *hanko* (to order an execution) were these: First, I hesitated to do what so many justice ministers before me had not done; and second, for the practical reason that my staff never gave me the paperwork. It was during my time in office that the two retrials for former death row convicts Menda and Taniguchi found them innocent, and the public mood then spelled hesitation towards the death penalty. If I had asked for Hirasawa's papers to stamp my order, it would have made

headlines the following day. I imagine not even one among ten people reading the story would have complimented me for 'making a brave decision and keeping the order of law...'

## **The Government's position on ratification of the Second Optional Protocol**

In its Third Periodic Report submitted in December 1991 under Article 40 of the ICCPR to the UN Human Rights Committee, the body of experts which monitors implementation of that treaty, the Japanese government stated that "The abolition of the death penalty is directly related to the national feeling and the domestic legislation based on it. Therefore, the conclusion of the Second Optional Protocol to the International Covenant on Civil and Political Rights aiming at the abolition of the death penalty should be studied carefully."

## **What Japanese judges have said on the death penalty**

Dr DANDO Shigemitsu published a book on 10 November 1991 *On Abolishing the Death Penalty (Shikei Haishi-ron)*. According to the publisher the 10,000 copies of the book's first edition were sold within three weeks. A second edition of the book is now being prepared. On 6 November 1991, the first day after the appointment of TAWARA Takashi as Minister of Justice, Dr Dando send him a facsimile which said "I earnestly hope that the execution of death sentences will be halted even under the current law. I also request that you particularly consider not placing your signature and seal on any death orders."

At the Forum 90 Conference in Tokyo for the Ratification of the Convention on the Abolition of the Death Penalty Dr Dando delivered his paper entitled *The Case against Capital Punishment*. The paper examined the death penalty in Japan and presented the abolitionist case from a judicial perspective and in his arguments said "If we consider that whenever the death penalty system is applied it is inevitable that innocent people will sometimes be executed as a result of misjudgment, the death penalty becomes the ultimate epitome of inhumanity and cruelty." He concluded that "The law must function as a model for society of how justice should be applied. If the law permits the taking of human life by its own hand while asking the nation to respect human life, the law can no longer exercise its discipline over society."

In December 1991 Dr Dando was invited to speak at a meeting on the theme *Judges and the death penalty* before legal trainees at the Legal Training and Research Institute.

## **What Japanese legal scholars have said on the death penalty**

Professor TSUJIMOTO Yoshio, Professor of Criminal Law and Criminology at Chu-Gakuin University, has published several books and articles on the subject of the death penalty and

supporting its abolition. In 1983 he published a compilation of "Historical Materials on the Death Penalty." Professor Tsujimoto also regularly contributes articles on the subject for the newsletter of the Japanese Council on Crime and Delinquency and translates documents on the subject from other languages. He has also translated into Japanese the Amnesty International report *When the State Kills...The death penalty v. human rights*.

At the debate sponsored by the *Asahi Shimbun* on 16 March 1992 Professor UEMATSU Tadashi, who favours retention of the death penalty, admitted the difficulty inherent in supporting the death penalty in the face of the international trend towards abolition. He felt, however, that retentionist arguments remained, in particular the deterrent effect of the death penalty and the view that there is no justice achieved by saving a murderer's life.

## What members of Japan's Diet (Parliament) have said on the death penalty

Support for abolition among members of the *Diet* appears to be growing. In December 1989 in answer to a survey conducted by the Liaison Committee for the Suspension of Executions, 81 members of the *Diet* said they were abolitionists. In March 1992, 136 members of the *Diet* explicitly supported the aims of Forum 90. A meeting held with Robert Badinter in March 1992 at the *Diet* Building was attended by 19 members of the the *Diet* belonging to the Liberal Democratic Party, the Social Democratic Party of Japan (formerly called the Japan Socialist Party), the Komeito Party, the Democratic Socialist Party, the United Social Democratic Federation and the Japanese Communist Party.

In general, political parties in Japan have not adopted an abolitionist position officially, although their members may have taken such a position individually.

The Liberal Democratic Party has no official stand, but several members of the *Diet* are abolitionists. Among them are SATOH Megumu, former Minister of Justice, and SHIGA Setsu and KUJIRAOKA Hyosuke, both former Ministers of the Environmental Agency.

The Policy Board of the Social Democratic Party of Japan has adopted an abolitionist position and the *17 Points Declaration on Human Rights* issued on the occasion of the 200th anniversary of the French Declaration of Human Rights by the office of the then Chairperson of the Party, DOI Takako also supports abolition. In her book *DOI Takako's lecture on the Constitution* she said: "We can understand the feelings of the victims of crime which call for 'an eye for an eye and a tooth for a tooth' but there is a danger of totalitarian politics when the state seeks to suppress crime by increasing the use of the death penalty." She also referred to well-known campaigners for abolition of the death penalty before World War II.

ISHIDA Koshiro, the Chairperson of the Komeito Party has publicly declared his support for abolition. Several other members of the Party are also abolitionists.

The Democratic Socialist Party has taken no official position on this issue but some of its members are known abolitionists.

The Japan Communist Party included abolition of the death penalty in a draft Japanese Constitution prepared in 1946. The then Chairperson and member of the House of Representatives, KIJIMA Hideo, in a letter to Amnesty International in October 1990 set out the key points of the Party's position on the death penalty and its commitment to the its abolition.

EDA Satsuki, the Chairperson of the United Social Democratic Party and most of the members of this party are abolitionists.

A group of members of the House of Councillors and of the House of Representatives who in May 1990 formed a supporting group for Amnesty International in the *Diet* has been actively discussing the issue of the death penalty. In March 1991 the group invited Dr Dando to one of its study sessions on this subject.

### **What Japanese religious groups have said on the death penalty**

On 23 January 1992 the Catholic Justice and Peace Commission and the National Council of Churches in Japan jointly submitted an appeal to the Ministry of Justice calling for the abolition of the death penalty and suspension of all executions.

The Peace and Human Rights Buddhist Network actively supports abolition. One of the organizers of Forum 90, SETOUCHI Jakucho, is a Buddhist nun.