

The Japanese View of Life and Death and the Law

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1. Introduction

A considerable time has elapsed since the advent of the age of globalization. One of the signs of globalization is that in many countries around the world, laws are beginning to share the same content in a variety of areas. Prevention of organized crime, including cyber crime, is one such example. Still, each country's cultural characteristics, rooted in its religious tradition, sometimes make for a distinct individuality in its laws. One of the reasons for the existence of religions lies in the teaching that death is not mere non-existence or ultimate end, but rather a milestone with a more optimistic meaning. How people face or cope with their own or others' death is quite strongly affected by religion or religious sentiments. The Japanese are often said to have a unique view of life and death ("*shiseikan*" in Japanese). The term "*shiseikan*" is an expression unique to Japanese that refers to how we face death and how we perceive the afterlife[1]. In this presentation, I would like to focus on two examples in which Japanese law is determined by the Japanese view of life and death as previously discussed. One is the capital punishment system and the other is the issue regarding the legal definition of death. The aim of this presentation is to shed light on the relationships of religion, culture and law in Japan through examples.

2. The Capital Punishment System in Japan

(1) Why has capital punishment not been abolished in Japan?

A point of departure in this discussion is capital punishment. Despite international criticism, especially from European countries, Japan still maintains its capital punishment system. Within recent history, some 20 death sentences are pronounced annually in Japan, of which several are actually carried out. According to public opinion polls conducted by the Cabinet Office every five years, more than 80% of respondents answer that capital punishment is a necessary evil. In the most recent poll of 2009, the percentage reached a record high of 85.6%. Those who answered that capital punishment should be abolished were a mere 5.7%. Although it can be said that politics should sometimes play the role of guiding public opinion rather than always following it, it would be difficult for politicians to take a leadership role in revising the capital punishment system when such a large and rapidly increasing majority of Japanese citizens think that capital punishment is necessary.

The issue of capital punishment was hotly debated in the Japanese Diet some 100 years ago. Approximately 70 death sentences are said to have been carried out annually at that time. Opinions in favor of restricting the imposition of capital punishment or abolishing the system altogether were presented in the Diet, where they were repeatedly debated for a full revision of the penal code. But why isn't the issue debated in the Japanese Diet today? It is not because the Japanese have become more inhumane or insensitive to human rights over the past 100 years. On the contrary, an understanding of human dignity and inviolability of individual life has significantly deepened in Japan since the end of World War II. As stated before, many Japanese consider capital punishment a necessary evil, and there is no attempt in the Diet to review the capital punishment system, perhaps for the following reason: the majority of people have come to share the understanding that capital punishment is necessary as a result of the heightened awareness of the inviolability of life, and the belief that homicide takes precious lives without reason.

The Japanese react very emotionally to the death of a family member. For example, when a fire occurred in a cable car in Kaprun, Austria, in 2000, resulting in 155 casualties, the behavior of the relatives of the ten Japanese killed in the accident was considerably different from that of people from other countries, and this is reported to have surprised local residents.

In addition, during the 1990s, dissatisfied that the punishment for crimes which took lives was too light, the bereaved families of crime victims in Japan began criticizing the criminal justice system. Mass media also joined the criticism, arguing for the imposition of heavier sentences. Supported by the trend for the protection of the rights of crime victims in criminal justice, their argument for imposing heavier sentences for crimes against persons greatly affected not only court decisions, but also legislative activities in the Diet. The bereaved families of crime victims in Japan even believed that it was their moral obligation to victims to act in favor of imposing the heaviest sentences available on perpetrators, especially when children's lives were taken. The bereaved joined victims' organizations, stated their opinions on criminal sentences in court to urge judges to lobby for the heaviest sentences possible, and appealed to the mass media, politicians and government agencies for an increase in punishment by the legislature for crimes. The activities of the bereaved families of crime victims actually affected the mass media and governmental organizations. As a result, the criticism that the Japanese Penal Code had been indifferent, partial and unfair to victims became widely accepted in the nation. During the first decade of 2000, this widespread criticism made it possible to achieve the largest reform of the Japanese Penal Code in the last 100 years.

The retributive justice theory, along with the principle of balance between crime and punishment that forms the major content of the theory, provides the strongest grounds for the capital punishment system in Japan. The retributive justice theory assumes that punishment itself is "harm" (i.e., a negative sanction that consists in the violation of interests in the form of pain) and maintains that there should be balance between punishment and crime, another form of "harm". The essential harm of a crime (harm of crime corresponding to the harm of punishment) is generally considered as tangible and visible damage resulting from the crime (e.g., death in the case of homicide). Even among legal experts, only a few support the Hegelian view that crime is the negation of law and punishment the negation of the negation. The view focused on punishment corresponding to the harm caused by crime, which maintains that punishment is lightened only in accordance with the degree of reproach about decisions made by the perpetrator, makes it difficult to impose sentences (e.g., life imprisonment) other than capital punishment as appropriate punishment for mass murder (such as the case of Adolph Hitler).

However, turning our attention to the actual state of violent crime in Japan, we find that the recorded number of homicides (including robbery homicides) has continued to decline after a record high in 1954, reaching a record low since the end of World War II in 2012. Data on the rate of crime (i.e., the recorded number of homicides per 100,000 persons) reveals the decline even more clearly. As a country where homicide is rare, Japan is an exception in the world; not only the number of homicides, but also their rate per capita, is continuing to decrease in Japan. The number of death sentences also continued to decline and capital punishment itself has been nearly abolished.

However, an amazing phenomenon occurred after the year 2000. Over the past decade, the number of death sentences pronounced or determined increased dramatically. This increase was partly affected by the sarin gas incident in 1995. This incident is said to have deteriorated the image of religions, reduced trust in and respect for religions among the Japanese, and made it difficult to abolish capital punishment in Japan. However, what was more important was the criticism leveled by the bereaved families of criminal victims against leniency toward criminals and actions taken toward imposing heavier punishment on criminals. Changes in the standards adopted by courts for imposing the death penalty are likely to be a result of these trends.

Needless to say, it is possible to raise questions about such operation of the death penalty system. It is meaningless to apply stricter standards for imposing capital punishment when the number of homicides continues to decrease and when there is no decrease in the effectiveness of homicide laws, and no need to enhance their effectiveness. It is even inappropriate to operate a public system of penal justice without regard for the actual state of crime or the practical effects of punishment.

There exists, too, the following consideration: imposing or not imposing capital punishment should not be determined solely by the retributive emotions of the bereaved of victims. Most of the bereaved of homicide victims are left with their retributive emotions unhealed. Between 1980 and 2009, only about 1.2% of homicide perpetrators (or robbery homicide perpetrators) who were pronounced guilty were sentenced to death. The extent to which death sentences are carried out is extremely limited for the families of homicide victims. Under these circumstances, questions naturally arise as to the significance of paying more attention to the retributive emotions of the bereaved. If we were to pay more attention to the retributive emotions of the bereaved, the number of death sentences may continue to increase without limit. On the other hand, however, if we restrict the imposition of capital punishment, dissatisfaction of the bereaved of victims will continue to accumulate. Even if we conclude that the capital punishment system should be maintained under the current circumstances, we would be criticized for being irresponsible if we did not properly answer the question as to how this system should be operated.

(2) Background of the trend toward heavier penalties

The trend toward heavier penalties is supported by a fundamental change in how the public views crimes. During the 1970s and 1980s, when I started my career as a researcher, a series of sociological theories that regarded crimes as results of social environment issues represented the dominant view at the time. Many researchers shared the philosophy that individuals' behavior is seriously restricted by social conditions, and crimes committed by individuals are the expressions of societal problems. The argument that society must also assume common responsibility for crimes (Peter Noll) had an irresistible attraction to us. In those days at least, the Penal Code, which is constructed around the concept of responsibility, assumed the replaceability between those who judge and those who are judged, i.e., that everyone has the possibility of undergoing the same fate as criminals. In this sense, the penal system had a tendency to exempt criminals from responsibility since negative social conditions affected their behavior.

Things have changed in recent years. Those who argue that society is also responsible for crimes are criticized as being too lenient with criminals, unjustly absolving them from responsibility without regard for their victims. The emphasis on the importance of protecting crime victims' interests even makes it difficult to study the social causes of crimes.

More fundamentally, the philosophy that understands crimes in relation to social conditions itself seems to have largely lost its persuasiveness in the spirit of the times. Sociologists who regard this as an inevitable outcome of changes in social structure and the trends of the times have introduced the term "individualization" to explain the phenomenon. As social conditions for individuals became homogenized under the post-war welfare state system, individuals were exempted from various restrictions. As a result, we now live in an age where self-determination and self-responsibility of individuals are strongly emphasized. Ulrich Beck, well known for his theory of risk society, convincingly argues that we live in an age where individuals, liberated from the regulations and restrictions imposed by classes and families, are forced to act on their own decisions and responsibility[2]. In an age of individualization, the notion that there are limits to individuals' responsibility weakens. Crime is separated from society and understood as an individual problem for which perpetrators must assume full responsibility. As wins or losses in free economic activities are attributed to individuals' responsibility, crime is also attributed to individuals, whose responsibility is no longer shifted to society. Trends toward heavier punishment are natural outcomes of this philosophy.

(3) The Japanese view of life and death and capital punishment

Trends toward heavier sentencing in Japan have emerged, especially regarding crimes that intentionally or accidentally result in the death of victims. Therefore, it is possible to presume that such trends are greatly affected by the Japanese view of life and death. What then are the characteristics of the Japanese view of life and death?

Japanese society is not an individualistic society, but a collectivistic society. Individuals are embedded in communities, such as families, corporate organizations and friendships. Japanese society is very difficult to live in for those who are not good at building relationships with other people. As examples, divorce is sometimes construed as a personal defect, and whistle blowing in a company may be considered immoral behavior.

I mentioned earlier that the Japanese consider it a moral duty toward the dead to advocate the heaviest sentences possible on the perpetrators, especially when their children's lives have been taken. Such behavior also shows that Japanese parents consider it their moral duty to dedicate themselves to the good of their children, even at the price of their own lives. The Japanese view of life and death is characterized as collectivistic in nature and related to community. The death of one's family member is a partial negation of one's own life and the death of an important part of oneself. This view is also reflected in Japanese terminology, in which the expression *shinareru* "to be bereaved of someone" is often used.

In Japan, death is not an individual phenomenon, but is always understood by its relation to other people. Death is sometimes said to "resonate."^[3] In a monotheistic religion, such as Christianity, individuals are separated from each other before God based on the binary relationship between God and the individual. This world and the other world are connected through a relationship with God. However, in the collectivistic Japanese society, the highest priority is placed on the relationship with the communities to which individuals belong. Since there are multiple gods, individuals cannot become independent beings through their relationship with any one God. The world after death is no more than an abstract image of a brilliant Pure Land, where one is reunited with others who have gone before them. This world-oriented thinking, which regards this world as the only existing reality, is the dominant mode of thought in Japan. Most Japanese do not truly believe in the afterlife, and seem to have the understanding that human beings "return to nature"^[4] when they die. Shuichi Kato, a prominent philosopher in post-war Japan, used the expression "group-oriented secularism"^[5] to describe the general framework of behavior of the Japanese.

Meanwhile, although life has high value for the Japanese and is even an inviolable right, there is nothing absolute in life itself. There are occasions where people feel that there is something more important than life. A hit song that touched the hearts of young people in Japan ten years ago^[6] includes the following lyrics:

*Suppose someone can save the world
At the price of his life,
I will only be waiting for that someone to save the world.
I love so many people
And they have made me a coward.*

This song suggests that sacrificing one's life to save the world is virtuous behavior and that the one who cannot do so is a coward (note, however, that the song implies the positive aspects of such a way of life, although in a somewhat self-deprecating way). This is a traditional way of thinking for the Japanese, and culminates in the *bushido* philosophy. Some people believe that bushido, rather than any religion, forms the basis of Japanese morality^[7]. Bushido requires that we atone for our sins with our own death, which must be bravely endured; hesitating to die is inconsistent with the spirit of samurai—this is the way of

thinking found in traditional Japanese philosophy. Before the modern Penal Code was established in Japan after the Meiji Restoration, a person who perpetrated a crime was allowed to commit *seppuku*, a form of suicide, as an acceptable way of death. This shows that the practice of atoning for one's sinful or shameful acts and clearing one's name with one's own death is firmly rooted in Japanese tradition. In Japan, approximately 30,000 people commit suicide annually. Most of those who commit suicide despair with no hope and choose death over life. However, there are also a considerable number of those who commit suicide in order to atone for sinful or shameful acts against their families, relatives, corporate organizations or neighborhood communities (apologizing by their own death)[8]. This is another reason why the Japanese accept capital punishment.

These considerations lead us to believe that capital punishment in Japan is closely related to the Japanese view of life and death. The following circumstances may also partly explain why so many Japanese people are in favor of capital punishment.

In Japan, individuals depend on the government to a large extent for the protection of their rights, and public and private interests are not clearly delineated. So, as a result, private damage is often being discussed as a public issue. Though an interesting problem, the scope of this presentation-which focuses on the connection of religion, culture and law-does not permit a detailed discussion

3. Standards for the Determination of Death and the Law

(1) Brain death theory in Japan

Another legal issue that is affected by the Japanese view of life and death is the problem regarding the definition of human death and methods for the determination of death. The notion that defines human death by brain death (referred to as the "brain death theory" in the following discussion) has not yet gained public approval in Japan. The conventional standards used to determine death are (1) cardiac arrest, (2) respiratory arrest, and (3) pupillary defect. Death is determined when a certain amount of time has elapsed after the occurrence of these three symptoms. Of these symptoms, (2) respiratory arrest and (3) pupillary defect are signs of the arrest of the brain stem function. Therefore, requiring (1) cardiac arrest in addition to these two symptoms for the determination of death means that heart and brain death are both required for the confirmation of death. However, theoretical grounds for this view are not clear. The view may regard the supply of oxygen by blood circulation as being of vital importance. However, since respiration and blood circulation can be maintained by artificial means, these functions cannot be regarded as essential for human life. Brain death refers to a state where cerebral functions have irreversibly ceased with the autolysis of brain cells occurring over a wide region; respiratory function is maintained by an artificial respirator, with oxygen supplied to the heart and blood circulation maintained by the heart. It is extremely doubtful that a brain dead person needs protection by the law as a living human being.

The view that regards brain death as human death determines death by so-called "total brain death," i.e., the irreversible arrest of functions of the entire brain, including the brain stem. At the stage of brain death, all brain functions are irreversibly lost, including the respiratory center function of the brain stem. As a result, oxygen is no longer supplied to cell tissues, and all brain cells suffer from necrosis or autolysis. The brain death theory maintains that a person who has reached this stage may be regarded as dead.

What are the theoretical grounds for this theory? This theory assumes that a human being consists of two elements: mind and body. According to the theory, if the essential parts of both of these two elements are irreversibly lost, an individual is no longer protected by law as a human being. The essential loss of the human mind and body is the same as the irreversible arrest of the functions of the brain. The irreversible loss of the functions of the cerebrum, which controls mental processes including

consciousness, thought and emotions, may not be regarded as death. For a living entity, fundamental life-maintaining functions, such as respiration, digestion and blood circulation, are as important as mental processes. Since the brain stem controls and integrates these life-sustaining functions, the arrest of brain stem functions also has important meaning. This, along with the fact that brain death signifies the beginning of the irreversible stage in the process of death—i.e., the point of no return—provides theoretical grounds for the brain death theory. This is precisely where the law must cease to provide protection to a human being as a person. The brain death theory is therefore based on reasonable grounds.

Nevertheless, the brain death theory has not yet gained full public recognition and is not generally approved as a standard for the determination of death in clinical care in Japan. One of the reasons for this is the way the Japanese view the death of family members, and therefore, their view of life and death. When faced with the death of family members, the Japanese generally avoid accepting the death, wishing for a miracle that might bring the loved one back to life.

Brain death is also called “invisible death.” We are often faced with the problem that it is impossible to regard someone who is breathing, has a regular pulse and a normal body temperature, and seems as if asleep, as dead. Doctors also respect the sentiments of families who are unable to accept a loved one’s death, and do not try to explain death to family members in medical terms. Indeed, many doctors themselves do not regard brain death as human death. Even now, doctors do not immediately remove an artificial respirator from a patient even when there is no doubt that the patient is brain dead. They may terminate the use of vasopressor and reduce the amount of air from the artificial respirator, but they usually wait until the heartbeat stops. In recent years, there have been cases where doctors were accused by lawyers, or even investigated by the police, for having removed artificial respirators attached to brain dead patients or patients facing imminent brain death. Therefore, doctors are very cautious about how to deal with artificial respirators.

(2) Choice between two statuses of death

The very cautious attitude among the Japanese toward brain death has caused a serious problem regarding organ transplant, especially heart transplant. If brain death is not regarded as human death, it becomes impossible to remove organs, especially hearts, from brain dead patients in order to save those who are suffering from serious diseases. In Japan, therefore, the discussion of legalizing the removal of organs from brain dead patients and whether or not to enforce a new Organ Transplant Act was hotly debated, especially after the 1980s. In the debate regarding the Transplant Act, there were heated discussions about whether or not brain death is human death. After lengthy and intense discussions, a new Organ Transplant Act was established and enforced in 1997. This act legalized the removal of organs from brain dead patients as “organ harvesting from dead bodies”, thereby providing a legal basis for performing heart transplant surgery.

However, these discussions did not lead to a consensus that brain death is human death. The view about the definition of death and the standards for determining death, supported by the Organ Transplant Act of 1997, were no more than a compromise. Although the act recognized brain death as human death if specific criteria are met, including written consent of the patient (organ harvesting was legal only if the requirements were fulfilled), human beings were considered dead in other cases only when cardiac arrest occurred (therefore, organ harvesting was allowed only after cardiac arrest). The new Organ Transplant Act enabled individuals to choose brain death for the purpose of organ donation, thereby legalizing organ transplants from brain dead patients only to the extent that they specifically opted for brain death. Based on the philosophy of the individual self-determination right, the act allowed individuals to make a choice between two statuses: cardiac death and cerebral death, thereby reconciling the two conflicting views about death.

Whether to choose a hamburger or pizza for lunch is an issue to be determined by individual choice. Is choosing between two perceptions of human death of the same ilk? Is it not a consideration to be determined by objective standards that do not depend on individual choice? Naturally this question arises.

The fact that a consensus could not be achieved among the Japanese to support the view that brain death is in fact human death—leaving only a strange and compromising solution—was fatal to medical transplantation in Japan. The Organ Transplant Act of 1997 allowed organ harvesting from brain dead patients only when patients themselves had left written consent for organ donation. In this act, an organ donor’s decision making offers a choice between the two statuses of death. A patient’s death must be determined based on a decision made by the patient. The patient should not be forced by others to make the decision. Even the patient’s family cannot force him or her to make the decision. As a result, Japanese law required the prearranged consent of brain dead patients for organ harvesting, and medical transplantation in Japan depended on donor cards. Unlike transplant acts in other countries, the Japanese Organ Transplant Act was severely restricted by stringent regulations. Some experts even criticized it, calling it an “Organ Transplant Prohibition Act”. In fact, under this act, only 83 organs were transplanted from brain dead patients between 1997 and 2009.

Faced with serious legalities in organ transplantation under the Organ Transplantation Act, patients that needed organ transplants had no choice but to receive transplants in overseas hospitals. Thus, the behavior of the Japanese, and their so called “transplantation tourism”, invited criticism from other countries for receiving transplants for money while not actually providing the organs themselves in countries faced with a shortage of organs. Seen from abroad as the behavior of the Japanese nation as a whole, there was indeed a contradiction: while refusing to provide organs on the grounds that brain death is not regarded as human death, the Japanese willingly accepted organs provided from brain dead patients in other countries.

This contradiction was resolved at least on the legal level in 2009, when the Organ Transplantation Act was drastically revised. The revised act made it possible to remove organs from a brain dead patient with the consent of family for the determination of brain death and organ harvesting, even if the patient’s intention about brain death and organ harvesting was unclear. This revision finally lowered the hurdle set by the Japanese Organ Transplant Act for medical transplantation to the global level.

It is to be noted that this change in the requirements for organ harvesting would have been impossible without a fundamental change in the legal nature of brain death. If organ donation assumes the choice of a period of death earlier than normal—in other words, if performing surgery on the body of a brain dead patient violates the patient’s interests—performing such surgery without explicit consent of the patient should not be allowed. Allowing organ harvesting from a brain dead patient, which is altruistic in nature, with family consent assumes that organ harvesting does not violate the patient’s rights or interests. Therefore, the revision of the requirements for organ harvesting in the new Transplant Act assumes the recognition that brain death is objectively human death, regardless of agreement or disagreement of the patients.

Nevertheless, it is not yet widely recognized in Japan that the revision of the Organ Transplantation Act constitutes a fundamental change in the legal nature of brain death (i.e., legal approval of the brain death theory). In particular, the revision is not considered to have any effect on the general nature of end-of-life care or the determination of death in medical care. The revision is believed not to affect judgment as to whether or not the removal of artificial respirators from brain dead patients should be allowed. Therefore, there has been no change in medical care practices.

(3) The Japanese view of life and death and medical transplantation

In Japan, it is difficult to achieve consensus regarding brain death as human death, presumably for the following reasons: (1) people have a strong desire to avoid accepting the death of family members and wait for a miracle to postpone death, and (2) the Japanese are reluctant to adopt a clear-cut stance on the ambiguous borderline between life and death. The Organ Plantation Act of 1997 provided an ambiguous solution. However, medical transplantation requires clear distinctions that leave no room for ambiguity. And this is inseparably tied to policies regarding organ donors. Transplantation procedures begin at the time when the medical treatment of a donor is initiated. Unless a clear vision is shared among medical personnel about how to terminate treatment, and there is consensus about legal obligations regarding the medical treatment, it is impossible to perform medical transplantation effectively. The more clearly established the rules regarding end-of-life care and its limits—i.e., the more clear-cut the standards for end-of-life care—the more developed medical transplantation will become. And so, the fact that transplantation from brain dead patients is not performed effectively in Japan—and with no well-established rules for end-of-life medical care—is closely related to the Japanese view of life and death.

In order to draw a clear line in end-of-life medical care, it is necessary to change the mindset of patients' families to help them cope with the death. For bereaved families, a loved one's death is something that cannot be forgotten; it is a personal event that marks the end of the relationship with the deceased. However, families must overcome the grief caused by death and move on to the future in order to function as members of society again. Organ transplantation provides the bereaved with an opportunity to change their mindset and to recover from grief. However, such a statement may still seem to be meaningless words for many people living in present-day Japan.

4. In Conclusion

In this presentation, I strived to explain the Japanese attitude toward capital punishment and brain death through their view of life and death. I believe that understanding the Japanese view of life and death will help to explain and to illustrate these issues. However, I do not think that this view of life and death will provide solutions to problems in Japan. In this contemporary secularized society[9], conformity to traditional culture is useless in providing justification for legal interpretation and serves as weak grounds for logical justification of any kind.

[1] Susumu Shimazono. *Reading the Japanese View of Life and Death: From the Meiji Bushido to "Departures,"* 2012, p. 55 sqq.

[2] Ulrich Beck. *Risk Society: Towards a New Modernity, 1992, Part II.*

[3] Yoshihiko Komatsu. *Death Resonates: Into the Depths of Brain Death and Organ Transplant,* 1996.

[4] Masaaki Ueda. *Living in the Face of Death: Japanese View of Nature and Life and Death,* 2012, p. 59 sqq.

[5] Shuichi Kato. "Six Lives, Six Deaths: Portraits from Modern Japan", 1977, in Kato Shuichi (ed.), *Self Collection (Vol. 6)*, 2010, p. 44.

[6] Mr. Children. *HERO*, 2002

[7] For such views, see Hiromi Shimada, *Why Is Religion Necessary?*, 2012, p. 114 sqq.

[8] Shuichi Kato, op. cit., p. 58.

[9] Charles Taylor, *A Secular Age*, 2007.