

# Life Imprisonment in Japan: Existing Legal System and Alternative Sanctions to the Death Penalty

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## I. INTRODUCTION

In February 2021, Japan's public broadcaster NHK released a documentary which covered the life of the longest-serving inmate in Japan.<sup>1</sup> The man was released on parole from Kumamoto Prison on 11 September 2019 after serving 61 years of a life sentence. The 61 years of imprisonment is thought to be the longest time ever served by a paroled inmate originally sentenced to life imprisonment in Japan. The man began serving his sentence in 1959 and was over 80-years-old at the time of his release.<sup>2</sup> The Japanese Penal Code provides life imprisonment with or without work (*Mukikei*) as the second most severe punishment, with the death penalty the most severe. Inmates sentenced to life may be paroled once they have served 10 years in prison and evidence signs of reformation.<sup>3</sup> However, the chance of parole is extremely slim. Basically, fewer than ten inmates are released each year out of 1,800 serving life sentences. How can inmates keep their hope alive when imprisonment continues for over 60 years? The documentary showed us the negative side effects of excessively harsh punishments.

Life imprisonment – especially life imprisonment without possibility of parole (LWOP) – has often been discussed in the context of abolishing the death penalty. According to an opinion survey conducted by the government of Japan, more than 80% of the public accept the death penalty as 'inevitable'; however, over 35% support its abolition as long as LWOP is introduced. Given this public opinion, some lawmakers and lawyers' groups have been considering the introduction of LWOP. They may believe that LWOP will break the overwhelming public support for the death penalty, making its abolition politically possible. Yet would the introduction of LWOP lead to another form of living death? Establishing LWOP without reforming the current nature of life imprisonment

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<sup>1</sup> NHK On Demand, *Nihon-ichi Nagaku Fukuekishita Otoko* [The longest-serving man in Japan], broadcast on 21 February 2021 <[https://www.nhk-ondemand.jp/goods/G2021113493SA000/?np\\_banID=top\\_sp0012\\_113493](https://www.nhk-ondemand.jp/goods/G2021113493SA000/?np_banID=top_sp0012_113493)> accessed 22 September 2021.

<sup>2</sup> SoraNews24, 'Kumamoto man released on parole after serving longest prison sentence on record in Japan' (Japan Today, 15 September 2020) <[Kumamoto man released on parole after serving longest prison sentence on record in Japan - Japan Today](https://www.soranews24.com/2020/09/15/kumamoto-man-released-on-parole-after-serving-longest-prison-sentence-on-record-in-japan-japan-today/)> accessed 22 September 2021.

<sup>3</sup> *Kei Hō* [Penal Code], Law No.48/1907, as finally amended by Law No.72/2018, article 28.

could result in accepting ‘life’ that literally denies any possibility of release. This paper examines the existing sanction of life imprisonment and potential alternative sanctions to the death penalty from the standpoint of the international and regional human rights standards. For this purpose, Part II gives an overview of the Japanese legal system along with statistics on Japanese life imprisonment, including those of release. In Part III, the challenges to the current system raised by the international and regional human rights standards are discussed. With very few life-sentenced inmates paroled each year, the life sentence could be a punishment without hope for most of the inmates in Japan. In contrast, the European Court of Human Rights (ECtHR) has developed the argument that the imposition of irreducible LWOP could violate the prohibition on inhuman or degrading punishment. Thus, Part III examines various challenges to Japanese life imprisonment in the light of the human rights standards, including the ECtHR’s jurisprudence. Part IV then explores the arguments over alternative sanctions to the death penalty. Finally, in Part V, some proposals to reform the current sanction of life imprisonment are made. Assuming LWOP is introduced, it would be essential to reform the current sanction of life imprisonment in order to replace the death penalty with an alternative punishment compatible with the human rights standards.

## II. EXISTING SANCTION OF LIFE IMPRISONMENT

### 1. Slim Chance to be Released: De facto LWOP

The Penal Code stipulates the categories of punishments for offences, including the death penalty, imprisonment and fines.<sup>4</sup> There are two types of imprisonments: those that involve prison work and those that do not. The former is called *Choeki* (imprisonment with work) and the latter is *Kinko* (imprisonment without work). They both have a sanction of life imprisonment and a fixed-term imprisonment ranging from one month to 20 years.<sup>5</sup> The fixed-term imprisonment can be aggravated up to 30 years.<sup>6</sup> However, fewer inmates are housed in penal institutions for fixed-term imprisonment without work. There are a few offences that are punishable by imprisonment without work, but this sanction does not apply to the offences committed by most of the life-sentenced inmates, such as murder, robbery and rape. Thus, only 3,076 inmates were sentenced to imprisonment without work, and 98.2% of their executions were suspended in 2019. This figure is quite low, given that 46,086 were sentenced to fixed-term imprisonments with

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<sup>4</sup> Penal Code, *supra* note 3, article 9.

<sup>5</sup> *Ibid.*, article 12.

<sup>6</sup> *Ibid.*, article 14.

work during the same period. In addition, no one has been sentenced to life imprisonment without work since at least 1947.<sup>7</sup> There have been no recent life-sentenced inmates who do not have an obligation to engage in prison work. In terms of treatment, there is no significant difference between life-sentenced inmates and fixed-term inmates. The Act on Penal Detention Facilities and the Treatment of Inmates and Detainees (2005 Prison Act) does not distinguish life-sentenced inmates from fixed-term sentenced inmates, and they are legally supposed to be treated in the same way. In addition, the Penal Code gives opportunities for parole to inmates sentenced to imprisonment, including those sentenced to life, and there is no LWOP provided in the current Code. However, the chance to be released for life-sentenced inmates is extremely slim.

*Enhancing transparency: Study group on parole for life-sentenced inmates*

The Penal Code stipulates a minimum term of imprisonment of 10 years for life-sentenced inmates, but in reality, those serving life must serve far longer. The Ministry of Justice has not disclosed sufficient statistics on life imprisonment, which has led to a huge gap between actual practices and public understanding. Some mass media coverage on life imprisonment has misreported that life-sentenced inmates could be released after serving 10 years (plus a few more) in prison. Therefore, in August 2009, the Minister of Justice set up a study group on parole for life-sentenced inmates in order to enhance the transparency of the review process for those serving life sentences.

The study group published its report in November 2009, stating that it was the responsibility of the government to disclose the correct statistics on life imprisonment and that such disclosure would be essential for the proper implementation of the lay judge system, which began in May 2009 and allows lay judges to make sentencing decisions for serious crimes.<sup>8</sup> Accordingly, the study group proposed that the Ministry of Justice publish statistics each year which include the number of life-sentenced inmates paroled, the average length of years served and the number of those who have died. In addition, the group proposed that parole boards review for parole regardless of whether or not the parole standards have been met after the inmates have served 30 years in prisons. The term of 30 years was chosen to reflect parole practice at the time as well as the fact that the maximum term of a fixed-term sentence is 30 years. The study group expected that if parole hearings were held for life-sentenced inmates who had served certain periods of time – irrespective of whether the parole standards had been met – and the outcomes of the reviews were made public, it would enhance the transparency of the parole review

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<sup>7</sup> Ministry of Justice, *Hanzai Hakusyo* [White Paper on Crime] (2019), and Ministry of Justice, *Hanzai Hakusyo* [White Paper on Crime] (1997).

<sup>8</sup> Ministry of Justice, *Mukikei Jukeisya no Karishakuhou ni kannsuru Houkokusyo* [Report about Parole for Life-Sentenced Inmates] November 2009.

process by making it clear when hearings were held and what their outcomes were. Additionally, the study group recommended that inmates should be interviewed by more than one panel member and that the parole board should consider input from victims and prosecutors unless there was some particular reason not to do so. The group stated that having more than one panel member interview inmates would make it possible to examine from multiple perspectives inmate rehabilitation and the risk of recidivism. The study group also indicated that inquiries of victims – who have a vital interest in the parole process – and prosecutors representing the public would lead to more appropriate parole decisions that could be supported by the public. Even prior to this recommendation, inquiries of victims and prosecutors had often been conducted. Out of 104 parole hearings conducted during the 10 years beginning in 2000 and ending in 2009, inquiries of victims and prosecutors were conducted in 70 and 96 cases, respectively.<sup>9</sup> As the opinion of prosecutors can have a significant impact on parole decisions, there have been concerns that the parole decision could become more dependent on prosecutor opinions than on rehabilitation or future dangerousness – that is, a high probability of engaging in the future in criminal behaviour of a serious nature – if inquiries of prosecutors are carried out for all parole hearings.

In accordance with these proposals, the Director General of the Rehabilitation Bureau issued a notice, in accordance with the Ministry of Justice began to publish detailed annual statistics on life imprisonment.

#### *Developments in the past 20 years*<sup>10</sup>

Since the publication of the study group's proposals, the Ministry of Justice has annually released detailed statistics on life imprisonment. Table 1 indicates the total number of life-sentenced inmates at the end of each year as well as newly imprisoned inmates serving life sentences. In 1998, the total number was 968, but it subsequently jumped up to 1,771 in 2008, remaining stable at approximately 1,800 thereafter. Newly imprisoned persons, on the other hand, reached 136 in 2006 and then declined to remain stable at approximately 20 in 2015. As can be seen in Table 2, most life-sentenced inmates die in prison without being released on parole. Fifteen inmates serving life imprisonment were

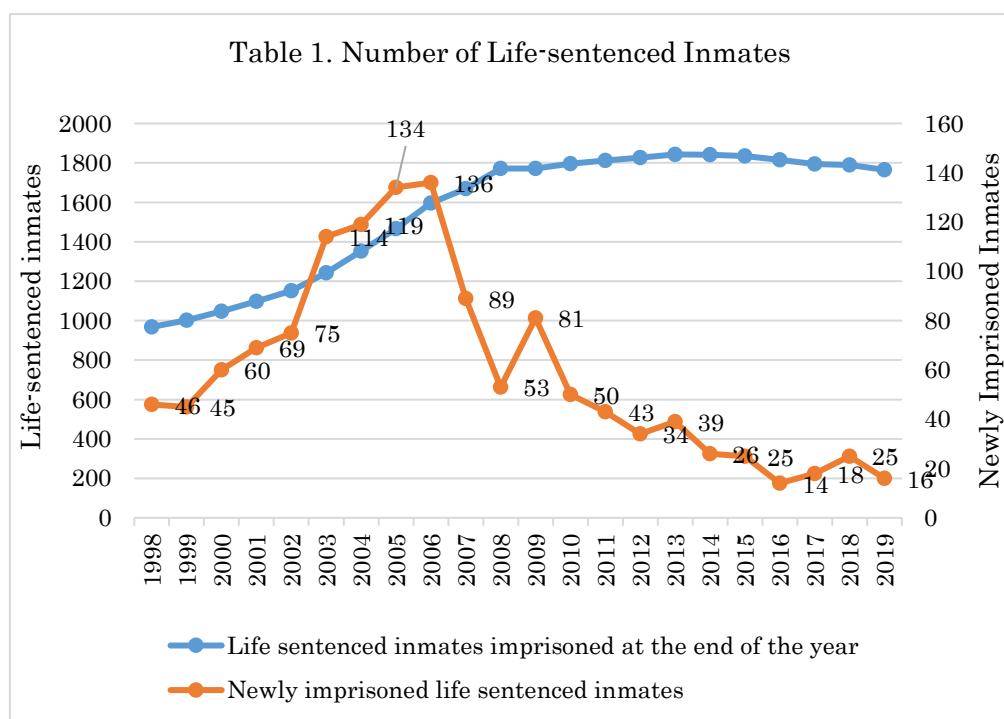
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<sup>9</sup> JFBA, *Mukikei Jukeisyा nitaisuru Karishakuhou Seido no Kaikaku wo Motomeru Ikensyo* [Opinion to reform parole system for life-sentenced inmates], 17 December 2010.

<sup>10</sup> The tables in this section are based on the following resources: Ministry of Justice, *Mukikei no Shikkou Joukyou oyobi Mukikei Jukeisyā ni Kakaru Karisyakuhou no Unnyoujoukyou nitui* [Life Imprisonment and Parole Reviews] November 2020; JFBA, *Saibann inn no Minasama he Shittehosii Keibatu no koto* [Handbook on Criminal Punishments for Lay Judges] May 2018; and Ministry of Justice, *Mukikei Jukeisyā no Karishakuhou ni kannsuru Houkokusyo* [Report about Parole for Life-Sentenced Inmates] November 2009.

released on parole in 1998, but since 2006, the number has remained at less than 10 per year except for 2019, while the number of inmates who have died has grown from six in 1998 to 30 in 2017. This means that far more inmates die in prison than are released on parole. The statistics also show that inmates have been serving longer periods in prison. Table 3 reveals that life-sentenced inmates released on parole served an average of 20 years and 10 months in 1998, but the average term of imprisonment has since become longer; it reached 31 years and 10 months in 2007 and has not been shorter than 30 years since 2009. The 19 inmates who were paroled in 2019 served an average of 36 years in prison. Given that the average term between 1989 and 1998 was from 18 years to 19 years,<sup>11</sup> the term has almost doubled in the past 30 years. Due to this increasingly longer period of incarceration, it is often said that life imprisonment in Japan is almost equal to that of life without possibility of parole.

What has made the possibility of parole so limited? In the background are the parole standards that tolerate continued incarceration despite the rehabilitation of the inmates and the parole boards that are susceptible to input from prosecutors and victims. The next section explores the existing legal system and evaluates how it works.



<sup>11</sup> JFBA, *Rkyoiki Seido wo kangaeru Choutouha no Kai no Kei Hō tou no Ichibu wo Kaisei suru Houritu ann (Shushinkeidounyukannkei) nitaisru Ikennsyō* [Opinion regarding the draft legislation on partial revision of the Penal Code submitted by the nonpartisan legislator group considering the sentencing system], 18 November 2008.

Table 2. Life-sentenced Inmates Released on Parole and Life-sentenced Inmates who Died

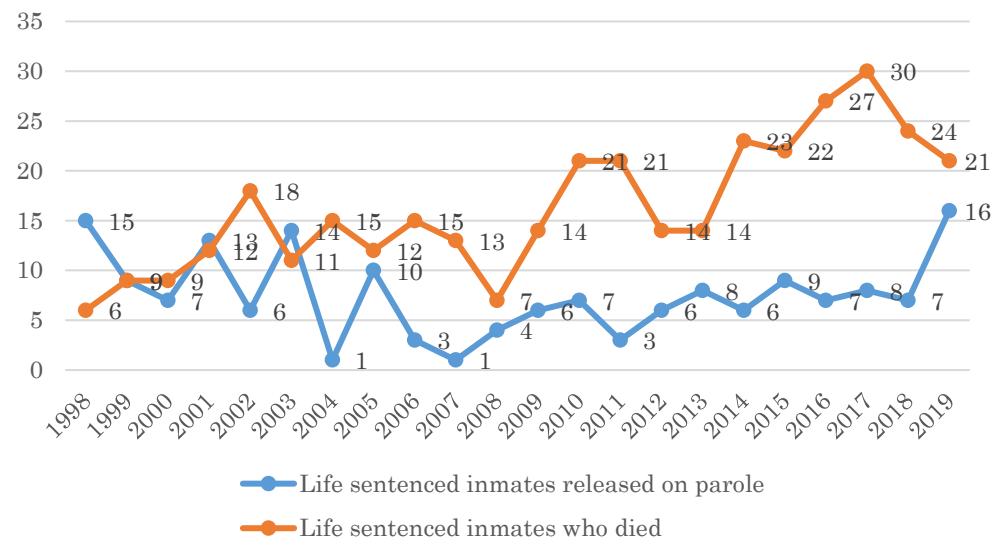
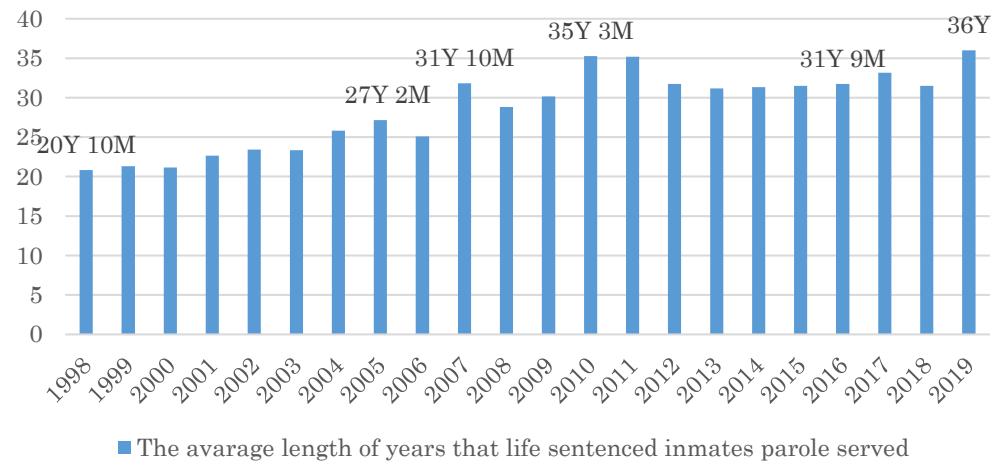


Table 3. The Average Length of Years Served by Life-sentenced Inmates who were Paroled



## 2. Existing Legal System for Parole: Law and Practice

### *Parole standards*

The Penal Code provides that when an inmate sentenced to imprisonment evinces signs of substantial reformation, the person may be paroled after serving one-third of his or her definite term sentence or after 10 years in the case of life imprisonment.<sup>12</sup> A Ministry of Justice regulation enumerates additional specific requirements that prisoners must meet

<sup>12</sup> Penal Code, supra note 4, article 28.

in order to be granted parole.<sup>13</sup> The regulation stipulates that: parole may be granted ‘when it is recognised that the person has a feeling of repentance and willingness to make improvements and reform him or herself, there is no risk that he or she will commit a crime again, and putting the person on probation is appropriate for their improvement and reform. However, this shall not apply when it cannot be recognised that the feelings of society endorse this’.

The ‘feelings of repentance’ presuppose an admission of guilt, and in cases in which inmates deny the criminal charges and seek a retrial even after the sentence has become final, ‘signs of substantial reformation’ are likely to be absent. Thus, it will be even more difficult for inmates seeking retrial to be released on parole. The feelings of society, on the other hand, can be examined by taking into account input from victims or prosecutors. When victims or prosecutors oppose the release, parole can be denied due to the feelings of society. Additionally, those who do not have their housing placement are likely to be regarded as not having supportive relationships and, therefore, to be at higher risk of recidivism. Many life-sentenced inmates could fail to make home placement plans because their families or friends who might have helped them passed away during the long incarceration. They may fail to gain parole even if they meet all other necessary requirements just because they cannot prepare a housing placement plan. The man introduced at the beginning of this paper who served 61 years in prison was not able to obtain a chance for parole over the years because he did not have home placement.

#### *Review bodies*

The decision to grant parole is made by regional parole boards located across the country and not by independent judicial bodies such as courts.<sup>14</sup> The boards hold hearings if the wardens of penal institutions recognise that all the requirements provided in the parole standards are met and submit a proposal for parole or if the boards themselves find it necessary.<sup>15</sup> Before making decisions on parole, members of the regional parole boards hold interviews with inmates, and, if it is needed, receive input from victims, their families and the prosecutors.<sup>16</sup> After the study group published its recommendations, the parole boards have not made inquiries for input unless particular reasons for it have existed. The parole decision is made by the consensus of three panel members. The parole boards deliver decisions when parole is being granted, but they do not make any decisions

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<sup>13</sup> Ministry of Justice Ordinance, *Hanzaiwo shita mono oyobi Hikou no aru Syounenn ni taisuru Syakainai ni okeru Syoguu ni kannsuru Kisoku* [Regulations on treatment against those who have committed crimes and delinquent juveniles in society], adopted on 23 April 2008.

<sup>14</sup> *Kôsei Hogo Hô* [Offenders Rehabilitation Act], Law No.88/2007, article 39.

<sup>15</sup> Ibid., article 34 and article 35.

<sup>16</sup> Ibid. article 37 and article 38.

if they deny parole. Nor do they give grounds for dismissal. Thus, it is not possible for inmates to appeal the rejection. The minimum safeguards to ensure impartial and objective decision making are not provided, especially in the case of rejection.

In the past, parole boards rarely held hearings without proposals from the penal institutions, but such practice has changed. Given the recommendations of the study group, the Director-General of the Rehabilitation Bureau issued a notice in March 2009<sup>17</sup> which stated that a parole board may consider the possibility of parole after a life-sentenced inmate has served 30 years in prison in a case in which the warden has not submitted a proposal for parole. The notice also stated that even if the inmate is not released on parole, the board may again consider the possibility after the prisoner has served another ten years. Since the notice was issued in 2009, the average term of imprisonment for life-sentenced inmates has not gone below 30 years. Currently, parole boards hold hearings from inmates without proposals from the penal institutions once they have served more than 30 years, and few hold hearings for life-sentenced inmates serving less than 30 years, let alone 10 years. The minimum term of 10 years prescribed by the Penal Code has, therefore, become almost meaningless.

#### *What is limiting the chance of release?*

The average term of imprisonment for life-sentenced inmates has been getting longer, reaching no less than 30 years, and some have served more than 40 years before being released on parole. Even if they have spent more than 30 years in prison, the number of inmates released on parole each year is less than ten. What then does restrict the possibility of being paroled? One of the keys to figure this out is the opinions of prosecutors. The statistics published by the Ministry of Justice show the impact of a prosecutor's input on parole decisions. During the period of 2010 to 2019, only 34 inmates (16.0%) were allowed parole out of a total of 213 cases in which prosecutors expressed opposition, while 178 (83.6%) cases were denied. On the other hand, in the 64 cases in which prosecutors did not oppose parole, it was granted in 44 cases (68.8%) and denied in only 20 cases (31.3%).<sup>18</sup>

Prosecutors have also strongly discouraged parole boards and penal institutions from granting parole to inmates who committed certain grave offences. On 18 June 1998, the Supreme Public Prosecutors Office issued a notice on life imprisonment (Supreme Public

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<sup>17</sup> Director-General of Rehabilitation Bureau, *Mukikei Jukeisya ni kakaru Karisyakuho Shinnri ni kannsuru Jimu no Unnyou nituite* [Parole Review Process for Life-sentenced Inmates], 6 March 2009.

<sup>18</sup> Ministry of Justice, *Mukikei no Shikkou Joukyou oyobi Mukikei Jukeisya nikakaru Karisyakuhou no Unnyoujoukyou nituite* [Life imprisonment and parole for life-sentenced inmates], November 2020.

Prosecutor's notice).<sup>19</sup> This notice was not made public at first, but coverage on 8 January 2002 by Asahi Shimbun – one of the four largest newspapers in Japan – led to a partial disclosure of the notice. According to this media coverage, this notice calls for certain measures to be taken for cases as vicious as those involving the death penalty.<sup>20</sup> In these cases, prosecutors will inform the prison immediately after the life sentence has been finalised that the prison authority should not be lenient when deciding whether to submit a proposal for parole and should not submit such a proposal without inquiries to the prosecutors. Prosecutors then store and preserve the evidence and the related materials. When they receive inquiries from the prison or the parole board several decades later, they will submit their opinions on parole taking into account that the case had been designated pursuant to the notice as being as malicious as those involving the death penalty. This notice has obviously been working to deny the chance to be released for certain life-sentenced inmates.

This notice was issued in 1998 at a time when more life-sentenced inmates were paroled. Back then, many life-sentenced inmates were released on parole after serving less than 20 years, and some of them even committed serious crimes again after their release. The notice was drafted in this context in response to public calls for harsher penalties. Now that the average term of imprisonment has reached over 30 years, the initial aim of the notice has been achieved. Today, it ends up imposing unnecessarily harsh punishments on life-sentenced inmates. The Supreme Public Prosecutor's notice, which has become outdated, should be withdrawn immediately.

What do the evolving human rights standards suggest about life imprisonment? Can the human rights standards provide a curb on harsher punishment? This will be examined in the next section.

### III. HUMAN RIGHTS STANDARDS AND JAPAN'S LIFE IMPRISONMENT

Article 36 of the Japanese Constitution provides that cruel punishments are absolutely forbidden.<sup>21</sup> In line with this provision, the unconstitutionality of life imprisonment which could incarcerate inmates for the rest of their lives was brought before the Supreme Court over 70 years ago. The Supreme Court, however, did not perceive that life

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<sup>19</sup> Supreme Public Prosecutors Office, *Tokuni Hanjou Akusitu tou no Muki Choueki Kakuteisyu nitaisuru Keino Shikkou Shiki oyobi sorerano mono no Karishutugoku nitaisuru Kensatukann no Ikenn wo yori Tekisei ni suru Housaku nituite* [Execution of punishment against life-sentenced inmates committing particularly heinous crimes and measures to make the prosecutor's opinion regarding their parole more appropriate], 18 June 1998.

<sup>20</sup> JFBA, *supra* note 8.

<sup>21</sup> *Kempō* [Constitution of Japan], adopted on 3 November 1946, in effect 3 May 1947, article 36.

imprisonment could constitute a ‘cruel punishment’ given that the Court had previously held on 12 March 1948 that the death penalty could not be seen as a cruel punishment.<sup>22</sup> In the case which challenged the constitutionality of life imprisonment, the Supreme Court stated that it was even more obvious that life imprisonment could not be described as a cruel punishment because the death penalty is not.<sup>23</sup> So far, the constitutionality of life imprisonment has not been thoroughly tested in Japan, where even a punishment depriving inmates of their lives is not considered to be cruel punishment.

In the meantime, there are some human rights standards at the international level which are applicable to life imprisonment. They could provide some clues, even if not fully developed, for regulating life imprisonment. In addition, at the regional level – particularly in Europe – there has been a growing body of standards and jurisprudence on life imprisonment. The next section explores the development of international and regional standards on life imprisonment and examines the challenges that Japanese life imprisonment faces.

### 1. International and Regional Human Rights Standards

The International Covenant on Civil and Political Rights (ICCPR) provides that ‘all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person’, and that ‘the penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation’.<sup>24</sup> With regard to this provision, the UN Human Rights Committee (HRC) stated in its general comment that ‘no penitentiary system should be only retributory; it should essentially seek the reformation and social rehabilitation of the prisoner’.<sup>25</sup> Important guiding principles on the treatment of inmates can be found in the former UN Standard Minimum Rules on Treatment of Prisoner (SMR). These principles provide that a sentence of imprisonment can only protect society ‘if the period of imprisonment is used to ensure, so far as possible, that upon his return to society the offender is not only willing but able to lead a law-abiding and self-supporting life’.<sup>26</sup> Referring to this principle, a report published by the United Nations in 1994 stated:

‘Within this framework, it might appear that, once a prisoner can be regarded as being no

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<sup>22</sup> Supreme Court, 12 March 1948, 2(7) *Keishū* 777.

<sup>23</sup> Supreme Court, 21 December 1949, 3(12) *Keishū* 2048

<sup>24</sup> UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171, article 10.

<sup>25</sup> UN Human Rights Committee, General Comment No. 21: Article 10 (Humane treatment of persons deprived of their liberty), 10 April 1992, para. 10.

<sup>26</sup> UN Standard Minimum Rules for the Treatment of Prisoners, Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Geneva in 1955 and Approved by the Economic and Social Council by its Resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977, Rule 58.

longer a danger to society, prolonged detention beyond the period that is deemed necessary for reasons of justice, including due consideration of the seriousness of the crime and the victims concerned, may be questionable and should be subject to special scrutiny'.<sup>27</sup>

The SMR was revised and adopted as the Nelson Mandela Rules in 2015, which includes an almost identical rule to the aforementioned guiding principle.<sup>28</sup> The UN report further mentioned the importance of legal representation in release procedures, stating that '[r]epresentation is a fundamental rights in judicial proceedings and is crucial to a fair assessment'.<sup>29</sup> The report recommended that the release assessment should consider the following:<sup>30</sup>

- (a) A target date for release could be established as soon as possible;
- (b) Release procedures could involve the life-sentence prisoners themselves;
- (c) Release procedures should be subject to a right to appeal in the event that the release is continually rejected;
- (d) Reports by prison authorities should be in writing (oral presentations may leave room for personal manipulation).

The United Nations has not updated this report since its publication over a quarter of a century ago, let alone adopted any instruments which focus on life imprisonment. In contrast, the Council of Europe has developed its recommendations in this field. The Committee of Ministers – the Council of Europe's statutory decision-making body – adopted a recommendation on 9 October 2003 on the management by prison administrations of prisoners serving life and other long-term sentences, which provides the following general principles:<sup>31</sup>

- (a) Consideration should be given to the diversity of personal characteristics to be found among life sentence and long-term prisoners and account taken of them to make individual plans for the implementation of the sentence (individualisation principle);
- (b) Prison life should be arranged so as to approximate as closely as possible the realities of life in the community (normalisation principle);
- (c) Prisoners should be given opportunities to exercise personal responsibility in daily

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<sup>27</sup> United Nations Office at Vienna Crime Prevention and Criminal Justice Branch, 'Life Imprisonment' (Vienna, 1994), para. 15.

<sup>28</sup> UN Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules), G.A. res, A/RES/70/175, 17 December 2015, Rule 4.

<sup>29</sup> UN report, *supra* note 27, para. 61.

<sup>30</sup> UN report, *Ibid.*, para. 62.

<sup>31</sup> Committee of Ministers of Council of Europe, Recommendation of the Committee of Ministers to member states on the management by prison administrations of life sentence and other long-term prisoners, Rec (2003) 23, adopted on 9 October 2003, para. 3–8.

prison life (responsibility principle);

- (d) A clear distinction should be made between any risks posed by life sentence and other long-term prisoners to the external community, to themselves, to other prisoners and to those working in or visiting the prison (security and safety principle);
- (e) Consideration should be given to not segregating life sentence and other long-term prisoners on the sole ground of their sentence (non-segregation principle);
- (f) Individual planning for the management of the prisoner's life or long-term sentence should aim at securing progressive movement through the prison system (progression principle).

The Committee of Ministers adopted another recommendation on conditional release (parole) on 24 September 2003, which clarified procedural safeguards to be taken when making decisions on conditional release. The Committee recommended that decisions on granting, postponing or revoking conditional release should be taken in accordance with the following safeguards:<sup>32</sup>

- (a) Convicted persons should have the right to be heard in person and to be assisted according to the law;
- (b) The decision-making authority should give careful consideration to any elements, including statements, presented by convicted persons in support of their cases;
- (c) Convicted persons should have adequate access to their files;
- (d) Decisions should state the underlying reasons and convicted persons should be notified in writing.

The European Court of Human Rights (ECtHR) has also been developing jurisprudence on life imprisonment. In *Vinter and Others v. the UK*,<sup>33</sup> the Court enunciated that irreducible LWOP could contradict Article 3 of the European Convention on Human Rights, which prohibits torture, inhuman or degrading punishment. In *Murray v Netherlands*, Judge Pinto de Albuquerque in his concurring opinion summarised the ECtHR's view into five binding principles that should govern release.<sup>34</sup>

- (a) The principle of legality ('rules having a sufficient degree of clarity and certainty', 'conditions laid down in domestic legislation');
- (b) The principle of the assessment of penological grounds for continued incarceration on the basis of 'objective, pre-established criteria', which include resocialisation (special prevention), deterrence (general prevention) and retribution;

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<sup>32</sup> Committee of Ministers of Council of Europe, Recommendation of the Committee of Ministers to member states on conditional release (parole), Rec (2003) 22, adopted on 24 September 2003, para. 32.

<sup>33</sup> *Vinter and Others v UK* ECHR 2013-III 317.

<sup>34</sup> *Murray v Netherlands* App no 10511/10 (ECtHR, 26 April 2016).

- (c) The principle of assessment within a pre-established timeframe, and, in the case of life prisoners, ‘not later than twenty-five years after the imposition of the sentence and thereafter a periodic review’;
- (d) The principle of fair procedural guarantees, which at minimum include the obligation to give reasons for decisions not to release or to recall a prisoner;
- (e) The principle of judicial review.

The Council of Europe and the ECtHR have been leading the development of the standards on life imprisonment, including those for evaluating decision making on release. Japan is not a member state of the Council nor is it a state party to the European Convention. Yet these standards will have a significant impact on the interpretation of international human rights standards such as the ICCPR, which Japan has ratified. The next section will explore challenges faced by Japanese life imprisonment bearing these standards in mind.

## 2. Challenges Faced by Japan’s Life Imprisonment

### *Harsh prison regime: Rampant use of solitary confinement*

Japanese prison authorities have imposed strict prison rules on convicted inmates. As the 2005 Prison Act does not distinguish life-sentenced inmates from fixed-term inmates, those sentenced to life have been equally subject to a harsh prison regime. Violations of even minor rules could result in disciplinary punishments. For example, there was a case in which an inmate faced punishment for simply looking aside for a few minutes during prison work. Some penal facilities, including Osaka Prison, have compelled inmates to march in a military style when leaving their cells for prison work.<sup>35</sup> While these are just the tip of the iceberg, they are enough to suggest that the principle of normalisation has not taken root in Japanese prisons.

Additionally, the rampant use of solitary confinement has blocked appropriate rehabilitation programmes. The Japanese correctional system retains various types of solitary confinement, namely protection cells, administrative and punitive segregation, and category four – solitary confinement established by an ordinance and not by law. In particular, the number of inmates placed in category four was 1,232 in 2016, although this was a reduction from 3,588 in 2006. Out of the 1,232, 32 inmates were placed there for more than 10 years, and four of them were there for over 30 years.<sup>36</sup> These figures

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<sup>35</sup> Osaka Bar Associations, Youbou oyobi Kannkokusyo [Requests and Recommendations] 12 December 2017.

<sup>36</sup> International Federation for Human Rights (FIDH) and Center for Prisoners’ Rights Japan, 130th session of the UN Human Rights Committee: (12 October - 6 November 2020): Shadow report submitted by FIDH - International Federation for Human Rights and Center for Prisoners’ Rights. UN Human Rights Committee, Seventh periodic report submitted by Japan under article 40 of the Covenant pursuant to the optional reporting procedure, due in 2018, CCPR/C/JPN/7,

may include life-sentenced inmates as well as those serving fixed-term sentences, but given the prolonged period of the solitary confinements shown by these statistics, it seems clear that a considerable number of inmates serving a life sentence could be in solitary confinement. It is undeniable that these strict prison regimes could make it impossible to provide adequate rehabilitation programmes for life-sentenced inmates.

The prison regime, which relies on the widespread use of solitary confinement, would deviate from the principle of normalisation expressed by the ECtHR as well as from the ICCPR which recommends that the essential aim of the treatment of prisoners shall be their reformation and social rehabilitation.

#### *Parole standards preventing retrial attempts*

The Penal Code provides that when life-sentenced inmates evince signs of substantial reformation, they may be paroled after serving 10 years in prison. The regulation issued by the Ministry of Justice further stipulates that parole may be granted ‘when it is recognised that the person has a feeling of repentance and willingness to make improvements and reform him or herself’. It is often said that the ‘feelings of repentance’ presupposes an admission of guilt, and inmates denying their criminal charges and seeking retrial are less likely to be paroled.

There have been three inmates released on parole while seeking retrial: Mr. Kuniji Murakami, who was sentenced to 20 years for murder and paroled in November 1969 after six years of imprisonment; Mr. Kazuo Ishikawa, who was sentenced to life for multiple offences including murder-robbery and released on parole in December 1994 after serving 20 years of imprisonment; and Mr. Dokyun Lee, who was sentenced to life for murder and released on parole in June 1977 after 22 years of imprisonment. These are said to be exceptional cases in which strong advocacy enabled the inmates to gain parole before the chance of parole had become as restricted as it is in recent years. Currently, it will be even more difficult for inmates seeking retrial to obtain parole.<sup>37</sup>

The most important factor in assessing the appropriateness of releasing life-sentenced inmates will be risk evaluation and not whether or not they have admitted their criminal charges. The UN report indicates, ‘once a prisoner can be regarded as being no longer a danger to society, prolonged detention beyond the period that is deemed necessary ... may be questionable and should be subject to special scrutiny’.<sup>38</sup> This report does not put much emphasis on the admission of criminal charges. This view is consistent with the

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<sup>28</sup> April 2020, and Center for Prisoners’ Rights Japan, The Alternative Report on the Fifth Periodic Reports of the Japanese Government under Article 40 of the International covenant on civil and political rights, September 2008.

<sup>37</sup> JFBA, *supra* no. 8, p.5.

<sup>38</sup> UN report, *supra* note 27, para. 15.

European standards. Judge Pinto de Albuquerque summarised the ECtHR's view in his concurring opinion in *Murray v. Netherland*, including the principle of the assessment of penological grounds for continued incarceration, which include resocialisation (special prevention), deterrence (general prevention) and retribution.<sup>39</sup> It is safe to say that the admission of criminal charges in itself does not directly affect special prevention, general prevention or retribution. The current parole standard, which requires inmates to admit their criminal charges and deprives those seeking retrial of the chance to be released, would not be consistent with the human rights standards recognised at the international and regional levels.

#### *Lack of effective parole review*

The current legal system does not provide the minimum safeguards for those who are denied parole. Even if the parole board has refused parole, inmates do not have the right to appeal and the reason for the denial of the parole is not given. The panel members hold interviews with inmates before making decisions, but inmates are no longer allowed to get involved in the review process. They do not have access to their case files nor do they have the right to be represented by lawyers. The expert meeting on rehabilitative measures, which was established by the Minister of Justice on 20 July 2005, recommended that broad participation of inmates in parole review processes, such as providing grounds for parole denial, should be considered as their participation would contribute to their own rehabilitation.<sup>40</sup> Yet no improvement has thus far been observed. The failure to provide minimum safeguards will go against the human rights standards outlined by the UN report, the Council of Europe and the ECtHR.

In addition, a prosecutor's intervention could bring about an unacceptable distortion of parole hearings. Since the objective aspects of offences and the prosecutor's view at the time of the conviction are well recorded in the case files, it is often said that there is little merit in asking for input from the prosecutors. Yet parole boards have been asking for prosecutorial inputs unless particular reasons not to do so exist, and statistics show that parole decisions could largely depend on these opinions. Prosecutors are likely to express opposition to parole from the perspective of social defence but without sufficient knowledge of a prisoner's rehabilitation. In particular, in cases designated as malicious by the prosecutors in accordance with the Supreme Public Prosecutor's notice, it has been established from the outset of the imprisonment that the prosecutors will oppose future parole. Such prosecutorial intervention could substantially constrain the possibility of

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<sup>39</sup> *Murray v Netherlands* App no 10511/10 (ECtHR, 26 April 2016).

<sup>40</sup> Expert Meeting on Rehabilitative Measures, 'Kouseihogo Seido Kaikaku no Teigenn – Anzen Anshin no Kunidukuri, Chiikidukuri wo Mezashite' – [Recommendations to reform the rehabilitation system: Towards safe and secure country and community], 27 June 2006, p.21

parole for these inmates. The decisions to release inmates may, as the UN report indicates, depend largely on whether or not the parole boards perceive that the inmates are dangerous because dangerousness is a focal point for decision making.<sup>41</sup> However, the parole hearings which rely on prosecutor opinions could be dominated by retributive thinking. Such a review process seems inconsistent with the UN report and the general comment to the HRC, which states ‘no penitentiary system should be only retributory’.<sup>42</sup> On the contrary, the victims’ involvement in the review process would be rather controversial. There is no doubt that input from victims could work towards denying parole, but the UN report is of the view that the victim’s human rights and interests may have to be considered in assessing the appropriateness of releasing life-sentenced inmates.<sup>43</sup> While it would not be appropriate to exclude victims from the parole review process, continued incarceration solely based on retribution must be avoided. To establish effective parole review procedures that balance the interests of both inmates and victims, it will be necessary to introduce minimum safeguards, such as guaranteeing inmates the right to appeal and the right to know the grounds for denial when the parole board has made this decision. Such safeguards will enable adequate parole reviews that balance the two sides and finally prevent overly prolonged imprisonment.

#### *Towards human rights-based parole reviews*

Reflecting the public call for harsher punishment, the chance that a life-sentenced inmate will be released on parole has become slim over the years. However, if the term of imprisonment is prolonged to the extent that the aim of incarceration can be regarded as solely retributive rather than rehabilitative, then the continued incarceration would go against the human rights standards. In a case in which incarceration can be viewed as an irreducible LWOP, life imprisonment may contradict the prohibition of torture, as the ECtHR has demonstrated in a series of jurisprudence. In this regard, the Supreme Court of Japan stated over 70 years ago that the Japanese penal system – the aim of which is not only retribution but also reformation – had made efforts to rehabilitate as much as possible life-sentenced inmates by providing them with opportunities for self-reflection.<sup>44</sup> While the Court mentioned this as one of the grounds supporting the constitutionality of Japanese life imprisonment, the current parole review process which heavily depends on prosecutors’ inputs could lead to prolonged imprisonment based solely on retribution. Seventy years after the Supreme Court’s judgement, one of the grounds supporting the constitutionality of life imprisonment has been wavering.

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<sup>41</sup> UN report, *supra* note 27, para. 55.

<sup>42</sup> HRC, *supra* note 25, para. 10.

<sup>43</sup> UN report, *supra* note 27, para. 54.

<sup>44</sup> Supreme Court, *supra* note 21.

In order to fundamentally reform Japanese parole reviews in line with human rights standards, prison programmes must improve so that the treatment of inmates, including those sentenced to life, would comply with the principles of normalisation. Even if such fundamental reforms are not forthcoming, it is essential to at least ensure due process in parole reviews. It will thus be necessary to suspend inquiries to prosecutors and to abolish the notice from the Supreme Public Prosecutor's Office which has made it extremely difficult for certain life-sentenced inmates to be released. Minimum safeguards, including the right to appeal and the right to know the grounds for denial, should then be given to life-sentenced inmates to ensure a fair parole review process which is not too biased towards retribution.

#### IV. ALTERNATIVE SANCTIONS TO DEATH PENALTY

##### 1. Movements Pushing for the Introduction of LWOP

Apart from the existing life imprisonment reform, the introduction of LWOP is often discussed in the context of application or abolition of the death penalty in Japan. In the background, there has been a public opinion supporting the abolition of the death penalty provided that LWOP is introduced. According to the opinion poll conducted by the government in 2019, 80.8% supported the death penalty and only 9.0% said it should be abolished. However, when people were asked whether they would still support the death penalty if LWOP is introduced, 35.1% said it should be abolished.<sup>45</sup> This trend has remained unchanged since the last opinion poll in 2014 when this question about LWOP was included for the first time. Given the result of the opinion survey, some lawmakers and lawyers' groups have been considering the introduction of LWOP. The Japan Federation of Bar Associations (JFBA) has begun a full-fledged discussion on alternative sanctions were the death penalty to be abolished. A non-partisan group of lawmakers which was established on 5 December 2018 has been examining the current death penalty system as well as the possibility of introducing LWOP. They may believe that LWOP will make the abolition politically possible.

There have also been some movements to introduce LWOP without abolishment of the death penalty. In August 2008, one of the lawmaker's groups drafted an amendment to the Penal Code which introduced LWOP. They explained that the aim of the amendment was to bridge the gap between the death penalty – which irreversibly deprives inmates of their lives – and life imprisonment, the minimum term of which is 10 years. The

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<sup>45</sup> Cabinet Office, *Kihonteki Houseido nikansuru Yoronchosa no Gaiyou* [Summary of Opinion Poll regarding Basic Legal System] January 2020.

lawmaker's group stated that there still remained a huge gap between the death penalty and life imprisonment, the second most severe punishment after the death penalty. They pointed out that though the imprisonment period before parole had been getting longer, it was just a result of parole practice and the gap between the death penalty and life imprisonment had not yet been legally resolved. The proposed amendment was strongly opposed by civil societies, including the JFBA, and was not adopted in the end.

Some members of the JFBA were in favour of this amendment as it would have made it possible to impose LWOP on those who would be sentenced to death if LWOP was not established and, consequently, reduce the number of death sentences. Yet the view remained a minority one in the JFBA, and the majority held that the introduction of LWOP while retaining the death penalty would hardly reduce the number of death sentences. Given the public call for harsher punishment, the majority believed that the amendment would not decrease the number of death sentences but instead lead to imposition of LWOP on those who would have received life imprisonment with possibility of parole under the current law. Thus, the amendment resulted in a lot of arguments within the JFBA, with many objecting to the introduction of LWOP while leaving the death penalty in place. This led to the JFBA expressing its opposition to the amendment.<sup>46</sup>

## 2. JFBA's Opinion on Alternative Sanctions to the Death Penalty

As the abolition of the death penalty was a controversial issue even within the JFBA, it was not easy for the federation to adopt a resolution calling for its abolition. Nevertheless, on 7 October 2016, the JFBA finally adopted the Declaration Calling for Reform of the Penal System Including Abolition of the Death Penalty.<sup>47</sup> The JFBA stated in the declaration that it aimed for the abolition of the death penalty by the year 2020, and that it would consider possible alternatives to the penalty which would be applicable to those most serious crimes for which the death penalty could currently be applied. The possible alternatives might include life imprisonment without the possibility of parole or another severe category of life imprisonment in which prisoners would need to serve at least 20 or 25 years instead of the existing 10 years before they became eligible for release on parole. In 2019, the federation adopted another resolution entitled Basic Propositions on Abolition of the Death Penalty and on Introducing Alternative Punishment and Instituting a Judicial Proceeding System for Commutation.<sup>48</sup>

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<sup>46</sup> JFBA, *supra* note. 9.

<sup>47</sup> JFBA, *Shikei Seido no Haishi wo fukumu Keibatuseido Zentai no Kaikaku wo motomeru Senngenn* [Declaration Calling for Reform of the Penal System Including Abolition of the Death Penalty] 7 October 2016. For the English Summary, see the JFBA's website:

<<https://www.nichibenren.or.jp/en/document/statements/161007.html>> accessed 22 September 2021

<sup>48</sup> JFBA, *Shikeiseido no Haishi narabini korenitomonau Daitaikei no Dounyu oyobi Genkei Tetsuzuki no Sousetsu ni kansuru Kihonhoushin* [Basic Propositions on Abolition of the Death

Since the adoption of the declaration in 2016, the JFBA has continued to study appropriate alternative sanctions. It has come to the conclusion – as revealed in its Basic Proposition – that LWOP, rather than life imprisonment with parole in which a minimum term of imprisonment could be extended to 20 or 25 years, would be appropriate as an alternative punishment because it would be acceptable by the broader public. At the same time, the Basic Proposition recommended the establishment of a commutation procedure, wherein LWOP could be commuted to the existing life imprisonment with possibility of parole in exceptional circumstances. It is expected that such a commutation procedure would resolve the concern that the introduction of LWOP might violate the Constitution and the human rights standards. Once commuted to the existing life sentences with possibility of parole, inmates may be released on parole only if they evince signs of substantial reformation after serving another 10 years. Yet given the recent practice of parole review for existing life-sentenced inmates, it will not mean that inmates can be easily released and return to the community even if an LWOP sentence is commuted to the existing life sentence with possibility of parole.

At the time of this writing, the JFBA has been working on further details regarding the commutation procedure, including which body should decide on commutation, who holds the right to apply for commutation and how many years of imprisonment are required to apply for commutation. In the near future, the JFBA will propose details of the commuting procedure that the federation considers appropriate.

## V. RECOMMENDATIONS AND CONCLUSION

It is quite reasonable to introduce LWOP as an alternative sanction to gain broader understanding from the members of the public who call for severe punishment. Yet the establishment of LWOP without reformation of the current life sentences, which offer very little possibility of parole, could bring about another despair in place of the death penalty. At the very least, there will be a risk that the continued incarceration of LWOP inmates could be based solely on retribution. In order to introduce an alternative punishment in line with the human rights standards, it will be vital to reform the current sanction of life imprisonment.

As already discussed, it is a challenge for all penal institutions in Japan to implement the principle of normalisation in the treatment of all inmates including those sentenced to life.

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Penalty and on Introducing Alternative Punishment and Instituting a Judicial Proceeding System for Commutation] 15 October 2019. For the English summary, see the JFBA's website:

<[https://www.nichibenren.or.jp/en/document/opinionpapers/20191015\\_2.html](https://www.nichibenren.or.jp/en/document/opinionpapers/20191015_2.html)> accessed 22 September 2021

Treatment of inmates that steps beyond retribution is fundamentally important for life imprisonment reform. To step closer to this seemingly far-off goal, an effective parole review procedure is needed. The existing parole standards require inmates to admit their criminal charges, which deprives those seeking retrial of the chance to be released. Even if the parole board has denied their parole, they are not allowed to appeal the rejection nor do they have access to the grounds for the denial. Most importantly, the parole decisions largely depend on prosecutor input. Life-sentenced inmates, especially those who have been designated by the prosecutors as particularly vicious in accordance with the notice, have little chance to be released. Such interventions by prosecutors could bring about an unacceptable distortion in parole hearings.

To establish an effective parole review procedure, the following reforms are necessary: i) amendment of the parole standards which require inmates to admit their criminal charges; ii) prohibition of prosecutor involvement in the parole process; iii) the provision of minimum safeguards, including the right to know the reasons for parole or denial, the right to appeal a denial and the right to be represented by lawyers. The longest-serving man introduced at the beginning of this paper found it difficult to adjust to community life after he was released from prison because he had acclimated too much to prison life in his 61 years of imprisonment. Longer and harsher imprisonment could make reintegration of inmates even more difficult. Effective parole review is essential to prevent excessively prolonged imprisonment of life-sentenced inmates and encourage their reintegration.