

The Death Penalty in Japan

A Report on Japan's legal obligations
under the International Covenant on Civil
and Political Rights and an assessment of
public attitudes to capital punishment



In association with:



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Foreword

Japan acceded to the International Covenant on Civil and Political Rights (ICCPR) in 1979. Thus, for almost 35 years the country has had an obligation to respect the rights described in the ICCPR and to provide effective remedies to individuals whose rights are, have been, and will be violated. The application of capital punishment in Japan is strictly limited by the ICCPR and related international norms, providing binding minimum standards which have to be applied in all countries that still impose capital punishment.

The retention of the death penalty by Japan is not itself a breach of the ICCPR treaty. However, the treaty does assume that abolition of the death penalty will be the ultimate goal for all state parties. As a result of its accession to the ICCPR, Japan has been under an obligation to develop domestic laws and practices that progressively restrict the use of the death penalty pending its abolition.

Japan's government has resisted calls to move towards abolition of capital punishment, mainly by relying on the claim that public support justifies its continued retention. But this claim has no bearing on the need to restrict the death penalty in accordance with the terms of the ICCPR and related international norms or on Japan's obligations under Article 6(6) of the ICCPR to do 'Nothing ... to delay or to prevent the abolition of capital punishment'.

This report was commissioned by the Death Penalty Project in order to assess Japan's legal obligations on the use of the death penalty under the ICCPR, and to examine the related subject of public attitudes toward capital punishment in Japan.

It goes without saying that public attitudes towards the death penalty need to be properly understood. This report provides a critical analysis of existing government survey evidence and presents alternative public opinion research showing that public support for the death penalty is neither as high nor as entrenched as Japan's government claims. There also needs to be a proper understanding as to whether Japan conforms to its obligations under the ICCPR and binding international norms on the death penalty, and whether the law and practice of capital punishment protects the rights of those facing the death penalty in Japan. This report describes the many gaps that exist between the rights promised to all citizens in Japan, including those facing execution, and the actual practice of capital punishment.

It is hoped that this report will produce greater understanding of the issues at stake and serve as a guide to policy-makers and people engaged in the debate about capital punishment in Japan.

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February 2013

Introduction

Roger Hood¹

This important report will be of great interest and concern to all those who seek to bring about improvements in the processes and conditions under which the death penalty is enforced in Japan and its eventual abolition.

It aims to inform a wider audience than just government officials of the obligations of Japan as regards the standards to be set and upheld under the International Covenant on Civil and Political Rights (ICCPR) of 1966, which Japan ratified in 1979, and the Safeguards Guaranteeing the Rights of those Facing the Death Penalty, which were first adopted unanimously by the United Nations in 1984 and subsequently added to in 1989 and 1996.

Japan ratified the ICCPR without any reservations. Although Article 6(2) does not ban the death penalty, it restricts its scope to ‘the most serious crimes’ in those states which have not yet abolished the death penalty and sets standards for protecting the arbitrary deprivation of the right to life (Article 6(1)) through the insistence on fair trials, the provision of procedures for appeal, the granting of clemency, and the humane treatment of persons under sentence of death. This report demonstrates that Japan has remained resistant to applying several of these standards and has failed to meet the requirement in Article 7 not to subject persons to ‘cruel, inhuman or degrading punishment or treatment’. Moreover, Japan has remained deaf to the inherent appeal in Article 6 of the ICCPR to move towards abolition of the death penalty, as set out in Article 6(6) which states ‘Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant’. The underlying reason for this resistance is that Japan has insisted that whether or not the death penalty remains on the statute book or is protected by the constitution is predominantly a sovereign criminal justice policy issue, the nature and operation of which should be decided by the national government informed by the wishes of the people, as elicited by public opinion polls.

This report responds to both these claims: firstly by demonstrating that Japan cannot avoid its obligations under treaties it has signed and secondly, by showing that the claim that the majority of the Japanese population demand the death penalty and would never accept its abolition is dubious, over-stated, and a result of policies that surround the death penalty with much secrecy. In early 2008, following the resolution at the UN General Assembly in December 2007 to call for a universal moratorium on the use of the death penalty, which Japan opposed, the government of Japan joined with 57 other countries in signing a Note Verbale to the UN Secretary-General objecting to that resolution on the grounds that ‘there is no international consensus that the death penalty should be abolished’ and that capital punishment is ‘... first and foremost an issue of the criminal justice system and an important deterring element vis-à-vis the most serious crimes’. Japan voted against the moratorium resolution again when it was introduced in 2008, 2010, and 2012, but it no longer endorsed the Note Verbale of dissociation following the votes in 2008 and 2010 and is not expected to do so when it will undoubtedly be presented again in the spring of 2013 following the 2012

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resolution. Not only have the number of executions fallen since they peaked at 15 in 2008 and become more erratic year by year as Ministers of Justice have changed, but a more open discussion of the death penalty and its mode of enforcement has emerged. This includes the country's obligations under the ICCPR, the UN Safeguards and in response to the decisions and ruling made by the UN Human Rights Committee, and by judgments of supreme and constitutional courts in other parts of the world.

Thus, this report appears at a propitious time. It has been carried out by experts on human rights law and standards and their review of the obligations facing Japan – and the extent to which they are acknowledged and enforced in the country – will prove to be of great value to those in Japan who are engaged in the debate.

The second part of the report deals with the justification commonly put forward by the Japanese government for retaining the death penalty – namely, that so large is the majority of the Japanese population in favour of capital punishment that a democratic government cannot ignore public opinion without endangering public confidence in and support for the criminal law. This argument is based on the government's own survey of opinion and beliefs. Dr Mai Sato demonstrates, on the basis of her own exceptionally well-conducted public opinion research, that the government's interpretation of its survey – that it reliably reflects the views of the public as a whole – is seriously flawed. Moreover, her findings suggest that the depth of opposition to abolition of the death penalty is neither as deep nor as unalterable as the government claims. Given more information and greater transparency about how the death penalty system works in practice, and some valid evidence based on academically credible empirical research on whether or not the rate of executions has any deterrent effect on the rate of murder, a truer reflection of the Japanese public's support for the death penalty would emerge. It would be a better policy for the government to lead public opinion in this way, so that it can feel confident in joining the large majority of developed democracies that have permanently banned capital punishment for all crimes in all circumstances. All the evidence suggests that once the death penalty is abolished, the majority of a new generation growing up without it comes to regard capital punishment as just one more cruelty of the past.

Taken together, the evidence presented in this report suggests that unless and until Japan can meet the universally agreed standards to which it should be committed by treaty and its membership of the United Nations, the death penalty should not be enforced. After studying this subject in detail for the last quarter of a century, I have come to the conclusion that no system of capital punishment has or can be devised that does not inevitably, and however administered, violate human rights: specifically, the right not to be arbitrarily deprived of life and the right not to be subjected to a cruel, inhuman, or degrading punishment. So, while improvements to make the administration of the death penalty in Japan as fair and humane as possible need to be implemented swiftly, the only solution that will truly safeguard prisoners from violation of their fundamental rights is complete abolition of capital punishment.

PART ONE:

Japan's legal obligations on the use of the death penalty under the International Covenant on Civil and Political Rights (ICCPR)

Maiko Tagusari, David T. Johnson,
Saul Lehrfreund and Parvais Jabbar

Introduction to the ICCPR and the safeguards guaranteeing protection of the rights of those facing the death penalty

The international community's concern with human rights in the modern era goes back to the foundation of the United Nations and in particular the adoption of the Universal Declaration of Human Rights (UDHR) by the General Assembly of the UN in 1948. To some extent, the activities of the international community in negotiating and adopting treaties and conventions on human rights at the regional and international plane may be seen as a development of the principles and aspirations set out in the Declaration.

The International Covenant on Civil and Political Rights 1966² (ICCPR) is the first universal treaty-based human rights instrument. The ICCPR came into force a decade after it was signed and Japan acceded to the ICCPR on 21 June 1979.

The basic obligation imposed on states is to ensure that national law permits an effective remedy for individuals subject to its jurisdiction to secure that the rights afforded are effectively respected. Article 2 of the ICCPR provides:

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory, and subject to its jurisdiction, the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognised in the present Covenant.
3. Each State Party to the present Covenant undertakes:
 - a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
 - b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
 - c) To ensure that the competent authorities shall enforce such remedies when granted.

² International Covenant on Civil and Political Rights, (1976) 999 UNTS 171.

A number of points emerge from the above that inform the interpretation of this instrument whether by a national court or the United Nations Human Rights Committee (HRC)³:

1. All individuals are protected, not just citizens or even lawful residents but everybody. These are *human* rights and not constitutional rights. Even irregular aliens may have rights that need protecting.
2. The view of the HRC and the settled jurisprudence of the European Court of Human Rights, is that individuals who are subject to the jurisdiction of contracting states have human rights claims whether or not they are also within the sovereign territory of those states.⁴
3. All branches of the state must respect these rights, national, federal and local, executive, administrative and judicial. A state cannot evade its obligations by contending that an independent branch of government is committing the violation.
4. There can be no discrimination in application of the rights. This emphasises not merely the point about citizens and aliens, but differential treatment on grounds of sex, race or social status. These terms are to be given a broad meaning developing as societies become more complex.
5. Where laws have not been passed to give effect to the rights there is a duty to do so.
6. Depending on the constitutional traditions judges may be able to fill the gap in legal measures by creative interpretation, strike down incompatible laws or grant declarations that laws need to be amended to bring them into compliance. What is not satisfactory is to remain indifferent to a failure to secure the rights in question.

These principles lie at the heart of human rights law and inform the nature of the obligation that states undertake when they introduce these provisions into their own legal systems. There is considerable discretion as to how states incorporate the ICCPR rights and principles into law: in some states international treaties are automatically incorporated without further legislation; in others they are presumed to be respected unless the terms of national law prevent such a conclusion.

The obligation, however, is to respect the rights and give effective remedies to individuals whose rights are, have been and in some cases will be violated. The fact that national law does not at present recognise these rights is not a sufficient answer to the ICCPR. States need to do something to bridge the gap between the incompatible laws and practices and the rights promised by either accession or incorporation into law.

Rights which cannot be derogated

Not all rights are of the same importance in the scheme of the ICCPR, but certain rights are non-derogable even in time of war or national emergency. Article 4 provides:

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures

³ Most of these points are drawn from General Comment 31 adopted March 2004, available at <http://www.unhcr.org/refworld/pdfid/478b26ae2.pdf>

⁴ "This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation." GC 31 paragraph 10.

derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

2. No derogation from Articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision.

No derogations can be made from Article 6 (life), 7 (torture), 8 (slavery), 11 (imprisonment for debt), 15 (retrospective criminal offence), 16 (recognition as a person in law) and 18 (freedom of thought, conscience and religion). These rights must always be respected although what amounts to a violation of them may depend on the context. Other rights (eg Article 9 detention) may be interfered with in a time of national emergency, but only if that is permissible under other international obligations, it is done without discrimination and because it is strictly necessary.

Preliminary observations on the right to life and the prohibition of torture and related ill-treatment

The right to life and freedom from torture are two rights that are non-derogable in times of war or national emergency. Together they impose restrictions on the use of deadly force by the state including the application of the death penalty. Article 6 is in these terms:

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.
2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.
3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.
4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.
5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.
6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

The right to life must be protected by law. The circumstances in which it may be legitimate to deprive someone of life have to be clearly set out in law, and this applies to the laws of homicide, self-defence, the use of reasonable force to quell disorder or prevent crime, or the use of capital punishment for grave crimes.

Deprivation of life must not be arbitrary. Any discretion to inflict lethal force or punishment must thus be narrowly circumscribed by clear, transparent principles not contrary to the other terms of the ICCPR.

Whilst it is not itself a breach of the ICCPR for states to retain capital punishment for a period after accession if it already exists in a state, accession to the ICCPR implies a state is moving towards abolition when it can sign the Optional Protocol to that effect. In the meantime, the application of capital punishment is strictly limited by the ICCPR.

Safeguards guaranteeing protection of the rights of those facing the death penalty

The restrictions on capital punishment set out in Article 6 of the ICCPR are reflected and further developed in the Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty (hereinafter 'the Safeguards') which: "... *constitute an enumeration of minimum standards to be applied in countries that still impose capital punishment*"⁵.

The Safeguards were adopted in 1984 by the UN Economic and Social Council Resolution 1984/50⁶. In 1989, these standards were further developed by the Council which recommended *inter alia* that there should be a maximum age beyond which a person could not be sentenced to death or executed and that persons suffering from mental retardation should be added to the list of those who should be protected from capital punishment⁷. The Council in its Resolution 1996/15, called upon Member States in which the death penalty had not been abolished "... *to effectively apply the safeguards guaranteeing the rights of those facing the death penalty*"⁸. The significance of the Safeguards has subsequently been reaffirmed by the Commission on Human Rights in 2005⁹ and the General Assembly in its resolutions 62/149 and 63/168.

All States, including Japan, are bound by the international standards set out in the Safeguards, which should be considered as the general law applicable to the death penalty.¹⁰

The right to life

Article 6(2) of the International Covenant on Civil and Political Rights provides that:

In countries which have *not abolished* the death penalty, sentence of death may be imposed only for the *most serious crimes* in accordance with the law in force at the time of the commission of

⁵ Capital punishment and implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty, Report of the Secretary-General, UN Doc. E/2010/10, at p.33

⁶ Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, ESC Res 1984/50, UN. Doc. E/1984/84 (endorsed by GA Res 39/118)

⁷ Implementation of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty', ESC Res 1989/64 at para.1(d).

⁸ UN Economic and Social Council Resolution 1996/15, adopted on 23 July 1996 at paragraph 2

⁹ UN Commission on Human Rights resolution 2005/59, adopted on 20 April 2005

¹⁰ See Report of the Secretary-General, Note 5 above at p.55

the offence and not contrary to the present Covenant...This penalty can only be carried out pursuant to a final judgment rendered by a competent court. (emphasis added)

Although an exception to the right to life, Article 6 of the ICCPR lists various safeguards in the application and implementation of the death penalty. It may only be imposed for the *most serious crimes*, it cannot be pronounced unless *rigorous procedural rules* are respected and it may not be imposed on pregnant women or to individuals for crimes committed under the age of 18.

Article 6(6) goes on to place the death penalty in its real context and assumes its eventual elimination:

Nothing in this article shall be invoked to *delay or to prevent the abolition* of capital punishment by any State Party to the present Covenant.

Professor William A. Schabas, has noted that these ‘important references to abolition’ were added to the draft text of the ICCPR when it was under consideration at the Third Committee of the UN General Assembly¹¹. He goes on to explain that the reference in Article 6(2) “indicated not only the existence of abolitionist countries but also the direction which the evolution of criminal law should take”, while the reference in Article 6(6) “... set a goal for parties to the covenant. The *travaux préparatoires* indicate that these changes were the direct result of efforts to include a fully abolitionist stance in the covenant. They represented an intention... to express a desire to abolish the death penalty, and an undertaking by states to develop domestic criminal law progressively towards abolition of the death penalty”.¹²

Professor Roger Hood has also characterised the exception to the right to life in Article 6(2) of the ICCPR as a creature of its time and in no way a permanent justification for the retention of the death penalty when read alongside Article 6(6) which makes abolition the ultimate goal. With the drafting taking place as early as 1957, when there were still only a very small minority of abolitionist states, Article 6 was a compromise. In order to achieve agreement, an exception had to be made in Article 6(2) allowing for the death penalty for those countries that had not yet abolished it.

In 1971, the United Nations General Assembly endorsed an approach of progressive restriction of the death penalty with a view to its eventual abolition. Furthermore, in its General Comment on Article 6 of the ICCPR, the UN Human Rights Committee stated that Article 6 “refers generally to abolition [of the death penalty] in terms which strongly suggest... that abolition is desirable. The Committee concluded that all measures of abolition should be considered as progress in the enjoyment of the right to life...”.¹³

The following limitation on capital punishment can be noted from Article 6:

1. It must be limited to the gravest of crimes and the possibility of retention shall not be used to delay or prevent eventual abolition.
2. Only courts of competent jurisdiction can impose the death penalty for conduct that was a capital offence at the time of its commission.

¹¹ The Third Committee of the UN General Assembly held 12 meetings between 13 November and 26 November 1957

¹² William A. Schabas, *The Abolition of the Death Penalty in International Law*, 3rd ed., Cambridge University Press, 2002, at p. 70

¹³ General Comment 6 on Article 6 of the International Covenant on Civil and Political Rights, adopted on 27 July 1982, paragraph 6

3. Capital punishment cannot be imposed on people who were under 18 at the time the crime was committed. It cannot be carried out on pregnant women.
4. There must be a right to seek pardon or commutation before the sentence is executed (see below at page 13 for commentary on Article 6(4)).

The case law of the HRC identifies when capital punishment and other deprivations of life is considered contrary to other provisions of the ICCPR. These include a breach of the fair trial provisions or where imposition of the death penalty can be considered as a form of inhuman or degrading treatment. These provisions cannot be read in isolation as a complete code. Under the ICCPR, as well as the regional Conventions, there are Optional Protocols to abolish the death penalty without reservation. As stated above, international human rights scholars agree that this indicates the direction of travel; the death penalty should be restricted in its application until its final abolition.

Whilst retention of the death penalty is permitted, its use cannot by itself constitute cruel or unusual punishment or torture or inhuman treatment and punishment. However, use of the death penalty *may* become an arbitrary violation of the right to life if capital punishment is imposed in circumstances that breach other rights under the ICCPR and, for present purposes, those other rights are most significantly the right to a fair trial and the prohibition on torture.

The scope of the death penalty

Article 6(2) of the ICCPR restricts the imposition of the death penalty to the ‘most serious crimes’. The first of the *Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty*¹⁴ emphasises that the death penalty may only be imposed for ‘intentional crimes with lethal or other extremely grave consequences’.

According to the recent case law of the Human Rights Committee, the definition of the ‘most serious crimes’ should be interpreted as narrowly as possible. There is a strong argument that capital punishment should [pending abolition] only be imposed for the most serious offences of intentional homicide, but it may not be mandatory for such crimes. The Committee has said that the death penalty should not be enforced for crimes that do not result in the loss of human life, such as drug-related or economic crimes, which is contrary to the ICCPR. In order to clarify the vaguely defined term ‘the most serious crimes’ and to give effect to its contemporary meaning, Professor Roger Hood has suggested that the first of the Safeguards should be re-written to limit the death penalty ‘to intentional murder, but only of the gravest kind, and ensure that it is never mandatorily enforced’.¹⁵

Japanese law and practice

In Japan as of 2012, 19 crimes are eligible for capital punishment, including the following seven crimes for which a death sentence is possible, even if the offence does not result in the loss of life.¹⁶

- Insurrection (Penal Code Article 77)

¹⁴ Note 6 above, Article 3

¹⁵ See Roger Hood, *Statement to the International Commission against the Death Penalty*, October 2010

¹⁶ The other 12 capital offences involve murder or criminal conduct resulting in death

- Inducement of Foreign Aggression (Penal Code Article 81)
- Participation in Foreign Military Aggression Against Japan (Penal Code Article 82)
- Arson of an Inhabited Structure (Penal Code Article 108)
- Destruction by Explosives (Penal Code Article 117)
- Damage to an Inhabited Structure by Trespass (Penal Code Article 119)
- Illegal Use of Explosives (Explosives Control Act Article 1)

Moreover, the death penalty is mandatory for the crime of Inducement of Foreign Aggression (Penal Code Article 81).

The death penalty has never actually been imposed for the crimes of Insurrection, Inducement of Foreign Aggression, or Participation in Foreign Military Aggression against Japan and, in practice, the death penalty would not be imposed for crimes that did not result in loss of life. Nonetheless, even though the United Nations Human Rights Committee has repeatedly recommended that Japan reduce the number of death-eligible crimes under Japanese law, Japan has not taken any measures to achieve such a reduction. Capital punishment for crimes that do not involve intentional killing fails to conform to the obligations under Article 6(2) of the ICCPR and to the first of the Safeguards, which restricts the death penalty to the ‘most serious crimes’.

Pardons and petitions of mercy

Article 6(4) of the ICCPR states:

Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.

The seventh Safeguard reinforces this norm:

Anyone sentenced to death shall have the right to seek pardon or commutation of sentence; pardon or commutation of sentence may be granted in all cases of capital punishment.

Thus, international law provides for a ‘right’ to seek pardon or commutation of sentence, and in order for this to be meaningful, states are under an obligation to provide *effective* measures for the proper consideration of clemency in all cases. No person may be executed while a petition for mercy or pardon is pending. This principle derives from the eighth Safeguard, which states that: “Capital punishment shall not be carried out pending any appeal or other recourse procedure or other proceedings relating to pardon or commutation of the sentence”. Filing an appeal or a petition for mercy should always provide a basis to suspend execution.

In recent years, the right to seek clemency, amnesty or pardon has been carefully examined in the Caribbean context, both by domestic courts and by regional human rights tribunals.

Article 4(6) of the American Convention on Human Rights is stated in terms very similar to Article 6(4) of the ICCPR:

Every person condemned to death shall have the right to apply for amnesty, pardon, or commutation of sentence, which may be granted in all cases.

The Inter-American Commission on Human Rights has considered the effect of Article 4(6) of the American Convention in a number of death penalty cases. In *Desmond McKenzie et al v. Jamaica*¹⁷, the Commission held that procedures for granting mercy or pardon must guarantee condemned prisoners an effective and adequate opportunity to participate in the process:

*“In the Commission’s view, the right to apply for amnesty, pardon or commutation of sentence... encompasses certain minimum procedural guarantees for condemned prisoners, in order for the right to be effectively respected and enjoyed. These protections include the right on behalf of condemned prisoners ... to be informed of when the competent authority will consider the offender’s case, to make representations, in person or by counsel... and to receive a decision from the authority within a reasonable period of time prior to his or her execution.”*¹⁸

In the landmark decision of *Neville Lewis and others v. Attorney General of Jamaica*¹⁹, the Privy Council ruled that fairness was a fundamental requirement of the proceedings before the Jamaican Mercy Committee, the body which ultimately decides who should be executed and who should be granted mercy or a pardon. The Court adopted an approach to constitutional interpretation, which was consistent with Jamaica’s international human rights obligations:

*“...Jamaica ratified the American Convention on Human Rights... and it is now well established that domestic legislation should as far as possible be interpreted so as to conform to the state’s obligations under any such a treaty.”*²⁰

Bearing in mind the obligations of Jamaica under Article 4(6) of the American Convention on Human Rights, the Court held that:

*“...it seems... that the State’s obligation internationally is a pointer to indicate that the prerogative of mercy should be exercised by procedures which are fair and proper and to that end are subjected to judicial review.”*²¹

The decision in *Neville Lewis* clearly establishes and applies the principle that public authorities who make such important decisions as whether or not a person sentenced to death should be executed must observe basic rules of fairness. There is no reason to suggest that the applicable standards under Article 6(4) of the ICCPR are any different, and signatories to the ICCPR should take steps to ensure that condemned prisoners are provided with adequate and *effective* mercy procedures. The decision is one of life or death and, as such, domestic law is required to make provision for a proper functioning, transparent, and fair system that allows for the proper consideration of clemency in all cases.

¹⁷ Inter-American Commission on Human Rights, Case 12.023, Report 41/00, 13 April 2000

¹⁸ See Note 17 above, at paragraph 228

¹⁹ [2001] 2 AC 50

²⁰ See Note 19 above at paragraph 78F

²¹ See Note 19 above at paragraph 79B

Japanese law and practice

Article 73 of Japan's Constitution states that the Cabinet shall "decide on general amnesty, commutation of punishment, reprieve, and restoration of rights". In addition, Japan's Pardon Act states that "special pardons, commutations of sentence with respect to a specific person, and remissions of the execution of a sentence or restoration of rights with respect to a specific person shall be granted to persons subject to a recommendation from the National Offenders Rehabilitation Commission". Moreover, the Ordinance for Enforcement of the Pardon Act has established procedures which require that when a person incarcerated in a penal institution requests special pardon, commutation of sentence, or remission of execution of sentence, the warden of the penal institution shall petition the National Offenders Rehabilitation Commission and include his or her opinion about the inmate's request. Thus, incarcerated persons in Japan cannot apply directly to the NORC for amnesty or pardon: they must do so through an intermediary.

Some death sentences have been commuted in Japan in the past. However, since Mr Kenjiro Ishii had his death sentence commuted to life imprisonment in June 1975 (more than 37 years ago), no other inmate has received a commutation of a death sentence. This means that many death row inmates live for years under continuous threat of execution. As of January 2013 when Japan had 135 inmates on death row under a finalised sentence of death, four had lived in those circumstances (see the next section for more detail about conditions on death row) for more than 30 years.

Legally, the lack of an effective process for considering petitions of mercy in Japan does not conform to obligations under Article 6(4) of the ICCPR or to obligations under the seventh Safeguard. And practically, the fact of no commutations since 1975 suggests that executive mercy is dead in Japanese capital punishment.

The prohibition of torture and related ill-treatment

Position under the ICCPR

Freedom from torture is a non-derogable right. Article 7 of the ICCPR prohibits subjecting people to treatment or punishment that amounts to torture or that is cruel, inhuman or degrading. Scientific experimentation without consent is prohibited under this article.

It is also important to note Article 10 of the ICCPR in the context of punishment:

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.
2. a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;

- b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.
- 3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

Even where a person faces a capital charge or has been sentenced to death by a court applying the highest standards of process, the treatment of a person in custody or following sentence may deprive him of dignity or be considered inhumane. Such treatment is not merely a violation of the ICCPR in its own right, but also prevents effect being given to the sentence of death. Compliance with Article 6 requires any deprivation of life to be in accordance with the “other provisions of this Covenant”.

The HRC's General Comment dates from 1992²² and is somewhat out of date. However, that comment combined with the subsequent case law particularly of the European Court of Human Rights²³ (ECtHR) suggests that inhuman treatment is where severe suffering is caused irrespective of intention. Cruel treatment means the same and degrading treatment is where a person is disproportionately humiliated and deprived of dignity. Whilst capital punishment, imprisonment and being restrained at trial all have the capacity to humiliate and degrade, there will only be a violation of this norm in the context of detention and punishment if the treatment is either done with the purpose of inflicting humiliation over and above the legitimate acts themselves, or does humiliate without objective justification.

The ninth Safeguard states that where capital punishment occurs, “...it shall be carried out so as to inflict the minimum possible suffering”. This requirement is relevant once a death sentence has been imposed. Issues may arise with respect to the conditions of detention on death row, and the HRC has expressed concern *inter alia* about poor living conditions, including undue restrictions on visits and correspondence²⁴, small cell sizes, lack of proper food and exercise, and inadequate time spent outside cells. The Committee against Torture has addressed the issue of conditions of detention for those under sentence of death and recognised that the mental anguish caused by spending an excessive length of time on death row may amount to cruel, inhuman, and degrading treatment.²⁵

In resolution 1996/15, the UN Economic and Social Council urged member states in which the death penalty may be carried out “to effectively apply the [UN] Standard Minimum Rules for the Treatment of Prisoners, in order to keep to a minimum the suffering of prisoners under sentence of death and to avoid any exacerbation of such suffering.”²⁶

Japanese law and practice

The following seven points summarise some of the most relevant Japanese laws and practices with respect to prohibitions against torture and related ill-treatment.

²² GC No 20 (1992)

²³ See for example *Peers v Greece* (2001) and the extensive subsequent case law including *Dougoz v Greece*, *Kalashnikov v Russia*, and *Onofriou v. Cyprus* (2010) E Ct HR

²⁴ Concluding observations of the Human Rights Committee: Japan<UN Document CCPR/CO/8/Add.102, 19, November 1998 at paragraph 21

²⁵ See Report of the Secretary-General, Note 5 above at p.54

²⁶ Note 8 above at paragraph 7

1. A new Prison Law was enacted in 2007 providing that a death row prisoner shall be detained in a single cell and separated from other prisoners day and night. Under this law, it is possible to make contact with other death row prisoners when it is deemed advantageous in light of the principle of treatment prescribed in paragraph (1) of Article 32, which states that “upon treatment of an inmate sentenced to death, attention shall be paid to help him/her maintain peace of mind”. But in reality, the Ministry of Justice acknowledges that such contact has never been allowed.
2. Contacts with people outside prison are severely restricted. The number of outside people allowed to make contact with a death row prisoner is limited to three to five, and even those who are allowed to exchange letters with the prisoner are not necessarily permitted to meet with him or her in person.
3. Meetings between prisoners and their legal representatives are usually observed by prison guards, but on 27 January 2012, the Hiroshima High Court held that meeting with one’s lawyers for a retrial case without attendance by a prison guard is a “legitimate interest of the inmate sentenced to death” and that unless there are special circumstances, a guard’s attendance at such a meeting should not be allowed. The government has appealed to the Supreme Court against this decision and the case is still pending before that Court. In the meantime, the attendance of guards at meetings between lawyers and inmates remains common practice.
4. The Ministry of Justice frequently claims that the idea underlying these restrictive practices is the need “to maintain the peace of mind” (*shinjo no antei*) of the death row inmate, as stipulated in Article 32 of the new Prison Law. The Ministry also states that “to maintain the peace of mind” should not be interpreted as a tool for restricting prisoners’ rights but rather should be used to provide them with assistance. In practice, however, the “peace of mind” provision is routinely used to restrict prisoners’ rights, especially the right to make contact with people outside prison.
5. Prisoners in Japan are not informed of the date of their execution until shortly before it occurs (usually just an hour or two of notice is given). Moreover, no one except a limited number of prison officials, a public prosecutor, and his or her assistant can attend executions. There is, therefore, no independent oversight of executions and little opportunity to observe whether cruelties or excessive suffering occur. Another consequence of this policy of secrecy is that Japanese citizens are poorly informed about many of the realities of capital punishment in their country (for more details, see Part Two of this report on public attitudes toward capital punishment in Japan).
6. Because of the severe conditions of confinement on Japan’s death row, mental illness appears to be common among persons condemned to death (though the exact number with mental health problems remains unknown because of the government’s policy of secrecy). Japan has a legal provision which prohibits the execution of inmates who are insane, but without any independent mechanism to evaluate the mental state of death row inmates, this provision has little effect. As documented by Amnesty International in 2009, Japan is contravening an important provision of its Criminal Procedure Act as well as Safeguard 3 of ECOSOC Resolution 1984/50 by failing to prevent the execution of prisoners who are mentally ill and by failing to provide decent medical care to persons on death row with mental health problems.²⁷
7. The only method of execution in Japan is hanging, and Japan’s government acknowledges that its method of hanging has not changed since 1873. Little is known about what happens at hangings because the people who know (a handful of public officials) seldom talk about it, but we do know that in 1883 a female prisoner’s head was almost torn from her body when she was hanged. In 2011, a defence team for Sunao Takami, who was accused of arson and murders and

²⁷ Amnesty International, *Hanging by a Thread: Mental Health and the Death Penalty in Japan*, September 2009 (ASA 22/005/2009), pp.1-93; available at <http://www.amnesty.org/en/library/asset/ASA22/005/2009/en/acc1c64b-e5ed-425f-bb93-36be3ec25f59/asa220052009eng.pdf>

eventually sentenced to death, challenged the constitutionality of death by hanging by arguing that hanging is a cruel punishment, which is prohibited by Japan's Constitution. In Takami's trial, two experts, a former prosecutor who had observed an execution and an Austrian forensic medical expert, testified about the reality of hanging. The former prosecutor (Mr. Takeshi Tsuchimoto, who supports capital punishment in principle) testified that "viewed sincerely, the cruelty of hanging cannot be endured", while the medical expert (Dr. Walter Rabl) testified that based on his extensive research, hanging is cruel. In the end, however, the Osaka District Court held that hanging does not violate Article 36 of Japan's Constitution (stating that "The infliction of torture by any public officer and cruel punishments are absolutely forbidden") because some degree of suffering "has to be put up with" when the method of hanging is employed. However, this claim is incompatible with the ninth Safeguard which requires the minimisation of suffering inflicted on inmates. Hitotsubashi University Professor of Law, Takeshi Honjo, believes this court's decision is based on the concept of "forgivable cruelty"²⁸. Takami's defence lawyers have appealed the decision.

In Japan, the conditions of detention on death row, the length of time inmates spend on death row, the treatment of death row prisoners, and the lack of proper treatment for death row prisoners with mental health problems violate Articles 7 and 10(1) of the ICCPR as well as Safeguards 3 and 9 and additional Safeguard 7 of ECOSOC Resolution 1996/15.

Pre-trial rights

The right to liberty

The right to liberty is a fundamental right in international and domestic law. It is enshrined in all international human rights instruments (Article 3 of the Universal Declaration on Human Rights; Article 9 of the ICCPR; Article 7 of the ACHR; and Article 5 of the ECHR) and guaranteed in all of the Commonwealth Constitutions. There is no right not to be detained; the purpose of the right to liberty is to protect individuals from arbitrary detention. In this context, the prohibition on arbitrary detention means that any detention must conform both to domestic and international standards. Hence the insistence of all the international human rights bodies that the final determination of whether detention is arbitrary is for the international body itself.

Article 9 of the ICCPR provides detailed provisions on pre-trial rights and failure to comply with Article 9 of the ICCPR can influence whether the death penalty is permissible in any given case.

Reasons for arrest and access to a lawyer

Reasons for arrest

Article 9(2) of the ICCPR states that:

²⁸ Quoted in Keiko Horikawa, 'Koshukei wa Zangyaku ka' [Is Hanging Cruel?], *Sekai*, January 2012 (No. 825), pp.63-72, and February 2012 (No. 827), pp.122-131

Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

The requirement that an individual deprived of his liberty be given the reasons for his arrest is common to both international human rights instruments and the Constitutions of the Commonwealth Caribbean. What is required is that the individual is told, 'in simple, non-technical language' that he can understand 'the essential legal and factual grounds for his arrest' (*Fox, Campbell and Hartley v. United Kingdom*)²⁹. So, for example, the Constitution of Trinidad and Tobago refers to 'reasonable particularity'.

The sufficiency of the information given to a detainee is measured by the purpose of the provision: to enable anyone deprived of his liberty to challenge the lawfulness of his arrest. And this is the essential distinction between the requirement of *reasons for arrest* and the additional (but later) requirement that everyone charged with a criminal offence be *notified of the 'charge'* against him, which is intended to be an important aspect of the right to prepare an effective defence. In *Kelly v. Jamaica*³⁰, the HRC found a violation of Article 9(2) of the ICCPR where the applicant was only merely told that he had been arrested for murder and only found out the details some week later.

The time-frame within which reasons have to be given is more complicated. Some of the international human rights bodies have been a little more relaxed – so, for example, the ECtHR in *Fox, Campbell and Hartley*³¹ found no breach of the European Convention where the reasons for the applicants' arrest was brought to their attention several hours after their detention – and some of the Commonwealth Caribbean Constitutions are (on paper at least) more relaxed still, mentioning periods such as 24 or 48 hours, for example.

Access to a lawyer

Early access to a lawyer and, in particular, access before questioning, is an aspect of international human rights law where standards are tightening. Principle 1 of the UN Basic Principles on the Role of Lawyers³² establishes the right to assistance at all stages of criminal proceedings, including interrogation. And, in the context of the right to silence (or, more accurately, drawing adverse inferences from silence during questioning), the ECtHR has effectively ruled out questioning suspects in the absence of their lawyers (see *Murray v. UK*³³; affirmed in *Condron v. UK*³⁴).

In a similar vein, the HRC has emphasised that 'all persons arrested must have immediate access to counsel' (Concluding Observations on the UN HRC: Georgia)³⁵. The Inter-American Commission on Human Rights has stated that the right to defend oneself requires that an accused person be permitted to obtain legal assistance when first detained. It concluded that a law which prohibited a detainee from access to a lawyer during detention and investigation would seriously impinge upon defence rights.³⁶

²⁹ European Court of Human Rights, [1991] 14 EHRR 108 at paragraph 40

³⁰ CCPR/C/4/D/253/1987, 10 April 1991

³¹ Note 30 above

³² Adopted by 8th UN Congress on Prevention of Crime and Treatment of Offenders, 7th September 1990

³³ [1996] 22 EHRR 29

³⁴ European Court of Human Rights, No. 35718/97

³⁵ UN Doc. CCPR/C/79/Add.74, 9 April 1997

³⁶ Annual Report of the IACmHR, 1985-86

Moreover, communications between a detainee and his lawyer must be confidential. In *S v. Switzerland*, the ECtHR noted that:

*“...an accused’s right to communication with his advocate out of the hearing of a third person is one of the basic requirements of a fair trial in a democratic society ... If a lawyer were unable to confer with his client and receive confidential instructions from him without such surveillance, his assistance would lose much of its usefulness...”*³⁷

The ECtHR accepted that confidentiality could be restricted if, for example, there was a risk of collusion between a client and his lawyer. However, the mere risk of collaboration between defence counsel is not enough.

Japanese law and practice

1. Article 203(1) of the Code of Criminal Procedure states: “When a judicial police officer has arrested a suspect upon an arrest warrant or has received a suspect who was arrested upon an arrest warrant, he/she shall immediately inform the suspect of the essential facts of the suspected crime and the fact that the suspect may appoint defense counsel and then, giving the suspect an opportunity for explanation, he/she shall immediately release the suspect when he/she believes that it is not necessary to detain the suspect, or shall carry out the procedure of referring the suspect together with the documents and articles of evidence to a public prosecutor within 48 hours of the suspect being placed under physical restraint when he/she believes that it is necessary to detain the suspect”.

Regarding the word “immediately” in Article 203(1), court standards in Japan are unclear because there are almost no decisions clarifying what time period this word implies and because one cannot find cases in which delay in informing the suspect of the essential facts of the crime has been adjudicated. In these senses, Japanese courts have done little to define what this important time-oriented provision requires.

At the same time, there is a court decision about delay in the notification of the suspect’s right to a defence lawyer and about the suspect’s right to provide an explanation to the persons conducting the investigation – a decision of the Morioka District Court on 5 January 1988. In this case, the police informed the suspect of his rights to appoint defence counsel and to provide an explanation to the police, but they did so 23 hours and 50 minutes after he was arrested. In an appeal against an earlier judicial decision to reject the request for detention of this suspect because of the long delay, the Morioka District Court overturned the original decision and held that there were no illegalities in the police’s arrest procedures. Thus, on the rare occasions when Japanese courts have considered Article 203(1), they have tended to interpret “immediately” in ways that benefit law enforcement.

2. The right of defence counsel to attend criminal interrogations is not clearly provided for in Japan’s Code of Criminal Procedure, and Japan has received repeated recommendations from the United Nations Human Rights Committee about this point. Here is what Japan’s

³⁷ (1992) 14 EHRR 670 at [48]

government says to deny a defence lawyer's right to attend the criminal interrogations of his or her client:

“Because of the limited means to obtain evidence, interrogation of suspects is the most important investigation method to bring out the truth. Therefore, Japan noted that the issue of the presence of Defense Counsel requires a cautious consideration. Japan also noted there are currently no limitations for detainees to access Defense Counsel in police detention facilities.”³⁸

This reply clearly reflects the government's position that confessions obtained from criminal suspects are the most important kind of evidence. This over-reliance on confessions is the central cause of many of the most troubling wrongful convictions in Japanese criminal justice.³⁹

3. Japan's government also claims that there are no limitations on meetings between suspects who have been detained and their defence lawyers. However, in reality, and regardless of whether the place of detention is a police facility or not, Article 39(3) of Japan's Code of Criminal Procedure permits meetings between suspects and their defence counsel to be restricted as follows:

“A public prosecutor, public prosecutor's assistant officer or judicial police official ('judicial police official' means both a judicial police officer and a judicial constable; the same shall apply hereinafter) may, when it is necessary for investigation, designate the date, place and time of the interview or sending or receiving of documents or articles prescribed in paragraph (1) only prior to the institution of prosecution; provided, however, that such designation shall not unduly restrict the rights of the suspect to prepare for defence.”

Moreover, the following two Supreme Court decisions apply to efforts to restrict meetings between defence lawyers and their clients:

“In principle, investigative institutions must always give a defense lawyer the opportunity to meet with his or her client when the defense lawyer makes application for such a meeting. In cases where the suspect is in the middle of an interrogation or the suspect's presence at a crime-scene search or inspection is needed and therefore interruption of the investigation would cause a conspicuous obstacle, the investigative institutions must take measures to allow the suspect to consult a defense lawyer by designating the earliest possible date and time for the interview.”

(First Petit Bench of the Supreme Court, 10 July 1978)

“Cases where there is a conspicuous obstacle due to the interruption of the investigation include instances not only where a suspect is in the middle of interrogation or he or she is attending the inspection of a crime scene, but also instances where interrogation of a suspect or a suspect's attendance at the inspection etc. is firmly scheduled very close at

³⁸ Presentation by the government of Japan at the Working Group on the Universal Periodic Review in October 2012

³⁹ See, for example, David T. Johnson, *The Japanese Way of Justice: Prosecuting Crime in Japan* (Oxford University Press, 2002), ch. 8; and Daniel H. Foote, “Confessions and the Right to Silence in Japan”, *Georgia Journal of International and Comparative Law*, Vol.21 (2001), pp.415-488

hand and therefore allowing a defense lawyer to have an interview with his or her client would probably hinder the commencement of such interrogation or inspection.”

(Third Petit Bench of the Supreme Court, 10 May 1991)

In these ways, restrictions on meetings between defence counsel and their clients have expanded in Japan, both as a matter of law and as a matter of judicial opinion. As a matter of practice, defence counsel in Japan are generally somewhat more able to meet with their clients at present than they were in the past, but in cases deemed critical to investigating authorities – especially cases in which the suspect has not confessed – meetings can still be prohibited, and meetings are often prohibited or abbreviated as a matter of fact.

4. Moreover, the right to secret communications between defence lawyers and suspects or defendants is guaranteed before a defendant's sentence has been finalised, but once the sentence becomes finalised the circumstances change. In particular, in the case of inmates with a finalised sentence of death, private meetings with a defence lawyer are usually impossible.

The right to be brought promptly before a court

Article 9(3) of the ICCPR states:

Anyone arrested or detained on a criminal charge shall be brought promptly before a judge... and entitled to trial within reasonable time or to release...

The length of permitted detention in police custody before a first appearance in court has practical implications for the effective enjoyment of other rights of the detainee. All international human rights instruments therefore provide that anyone arrested or detained must be brought *promptly* before a judge or other officer authorised by law to exercise judicial power. While no time limits are expressly stated within the standards, and they are to be decided on a case by case basis, the HRC has stated that ‘...delays should not exceed a few days’ (UNHRC General Comment 8(2))⁴⁰. In a Caribbean death penalty case, the HRC ruled that a delay of one week from time of arrest before the detainee was brought before a judge was incompatible with Article 9(3) of the ICCPR⁴¹. Likewise, in *Rawle Kennedy v. The Republic of Trinidad & Tobago*⁴², the HRC considered that a six-day delay in bringing the applicant before a judge was a violation of Article 9(3). The HRC held that the word promptly in Article 9(3) should not exceed a few days. The ECtHR has ruled that detaining a person for four days and six hours before bringing him before a judge was not prompt access (*Brogan and others v. UK*).⁴³

All states have an obligation to ensure that the judicial control mechanisms articulated in Article 9(3) and 9(4) of the ICCPR are accessible and effective in order that these provisions are operative. The basic principle in relation to police custody and detention pending trial is that restriction to the right to liberty must be exceptional and the initial judicial control of the lawfulness of the deprivation of

⁴⁰ CCPR General Comment no.8, Right to liberty and security of persons (art.9), 30/06/82

⁴¹ *McLawrence v. Jamaica*, CCPR/C/60/D/702/1996, 29 September 1997

⁴² CCPR/C/74/D/845/1998, 26 March 2002

⁴³ [1988] 11 EHRR 117

liberty must be conducted as soon as possible. The starting point of the period under consideration is the actual arrest and the first court appearance must be conducted as soon as possible.

In addition to reviewing the lawfulness of detention and ascertaining the treatment in detention, the purpose of the initial judicial control is also, should the person be placed on remand, to prevent an on-going or an increased risk of ill-treatment. This means that detention on remand must take place in a facility under a different authority than the one responsible for the investigation. The UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has stated that: *“Those legally arrested should not be held in facilities under the control of their interrogators or investigators for more than the time required by law to obtain a judicial warrant of pre-trial detention which, in any case, should not exceed a period of 48 hours. They should accordingly be transferred to a pre-trial facility under a different authority at once, after which no further unsupervised contact with the interrogators or investigators should be permitted.”*⁴⁴

Japanese law and practice

According to Article 203 of Japan's Code of Criminal Procedure: “when a judicial police officer has arrested a suspect upon an arrest warrant or has received a suspect who was arrested upon an arrest warrant, ...he/she... shall carry out the procedure of referring the suspect together with the documents and articles of evidence to a public prosecutor within 48 hours of the suspect being placed under physical restraint when he/she believes that it is necessary to detain the suspect.”

A prosecutor who received a suspect from a police officer has to ask a judge to issue a detention warrant within 24 hours whenever he or she believes that further detention of the suspect is necessary. Thus, the period of time between arrest of a suspect and a request to remand can be up to 72 hours.

Problems often occur after the judge's decision to remand a suspect. Under the Law on Penal Facilities and the Treatment of Inmates, suspects are supposed to be detained in “penal institutions” under the control of the Ministry of Justice. However, in circumstances which make it impossible to detain suspects in official “penal institutions”, the law allows the use of police cells as a substitute. This is known as Japan's “substitute prison system” (*daiyo kangoku seido*). In reality, suspects are sent back to police cells in almost all cases where the police have made an arrest. Hence, substitute imprisonment has become the norm in Japanese criminal justice. This is dangerous because it places suspects under the control of police, who are in charge of both their detention and their interrogation. Many analysts believe this system is a hotbed for false confessions.⁴⁵ False confessions obtained in this manner occurred in four capital cases that resulted in death row exonerations following retrials in the 1980s.⁴⁶ There may well be other condemned persons on Japan's death row today who also falsely confessed – including former boxer Hakamada Iwao, who was originally sentenced to death in 1968 and who is still trying to obtain a retrial almost half a century later. One of the judges who originally sentenced

⁴⁴ Report to the Commission on Human, E/CN.4/2003/68, paragraph 26(g)

⁴⁵ One classic study is Igarashi Futaba, “Crime, Confession, and Control in Contemporary Japan”, in *Law in Context*, Vol.2 (1984), pp.1-30 (originally published in Japanese in the journal *Seikai* in February 1984)

⁴⁶ Daniel H. Foote, “From Japan's Death Row to Freedom”, *Pacific Rim Law & Policy Journal*, Vol.1, No.1 (1992), pp.11-103

Hakamada to death deeply regrets his own participation in a case he considers to be a wrongful conviction.⁴⁷

Minimum fair trial guarantees in capital cases

The comprehensive provisions of Article 14 of the ICCPR set out in detail the minimum guarantees for a fair trial. These provisions *must* be respected in all capital cases.

The fifth Safeguard states: “Capital punishment may only be carried out pursuant to a final judgment rendered by a competent court after legal process which gives all possible Safeguards to ensure a fair trial, at least equal to those contained in Article 14 of the ICCPR, including the right of anyone suspected of or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings.”

The UN Special Rapporteur on extrajudicial, summary, or arbitrary executions has stated that fair trial guarantees in death penalty cases “must be implemented in all cases without exception or discrimination”⁴⁸. The Special Rapporteur has reiterated that “proceedings leading to the imposition of capital punishment must conform to the highest standards of independence, competence, objectivity and impartiality of judges and juries, in accordance with the pertinent international legal instruments.”⁴⁹ The general understanding is that those facing the death penalty should be afforded special protection and all guarantees to ensure a fair trial (sometimes referred to as “*super due process*”) above and beyond the protection afforded in non-capital cases.

The HRC has consistently held that if Article 14 (fair trial) of the ICCPR is violated during a capital trial, then Article 6 (right to life) of the ICCPR is also breached. In *Carlton Reid v. Jamaica* the HRC held that:

*“[T]he imposition of a sentence of death upon the conclusion of a trial in which the Provisions of the Covenant have not been respected constitutes... a violation of Article 6 of the Covenant. As the Committee noted in its General Comment 6(16), the provision that a sentence of death may be imposed only in accordance with the law and not contrary to the provisions of the present Covenant implies that ‘the procedural guarantees therein prescribed must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence, and the right to review by a higher tribunal’.”*⁵⁰

⁴⁷ This judge (Kumamoto Norimichi) originally wanted to acquit Hakamada, and wrote a 360-page document stating his reasons for believing in the defendant's innocence, but he was outvoted by two other judges on the panel who wanted to convict and condemn the defendant to death. The following year (1969) Kumamoto quit the bench in protest, and in 2007 he filed a petition with Japan's Supreme Court demanding a retrial for Hakamada. See Yamadaira Shigeki, *Sabakareru no wa Ware Nari: Hakamada Jiken Shunin Saibankan Sanjukunen no Shinjitsu* (Tokyo: Futabasha, 2010)

⁴⁸ *Extrajudicial, summary or arbitrary executions: Report of the Special Rapporteur...*, UN Document E/CN.4/2001/9, 11 January 2001, paragraph 86

⁴⁹ *Extrajudicial, summary or arbitrary executions: Report of the Special Rapporteur...*, UN Document E/CN.4/1997/60, 24 December 1996, paragraph 81

⁵⁰ (Communication No. 250/1987), U.N. Doc. CCPR/C/39/D/250/1987, at paragraph 11.5

The Committee went on to add that in death penalty cases, “*the duty to observe rigorously all the guarantees for a fair trial set out in Article 14 of the Covenant is even more imperative*”.

The HRC has found violations of Article 14 and consequently Article 6 in scores of capital cases in particular, from Jamaica and Trinidad & Tobago. In so doing, the Committee has declared that defendants in a capital trial have the absolute right to *effective* counsel and must have *adequate time* and *facilities* for the preparation of the defence. The Inter-American Commission and Court have adopted a similar approach to due process in capital cases.

Adequate time and facilities to prepare a defence:

Article 14(3)(b) of the ICCPR states that a person shall be entitled:

to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing.

Before a trial starts, the central aspect of the right to a fair trial is the right to have adequate time and facilities to prepare a defence. This is the springboard for other fair trial rights such as legal representation and discovery.

The time needed to prepare a defence inevitably depends on the nature of the proceedings and the factual circumstances of each case. Relevant factors include the complexity of the case, the accused’s access to evidence and to his lawyer.

In *Aston Little v. Jamaica* the HRC found that the requirements of Article 14(3)(b) of the ICCPR had been breached in a capital case from the Caribbean. The Committee held that:

“In cases in which capital sentence may be pronounced, it is axiomatic that sufficient time must be granted to the accused and his counsel to prepare the defence for trial; this requirement applies to all stages of the judicial proceedings... In the instant case it is uncontested that the author did not have more than half an hour for consultation with counsel prior to the trial and approximately the same amount of time for consultation during the trial.”⁵¹

In that case, the Committee also concluded that Article 14(3)(e) of the ICCPR had been violated as the lack of sufficient time for the adequate preparation of the defence had clearly affected counsel’s ability to trace or call defence witnesses to trial. The defendant was therefore unable to obtain the testimony of a witness on his behalf under the same conditions as testimony of witnesses against him.

The right to adequate facilities to prepare a defence includes the right of the accused to obtain the opinion of *independent experts* in the course of preparing and presenting a defence. Article 8(2)(f) of the ACHR guarantees the right of the defence “*to examine witnesses present in the court and to obtain the appearance... of experts or other persons who might throw light on the facts*”.

⁵¹ (Communication No. 283/1988), UN Doc. CCPR/C/43/D/283/1998 at paragraph 8.3

In relation to medical experts and, in particular, the responsibility of the state to provide psychiatric assessments in capital trials, the Inter-American Court of Human Rights recently addressed this point for the first time in their judgment in the case of *DaCosta Cadogan v. Barbados*. The Court re-emphasised that in capital cases the procedural requirements for a fair trial must be strictly observed and in this regard were specifically asked to consider whether the accused person's right to a fair trial was violated in light of the fact that no detailed evaluation of his mental health was made during his criminal trial:

"[E]very judge has the obligation to ensure that proceedings are carried out in a manner that guarantees and respects those due process rights necessary to ensure a fair trial in each case. Accordingly, Article 8(2) of the Convention specifies which of these constitute "minimum guarantees" to which all persons have an equal right during proceedings. Specifically, Article 8(2)(c) of the Convention requires that individuals are able to adequately defend themselves against any act of the State that may affect their rights. Additionally, Article 8(2)(f) recognizes the right of defendants to examine witnesses against them and those testifying on their behalf, under the same conditions as the State, with the purpose of defending themselves".

"[T]he Court observes that the supposed mental illnesses that the representatives alleged Mr. DaCosta Cadogan suffered or suffers are alcohol dependence and anti-social personality disorder, which could have allowed Mr. DaCosta Cadogan to raise a defense of diminished responsibility ... Consequently, Mr. DaCosta Cadogan's mental health at the time of the offense was never fully evaluated by a mental health professional for the purpose of preparing his defense in a case where the death penalty was the only possible sentence".⁵²

The Court held that taking into account the strict procedural requirements that the state is obliged to observe in all capital cases, the judge had a duty to adopt a more active role in ensuring that all necessary measures were carried out in order to guarantee a fair trial. The failure by the judge to ensure that the accused's mental health was fully evaluated was held to constitute a violation of the right to a fair trial. As a measure of reparation and in order to guarantee that events such as those analysed in the case are not repeated, the Court ordered the state to ensure that all persons accused of a crime whose sanction is the [mandatory] death penalty are duly informed, at the initiation of the criminal proceedings against them, of the right to obtain a psychiatric evaluation carried out by a state-employed psychiatrist recognised under domestic law.

Japanese law and practice

Since Japan's lay judge system started in 2009, courts have become more restrictive about what evidence can be introduced at trial. This change is largely motivated by the desire to minimise the "burden" (*futan*) felt by citizens who serve as lay judges. For the same reason, courts have also become more likely to demand that expert testimony be presented in extremely abbreviated forms. In these ways, defendants' psychological conditions and developmental problems are seldom considered by lay judge tribunals as carefully as they should be.

⁵² Inter-American Court of Human Rights, Judgment of 24 September 2009, Series C, No. 203, at paragraphs 84-86

More generally, death is not deemed a *different* form of punishment in Japan. As a result, there are few special procedural protections accorded to suspects and defendants in potentially capital cases⁵³. Consider three consequences that follow from the assumption that death is not different.

First, Japanese prosecutors make no advance announcement as to whether they will seek a sentence of death; the disclosure is only made on the penultimate day of trial, after all the evidence has been presented and immediately before the defence makes its closing argument. This non-disclosure policy makes it difficult for Japanese bar associations to provide institutional support of the kinds that American capital defenders take for granted. The non-disclosure policy also means that while Japan has a system of capital punishment, it does not have anything that can be called a “capital trial” because nobody except the prosecutor knows until the trial ends whether the defendant’s life is at stake. This significantly handicaps the defence attorney’s ability to prepare a decent defence.

Second, capital trials in Japan are not bifurcated into separate guilt and sentencing phases, even when the defendant denies guilt. Hence, when a defendant denies the charges against him or her, the court often hears little mitigating evidence, for such presentations by the defence might undermine its arguments for acquittal. In this way, protestations of innocence in Japan may increase the probability of receiving a sentence of death.

Third, in Japan there is no requirement that all judges and lay judges agree that a death sentence is deserved, nor is there even a requirement that a “super-majority” of six or seven or eight of the nine people on a panel agree before the ultimate penalty can be imposed. In Japan, a bare “mixed majority” – five votes, with at least one from a professional judge – is enough to condemn a person to death. By contrast, in all American jurisdictions that retain capital punishment (save for Florida, where the state legislature is ignoring the state supreme court’s directive to conform with death sentencing practice in the rest of the country), a death sentence can only be imposed if all 12 jurors agree that death is the appropriate sanction. In America, therefore, in 33 of the 34 retentionist states, a death sentence can be prevented if a defence attorney convinces a single juror to oppose the ultimate punishment, whereas defence attorneys in Japan can convince four decision-makers to avoid a capital sentence and still see their client condemned to death. It is difficult to square Japan’s mixed majority rule with the claim often made by Japanese officials that the country is extremely “cautious” (*shincho*) about capital punishment.⁵⁴

Effective legal assistance

Article 14(3)(d) of the ICCPR states that a person shall be entitled:

to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing... and to have legal assistance assigned to him where the interests of justice so require...

⁵³ David T. Johnson, “Capital Punishment without Capital Trials in Japan’s Lay Judge System”, *Asia Pacific Journal*, Vol. 8, Issue 52 (December 27, 2010), pp.1-38. Available at http://www.japanfocus.org/-David_T_Johnson/3461

⁵⁴ David T. Johnson, “Progress and Problems in Japanese Capital Punishment”, in *Confronting Capital Punishment in Asia: Human Rights, Politics, Public Opinion, and Practices*, edited by Roger Hood and Surya Deva, Oxford University Press, 2013 (forthcoming)

In Resolution 1989/64⁵⁵, the UN Economic and Social Council recommended that Member states afford “special protection to persons facing charges for which the death penalty is provided by allowing time and facilities for the preparation of their defence, including the adequate assistance of counsel at every stage of the proceedings, above and beyond the protection afforded in non-capital cases”.

In *Frank Robinson v. Jamaica* the HRC considered whether a State Party is under an obligation itself to make provision for effective representation by counsel in a capital case, should the counsel selected by the defendant decline to appear. The Committee held that “it is axiomatic that legal assistance be made available in capital cases”⁵⁶ and that Jamaica was in breach of Article 14(3)(b) of the ICCPR as the applicant had faced a capital trial without legal representation.

In *Trevor Collins v. Jamaica*, counsel effectively abandoned the appeal against a capital conviction without prior consultation with the author. The HRC stated that:

*“While article, paragraph 3 (d), does not entitle the accused to choose counsel provided to him free of charge, measures must be taken to ensure that counsel, once assigned, provides **effective** representation in the interest of justice.”*⁵⁷ [emphasis added]

Similarly in *John Campbell v. Jamaica*⁵⁸ the HRC noted that the complainant was only notified the name of his court-appointed lawyer after the appeal was dismissed meaning that he had no opportunity to prepare his defence, thus violating Article 14 (3)(d) of the ICCPR.

Japanese law and practice

In Japan, there are no legal provisions requiring the effective assistance of defense counsel. Indeed, Japanese courts tend not to find problems even when defense counsel's assistance is clearly ineffective and inappropriate.

One example is a decision of the Third Petit Bench of Japan's Supreme Court issued on 29 November 2005. In this opinion, Japan's highest court found no legal problem with the court proceedings of first instance, which did not take any corrective measures in a murder case involving a defendant who changed from confessing to a complete denial of the charges against him in the middle of his trial, even while the defendant's defence lawyer continued presenting a trial defense based on the defendant's previous admissions of guilt. In effect, the Supreme Court ruled that it is permissible for a defence lawyer to ignore a client's statements about the criminal charges against him or her.

However, a similar case was decided by the Tokyo High Court on 12 April 2011. In this case, the defense lawyer made arguments in court based on the premise that the defendant was guilty, even though the defendant had stated that he was not guilty, and the High Court overruled the original decision by finding that the defence lawyer's actions were incompatible with his basic obligation to protect the interests of his client and that there was a violation of the rules for court proceedings.

⁵⁵ Note 7 above, at paragraph 1(a)

⁵⁶ (Communication No. 223/1987), U.N. Doc. CCPR/C/35/D/223/1987 at paragraphs 10.3 and 10.4

⁵⁷ CCPR/C/47/D/356/1989, 12 May 1993 at [8.2]

⁵⁸ CCPR/C/47/D/307/1988 20 June 1988

In capital cases as well, there are some cases where the death sentence has been imposed and finalised despite insufficient assistance from a defence lawyer, but there have been no cases in which a death sentence has been overturned because of the ineffective assistance of counsel. This raises serious concerns that Article 14(3)(d) of the ICCPR is not being respected in all capital cases.

Disclosure

Few international instruments expressly provide a right of disclosure, but it has consistently been read into the right to a fair trial generally and the right to adequate time and facilities to prepare a defence under Article 14(3)(b). The classic statement comes from the ECtHR in the case of *Edwards v. UK*⁵⁹:

“...it is a requirement of fairness [under Article 6] ...that the prosecution authorities disclose to the defence all material evidence for or against the accused and that failure to do so [can] give rise to a defect in the trial process.”

While it is permissible to withhold material from the defence that does not have the potential to assist the defence on grounds of public interest immunity only such measures as are ‘strictly necessary’ are permissible (*Van Mechelen v. Netherlands*⁶⁰; *Rowe and Davis v. UK*⁶¹).

Japanese law and practice

When Japan established a formal pre-trial procedure in 2005, a provision requiring disclosure of evidence in cases that employ the new process was established. Criminal cases now fall into one of two categories: those in which the formal pre-trial procedure is required, and those in which it is not.

Murder cases in Japan ordinarily must go through the formal pre-trial procedure, but the newly established system of discovery does *not* require prosecutors to disclose to the defence all of the evidence in their possession and hence does not conform to the right to a fair trial and, in particular, to the right to ‘adequate time and facilities to prepare a defence’ under Article 14(3)(b). As a result, Japanese defence lawyers work at a huge informational disadvantage compared to their police and prosecutor counterparts in potentially capital cases.

Legal aid

Under Article 8(2)(e) of the ACHR, appointed counsel is to be paid by the state only if domestic law so provides. However, the IACtHR has held that states must provide counsel free of charge for a person who cannot afford to pay, if counsel is necessary to ensure a fair hearing (Advisory Opinion, 10 August 1990).⁶²

⁵⁹ (1993) 15 EHRR 417

⁶⁰ (1993) 15 EHRR 647

⁶¹ (2000) 30 EHRR 1

⁶² OC-11/90

Principle 3 of the Basic Principles on the Role of Lawyers, require states to provide sufficient funding and other resources to provide legal counsel to the poor and disadvantaged.

The HRC have held that state parties to the ICCPR have an obligation to make remedies in the constitutional courts *available* and *effective* in relation to claims of violations of the rights set out in the ICCPR. In *Rawle Kennedy v. Trinidad & Tobago* the HRC held that the denial of legal aid for the applicant to pursue a constitutional motion relating to an alleged violation of his right to a fair trial constituted a violation of Article 14(1) read together with Article 2(3) of the ICCPR:

*“The Committee notes that the Covenant does not contain an express obligation as such for any State party to provide legal aid to individuals in all cases but only in the determination of a criminal charge where the interests of justice so require (Article 14(3)(d)). It is further aware that the role of the Constitutional Court is not to determine the criminal charge itself, but to ensure that applicants receive a fair trial. The State party has an obligation, under Article 2, paragraph 3, of the Covenant, to make the remedies in the Constitutional Court... available and effective in relation to claims of violations of Covenant rights. As no legal aid was available to the author before the Constitutional Court in relation to his claim of a violation of his right to a fair trial, the Committee considers that the denial of legal aid constituted a violation of Article 14, paragraph 1, in conjunction with Article 2, paragraph 3.”*⁶³

Japanese law and practice

In Japan, state-appointed defence lawyers are appointed *after* a judge has made a detention decision. One result is that from arrest to detention there is a strong possibility that suspects without resources will have no legal representation. Moreover, since state-appointed defence lawyers are only appointed for certain kinds of crime which are punishable by death, life imprisonment, or imprisonment for more than three years, suspects do not receive this essential form of assistance for minor offences. Problems commonly arise in murder cases that also involve the minor crime of disposing of a dead body. In this kind of case, the suspect is often arrested, detained, and investigated for the minor crime first, without access to a defence lawyer.

In addition, once a criminal penalty has been finalised, legal aid cannot be used, even to seek a retrial. Hence, some inmates have resigned themselves to their death sentence even when they believe it is unjust, simply because they cannot afford to pay for the assistance of defence counsel.⁶⁴ In 2010, JFBA conducted its second survey on death row conditions by sending questionnaires to all 110 death row prisoners. The survey found that 24 inmates said they were not seeking a retrial, and six of them explained that this was because they could not afford to hire attorneys.⁶⁵ The minimum fair trial guarantees provided for under Article 14 of the ICCPR also apply to the appellate process, and the failure to provide legal aid for an appeal or retrial breaches the requirements of Articles 14(3)(d) and 14(5) of the ICCPR (See 1.5.5. below).

⁶³ Note 42 above at [7.10]

⁶⁴ Shinomiya Satoru, “Criminal Legal Aid in Japan: Past, Present, and Future”, paper presented at the conference on Criminal Legal Aid in the World, at China University of Politics and Law, Beijing, December 15–16, 2012, pp.1–16

⁶⁵ http://www.nichibenren.or.jp/library/ja/jfba_info/publication/data/shikei_syoguu_enquete_a2.pdf

More generally, the quality of capital defence in Japan leaves much to be desired, not only because the rules of criminal procedure confer many advantages on law enforcement officials, but also because the systems for training defence lawyers remain rudimentary, and because the culture of defence lawyering in Japan sometimes discourages aggressive advocacy of the defendant's interests. There have been some improvements in defence lawyering since the advent of Japan's lay judge system in 2009, but there remains much room for improvement.⁶⁶

The Right of Appeal

The Right of Appeal is guaranteed under Article 14(5) of the ICCPR:

Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

Safeguard six adopted by the UN Economic and Social Council in 1984, states: "Anyone sentenced to death shall have the right to appeal to a court of higher jurisdiction, and steps should be taken to ensure that such appeals shall become mandatory."

The importance of a *mandatory* right of appeal was confirmed by the UN Economic and Social Council in its resolution 1989/64⁶⁷. Furthermore, in resolution 2005/59, the UN Commission on Human Rights urged all states that still maintain the death penalty "[t]o ensure that all legal proceedings, including those before special tribunals or jurisdictions, and particularly those related to capital offences, conform to the minimum procedural guarantees contained in Article 14 of the ICCPR."⁶⁸

Japanese law and practice: no system of mandatory appeal

Appeal to a higher court against a death sentence is not mandatory in Japan, despite repeated recommendations by the Committee against Torture⁶⁹ and the Human Rights Committee⁷⁰. The government of Japan insists that a mandatory appeal system is unnecessary because most defendants do exercise their right to appeal. But the numbers are troubling. Of the first 15 death sentences imposed by lay judge panels in Japan, three (20 per cent) became finalised after defendants withdrew their appeals. Moreover, persons sentenced to death in Japan who withdraw their appeals tend to be executed more quickly than non-volunteers (these inmates seldom file requests for retrial or pardon either). As the graph below shows, more than 30 per cent of the death sentences carried out in Japan between 1993 and 2012 were never reviewed by the Supreme Court. By comparison, only 11 percent of death-sentenced persons who have been executed in the United States hastened their own execution by abandoning their appeals.⁷¹

⁶⁶ David T. Johnson, "Keiji Bengoshi to Saibanin Seido: Henkaku no Naka no Toso" [War in a Season of Slow Revolution: Defense Lawyers and Japan's Lay Judge System], *Sekai*, No. 819 (July 2011), pp. 266-275

⁶⁷ Note 7 above at paragraph 1(b)

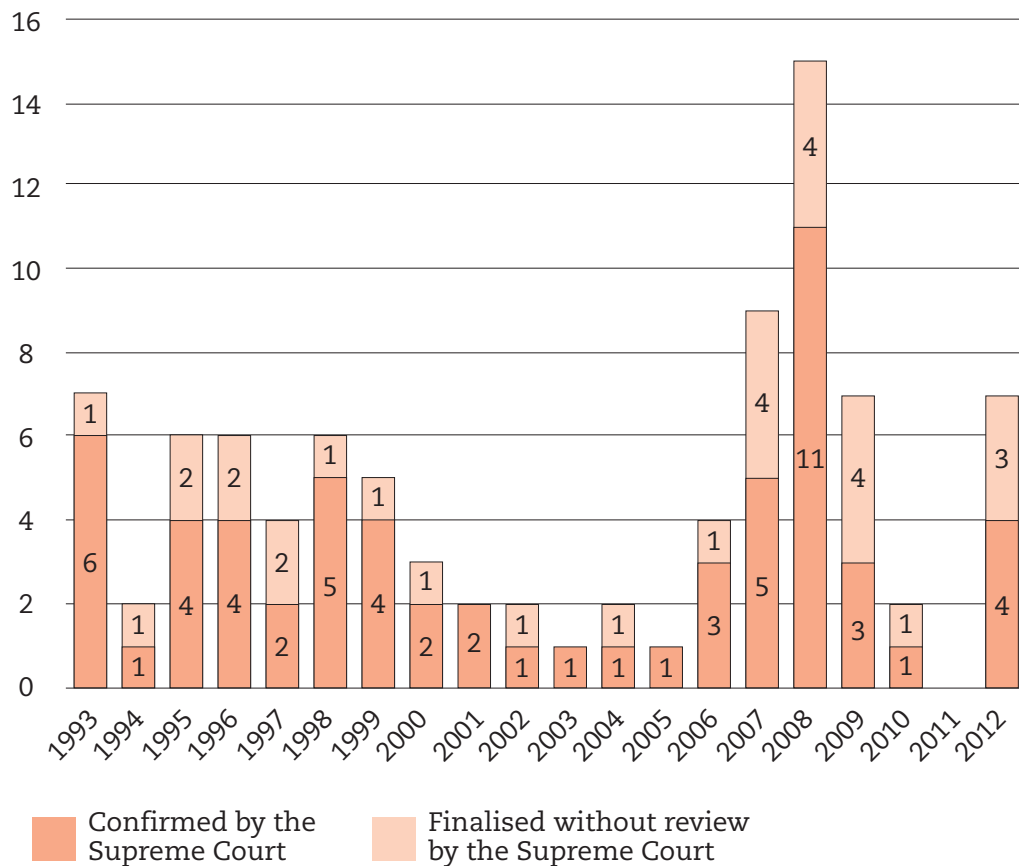
⁶⁸ See also *Nicholas Henry v. Jamaica*, paragraph 8.4., CCPR/C/64/D/610/1995, 21 October 1998

⁶⁹ paragraph 20, CAT/C/JPN/CO/1, 3 August 2007

⁷⁰ paragraph 17, CCPR/C/JPN/CO/5, 30 October 2008

⁷¹ Meredith Martin Roundtree, "I'll Make Them Shoot Me": Accounts of Death Row Prisoners Advocating for Execution", *Law & Society Review*, Vol.46, No.3 (2012), pp.589-622

More inmates executed without review by Japan's Supreme Court



On the other hand, appeals by public prosecutors against not-guilty verdicts and non-capital sentences are permitted in Japan. In the case of Masaru Okunishi, the defendant was convicted and sentenced to death on appeal in 1969, five years after he was acquitted in his original trial (the conviction was based largely on dubious testimony about bite marks on a bottle stopper and Okunishi's dental structure). In a more recent example, prosecutors appealed against the acquittal of Masahiro Shirahama by the Kagoshima District Court in a capital trial in 2010, but their appeal was dismissed when the defendant died before the appeal proceedings started.⁷²

⁷² David T. Johnson, "Capital Punishment without Capital Trials in Japan's Lay Judge System", *Asia Pacific Journal*, Vol.8, Issue 52 (December 27, 2010), Available at http://www.japanfocus.org/-David_T_Johnson/3461.

Conclusion and recommendations

As a signatory to the ICCPR, Japan is under an obligation to submit periodic reports to the Human Rights Committee, to respond to concerns raised by the UN Human Rights Council (formerly the Commission), and to take whatever measures are necessary to bring its domestic law into conformity with its international treaty obligations. It is clear from this survey of Japanese law and practice that Japan has repeatedly failed to respond to the concerns previously raised by the HRC regarding the use of the death penalty. The comments of the HRC on Japan's fourth periodic report almost 15 years ago (in 1998)⁷³ are still very much relevant today. At that time, the HRC highlighted its profound concern about conditions of detention and treatment on death row, the lack of procedural guarantees concerning pre-trial detention, the high number of capital convictions based on confessions, and the limited recourse to *habeus corpus*. The concerns identified by the HRC in 1998 have still not been addressed in Japan as successive governments have failed to reform outdated death penalty laws and practices that clearly fail to meet the minimum standards as reflected in the Safeguards. These Safeguards provide obligatory minimum legal standards that must be applied in all countries still intent on imposing capital punishment pending abolition – the ultimate goal under Article 6(6) of the ICCPR.

In 2007, the UN Committee against Torture expressed grave concern “at the large number of convictions in criminal trials based on confessions, in particular in light of the lack of effective judicial control over the use of pre-trial detention and the disproportionately high number of convictions over acquittals”. It further expressed concern about “the lack of means for verifying the proper conduct of interrogations of detainees while in police custody, in particular the absence of strict time limits for the duration of interrogations and the fact that it is not mandatory to have defence counsel present during all interrogations.”

The Committee recommended that interrogation of detainees be “systematically monitored” through video or other recordings. It further recommended that detainees have access to a lawyer during interrogation.⁷⁴ These recommendations were echoed in 2008 by the UN Human Rights Committee, which added that the state should “acknowledge that the role of the police during criminal investigations is to collect evidence for the trial rather than establishing the truth, ensure that silence by suspects is not considered inculpatory, and encourage courts to rely on modern scientific evidence rather than on confessions made during police interrogations”.⁷⁵

Both the Human Rights Committee and the Committee against Torture also expressed concerns that the *daiyo kangoku* system violates fair trial standards – undermining the presumption of innocence, the right to remain silent, the right of defence, the right not to be compelled to incriminate oneself or confess guilt, and the right not to be subjected to torture or other ill-treatment.

Until these concerns are addressed, Japan will continue to violate its treaty obligations as well as general binding principles of international law. The recommendations and decisions of international

⁷³ Concluding Observations of the Human Rights Committee, Japan, CCPR/C/79/Add.102, 19 November 1998

⁷⁴ Note 73 above

⁷⁵ Concluding Observations of the Human Rights Committee: Japan, UN Doc. CCPR/C/JPN/CO/5, 18 December 2008, at paragraph 19

monitoring bodies with regard to the death penalty in Japan need to be implemented to ensure compliance with the Safeguards in each and every case.

Japan's judiciary can play a crucial role in ensuring that domestic law is interpreted and construed consistently with human rights norms restricting the death penalty pending abolition. The wave of recent case law from national courts around the world – which have found, for example, that mercy procedures are judicially reviewable – reveals an increasing interdependence between different legal systems. It also reveals a willingness by the judiciary to invalidate laws that do not comply with contemporary international norms and to ensure scrupulous respect for fair trials and due process guarantees in capital cases.

In the years leading up to the start of Japan's lay judge system in 2009, more than 500 “mock trials” were held. The main objective of those test trials was to anticipate the problems that might occur in the new trial system and to prepare for the complexities that inevitably accompany fundamental reform of this kind. But despite the scale of this preparation, not a single mock trial was held in which prosecutors sought a sentence of death and a mock tribunal was asked to make a life-or-death decision. This absence illustrates the Japanese tendency to assume death is not a fundamentally different form of punishment – and one that therefore requires special preparations, procedures, and protections. Part 1 of this report has shown that in many respects Japan's death penalty policy and practice fail to conform with its legal obligations under the ICCPR. From the overly broad scope of Japan's capital statutes, to the de-facto death of executive clemency, to the ill-treatment of inmates on death row and the possibility of execution without appeal, to problems of access to capable defence counsel and to potentially mitigating or exonerating evidence possessed by prosecutors, Japan's system of capital punishment is seriously flawed.⁷⁶ There is a large gap between what Japan is required to do under the ICCPR and the Safeguards set up to protect those facing the death penalty and what its domestic law requires for the administration of capital punishment. Until this gap is either eliminated or significantly reduced in size, Japan will remain an international outlier with respect to “the gravest real-life problem in the law.”⁷⁷

Recommendations:

To achieve a measure of conformity with binding international norms and the obligations of Japan under the ICCPR, the following reforms to the criminal and constitutional laws that regulate Japan's death penalty need to be implemented:

- Eliminate the death penalty from crimes which do not involve deliberate intent to kill
- Abolish the system of *daiyo kangoku* and replace it with a system that provides effective judicial control over the use of pre-trial detention, the length of which needs to be dramatically reduced
- Strengthen procedural guarantees in the trial and appellate processes

⁷⁶ For additional analysis of shortcomings in Japanese capital punishment, see David T. Johnson, “Progress and Problems in Japanese Capital Punishment”, in Roger Hood and Surya Deva, editors, *Confronting Capital Punishment in Asia: Human Rights, Politics, Public Opinion and Practices* (Oxford University Press, 2013, forthcoming)

⁷⁷ Scott Turow, *Ultimate Punishment: A Lawyer's Reflections on Dealing with the Death Penalty* (New York: Farrar, Straus and Giroux, 2003), p.11

- Provide all persons sentenced to death with an effective and mandatory right of appeal, including the provision of legal assistance at all stages of the appeals process, including retrial phases
- Provide full access to a fair and functioning process of executive mercy
- Stay all executions while a retrial or an application for clemency is pending
- Improve conditions on death row and the treatment of death row prisoners

Until such initiatives are taken, *and* as long as the law and practice on the death penalty does not adequately protect the rights of those facing the death penalty, a moratorium on all executions should be established to prevent further breaches of international law by Japan.



PART TWO:

Public attitudes to the death
penalty in Japan

Mai Sato

Introduction

Part Two of this report shows that existing survey evidence about Japanese public attitudes to the death penalty cannot be taken at face value. This conclusion is based on two main findings. First, we assess the quality of Japanese government surveys of public opinion toward capital punishment and find them to be seriously flawed. Second, we provide additional survey evidence concerning Japanese public attitudes in order to contextualise the gaps identified in the government survey – and to question the conclusions that have been drawn from it.

The Japanese government survey

The government survey has been conducted since 1956, approximately every five years. The most recent government survey, conducted in 2009, found that 86% of respondents favoured retention (Cabinet Office, 2009). In Japan, the results of the government survey have been taken as long-standing proof of public support, and have provided the reason put forward by the government for not abolishing the death penalty in Japan.

Question wording

The government survey has been criticised for phrasing questions in a way that is leading, and likely to increase support for the death penalty (Kikuta, 2004; Japan Federation of Bar Associations, 2002).

2009 government survey questions:

Which of the following opinions concerning the death penalty do you agree with?

1. The death penalty should be abolished *under all circumstances*
2. The death penalty is *unavoidable in some cases*
3. Don't know/difficult to say
(emphasis added)

The second option “the death penalty is unavoidable in some cases” is more likely to gain votes than the first option “death penalty should be abolished under all circumstances”. This is because the first option is designed to measure a narrow definition of abolitionist by using the term “under all circumstances” and the second option to measure a wide definition of retentionist by using the term “unavoidable in some cases”. In other words, abolitionists are defined as those who are strongly committed to abolition, but retentionists include a wider range of positions from very committed retentionists to reluctant retentionists.

This point is further strengthened by the fact that those who support future abolition are categorised as retentionist under the government survey (Nagai, 2005, para. 3). Using the figures from the 2009

survey, out of the 86% who chose “the death penalty is unavoidable in some cases”, 34% also approved the possibility of future abolition. In this sense, it is possible to argue that retentionists – who favour retention without any possibility of future abolition – only account for 56% of the total respondents. This is a large difference from the 86% of “retentionists” cited by the government report (Cabinet Office, 2009).

In addition, the question which measures attitudes towards future abolition also uses unclear language. It asks: “Do you think the death penalty should not be abolished in the future, or should it be abolished if circumstances change in the future?” It is not clear what is meant by circumstantial change. A third of the respondents who chose “abolition when circumstances change” in the 2009 survey could be referring to a number of situations, such as the reduction in crime rates, introduction of life imprisonment without parole, or the revelation of wrongful executions.

These questions, which attempt to measure public attitudes to the death penalty, could potentially be influencing the outcome. If questions were phrased in a more objective manner, the results may show a lower support towards the death penalty, which is examined in the sections to follow.

Other supplementary questions

Past government surveys have consistently asked the Japanese public about their perception of the deterrent effect of the death penalty (Cabinet Office, 1956, 1967, 1975, 1980, 1989, 1994, 1999, 2004 & 2009). In the 2009 survey, there were two questions that dealt with this issue. One question asked all respondents if they thought serious crimes would increase if the death penalty was abolished, to which 62 % answered that crimes would increase with only 10% selecting crimes would decrease (Cabinet Office, 2009). While there is no doubt that the majority of respondents consider that the death penalty reduces serious crimes, the quality of this question would have been improved by adding the option “serious crimes would stay the same”. The other question on deterrence is a sub-question to those who are categorised as retentionist⁷⁸ where they are offered various reasons for retaining the death penalty. In this question, “abolishing the death penalty will increase serious crimes” was again one of the popular options chosen by respondents (Cabinet Office, 2009).

These results show that the majority of respondents believe the death penalty deters serious crimes. This is not borne out by academic social science research. Various studies have found both negative and positive correlations between use of the death penalty, in particular the probability of execution, and the rate of murder. There is an increasing academic consensus that proving or disproving deterrence is virtually impossible (for example, Nagin and Pepper, 2012; Dezhbakhsh & Shepherd, 2006; Fagan, 2006; Hood & Hoyle, 2008, pp. 317-333). In the case of Japan, the existence of executions had no positive effect on the murder rate during the moratorium between 1990 and 1994. Indeed the number of recorded murders fell during this period and then went up again when executions resumed in 1994 (Dando, 2000).

Furthermore, the government survey does nothing to inform the public that their perception that the death penalty acts as a deterrent is at best inaccurate and academically contested. The question has

⁷⁸ “Retentionists” here refer to those who selected “the death penalty is unavoidable in some cases” in the government survey.

been used for over 50 years in all past sweeps of government surveys, but nothing has been done to address the public belief in deterrence. This is not to say that the government survey should not ask members of the public whether they believe that executions have a stronger deterrent effect on the murder rate than any alternative punishment. It is a perfectly sensible question to ask if the purpose is to ask about their perception – rather than their informed judgment. However, the public responses to the government survey have been used as evidence to determine policy – in this case to justify retention. In this regard, providing policy-driving-respondents with accurate information or making efforts to correct their misconception is crucial.

Aside from the issue of the perception of deterrence, the government survey asks respondents about their reasons for preferring retention or abolition, with questions whose wording could also be improved. In the 2009 survey, retentionists and abolitionists were provided with a multiple choice of options for supporting their position.

Reasons for abolition and retention

Options provided for retentionists⁷⁹

- Those who committed serious crimes should compensate by giving their lives
- The death penalty is necessary when considering the feelings of victims and victims' families
- Abolishing the death penalty will increase serious crimes
- Those who have committed serious crimes may repeat similar crimes if kept alive

Options provided for abolitionists⁸⁰

- Killing a human being is inhumane and barbaric, even if it is a legal punishment
- Even the state cannot justify killing a human being
- Miscarriages of justice cannot be reversed after execution takes place
- Even those who commit serious crimes have the potential to be rehabilitated
- Serious crimes will not increase even if the death penalty is abolished
- Offenders should be kept alive to pay for their crimes

The options for those who agreed that the death penalty is 'unavoidable in some cases' – the retentionists – are all reasons that "positively" choose the death penalty over other sentences. There are no options that allow respondents to express their "reluctant" choice of the death penalty: such as "there is no life imprisonment without parole" – implying that the death penalty is accepted due to the lack of a preferred alternative sentence; or "the death penalty is the most severe punishment under the current Japanese criminal law" – meaning that what is important is for serious offenders to receive the most severe punishment, rather than necessarily the death penalty itself. If these passive options were to be presented, the results may show a substantial number of retentionists supporting the death penalty by acceptance and not by preference. In sum, while the government survey provides a wide definition of retentionist which includes enthusiastic retentionists to reluctant retentionists, the reasons offered to these 'retentionists' to explain why they support the death penalty are one sided, because they focus on committed retentionists.

⁷⁹ "Retentionists" here refer to those who selected "death penalty is unavoidable in some cases" in the government survey

⁸⁰ "Abolitionists" here refer to those who selected "death penalty should be abolished without conditions" in the government survey

Sample bias

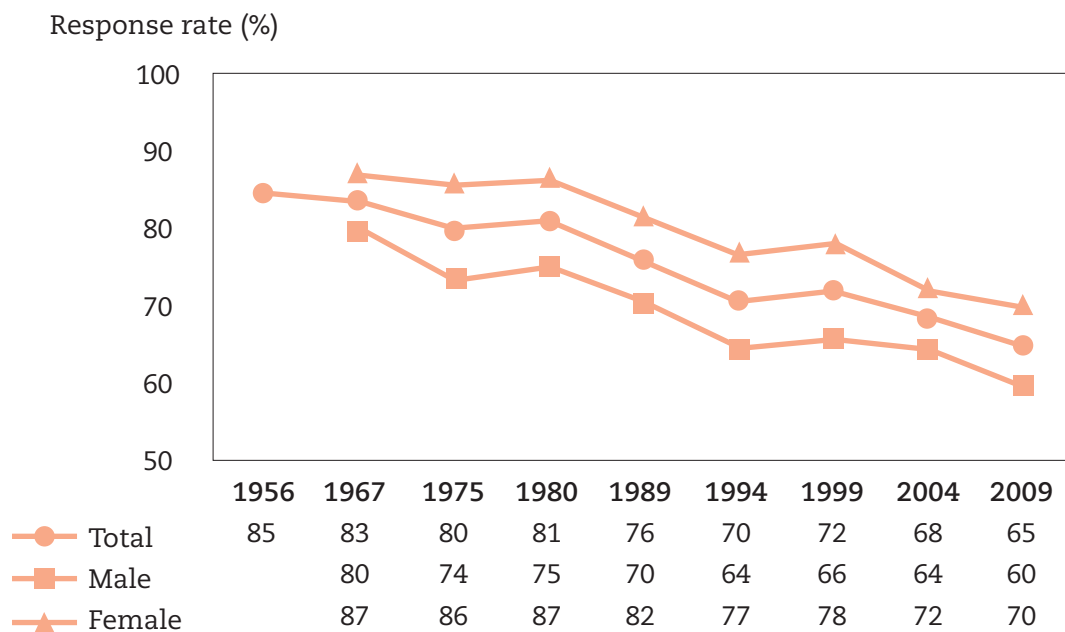
All nine past government surveys listed have been consistent in their sampling method. They are all nationwide surveys, using two-stage stratified random sampling (Cabinet Office, 1956, 1967, 1975, 1980, 1989, 1994, 1999, 2004, & 2009). Each sample is comprised of Japanese men and women aged 20 and over. In addition, either Chuo Chosasha or Shin Joho Center has been contracted for all past sweeps.

Sampling method alone, however, does not guarantee that the resulting sample is representative of the population, if the response rate is not sufficiently high (Yamauchi, 2004; Yasuda & Inaba, 2008). Analyses conducted on a biased sample will not produce results which are reliable. Therefore, while the government surveys' sampling method is sound, response rates also need to be examined to ensure that the resulting sample is representative of the Japanese public.

Figure 1 and Figure 2 show the changes in response rates for the past nine sweeps.

Figure 1 shows the overall shift in response rates and shifts according to the gender of the respondents. It shows that the response rate – which reached 85% in 1956 – has been going down, falling to 65% in the 2009 government survey. Both male and female response rates show a downward trend, but at any particular time, men are less likely to respond than women, with response rates that are over 10 percentage points lower.

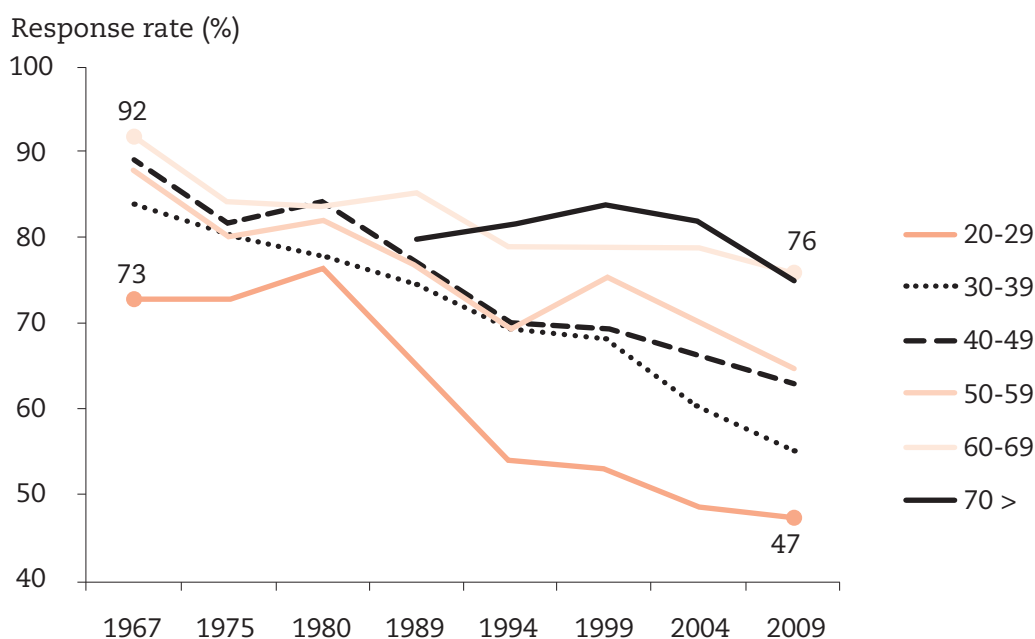
Figure 1: Response rate by gender



Note: Data for male and female not available for 1956 government survey

Figure 2, which shows the changes in response rate by age group, identifies the same downward trend overall, but with important difference between age groups. Firstly, response rates are consistently higher for the older generation, with age groups over 60 being the highest and the 20-29 age group being the lowest. The drop in response rates for the age group 20-29 is largest: 73% in the 1967 government survey, falling 26 percentage points to 47% - under half - in the latest 2009 government survey. Secondly, the gap between response rates is also widening between the older and the younger age group. For example, for the 2009 government survey, response rate was 76% for the 60-69 age group compared with 47% for the 20-29 age group.

Figure 2: Response rate by age



Note: 1) Data not available for 1956 government survey.
 2) Line indicating "60-69" for the 1967, 1975, and 1980 government surveys include those who were 70 and over.

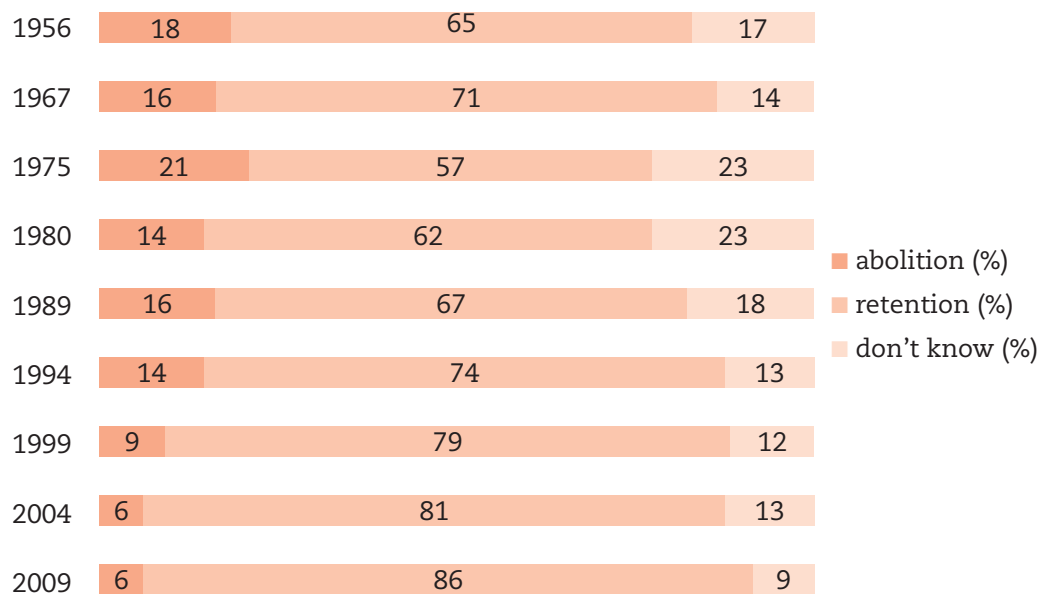
The declining response rate in face-to-face surveys is not unique to government surveys and may be inevitable to a certain extent. The real problem with the government survey is not the declining response rates per se, but the lack of any correction to take account of the increasingly disproportionate representation of certain groups. In particular, the aged are over-represented and male and younger respondents are under-represented. Over half (53%) of men in their 20s excluded themselves from the 2009 survey. It is for this reason that results published from the government survey become questionable.

“Increasing majority support?”

According to the 2009 survey, the vast majority (86%) of survey “respondents” support the death penalty. These results have been interpreted by the Japanese government, politicians, and the courts as the voice of the Japanese “public”. To say that an XX% of “respondents” support the death penalty and XX% of the “Japanese public” support the death penalty have different meanings. The former is a descriptive analysis of people who answered the survey, and the latter is an inferential analysis about the Japanese public based on the respondents’ answers.

Large-scale surveys conducted by the government are normally done to find out about the “Japanese public”, and the government survey is no exception. The problem with the current analyses done on the government survey is that the bias present in the sample is not addressed and corrected to make inferences about the general public. Figure 3 summarises the past government surveys on death penalty attitudes, using officially reported figures. The chart clearly shows a constant increase in retentionists since the 1975 survey. The rise in retentionists appears to be solid especially taking into consideration that the same question has been used since the 1994 survey. The following section, however, argues that when taking into consideration the response rates, what seems to be an unshakable large majority in favour of retention becomes less evident and convincing.

Figure 3: Death penalty attitudes

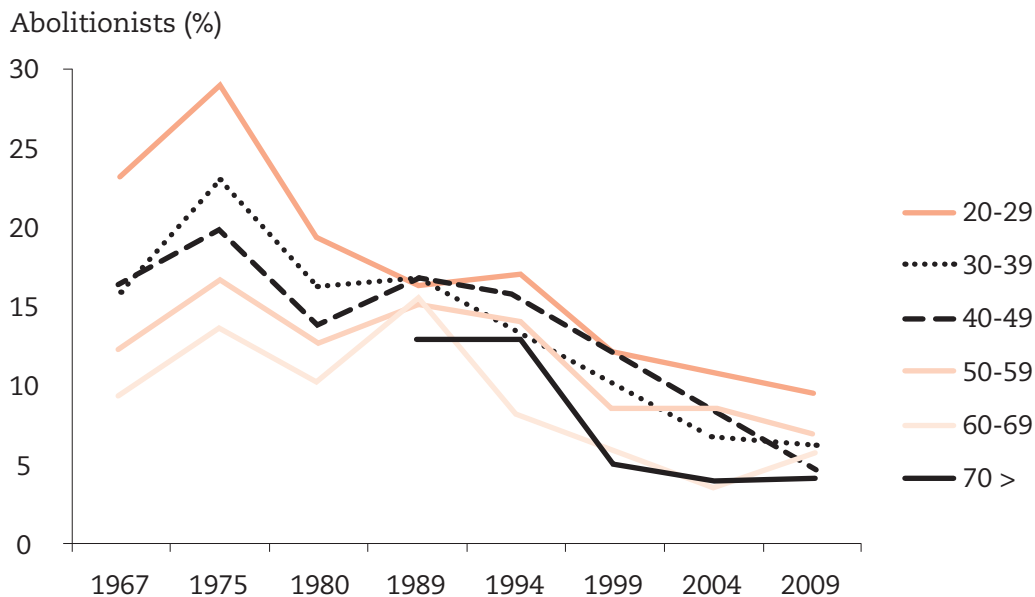


Note: 1) Question used for 1994, 1999, and 2004, and 2009 government surveys: “Which of the following opinions concerning the death penalty do you approve of?” Options were “the death penalty should be abolished under all circumstances”, “the death penalty is unavoidable in some cases”, and “don’t know/difficult to say.”

2) Question use for 1956, 1967, 1975, 1980, and 1989 government surveys: “Considering the current situation in Japan, do you agree with the view that the death penalty should be abolished under any circumstances?” Options were “agree”, “disagree” and “I don’t know”.

First, Figure 2 identified that younger respondents, especially the age group 20-29, had the lowest response rates in the government survey. Secondly, when looking at death penalty attitudes, it shows that the same age group comprised the largest proportion of abolitionists (Figure 4). This means that the group which is least represented has the highest proportion of abolitionists.

Figure 4: Abolitionists by age

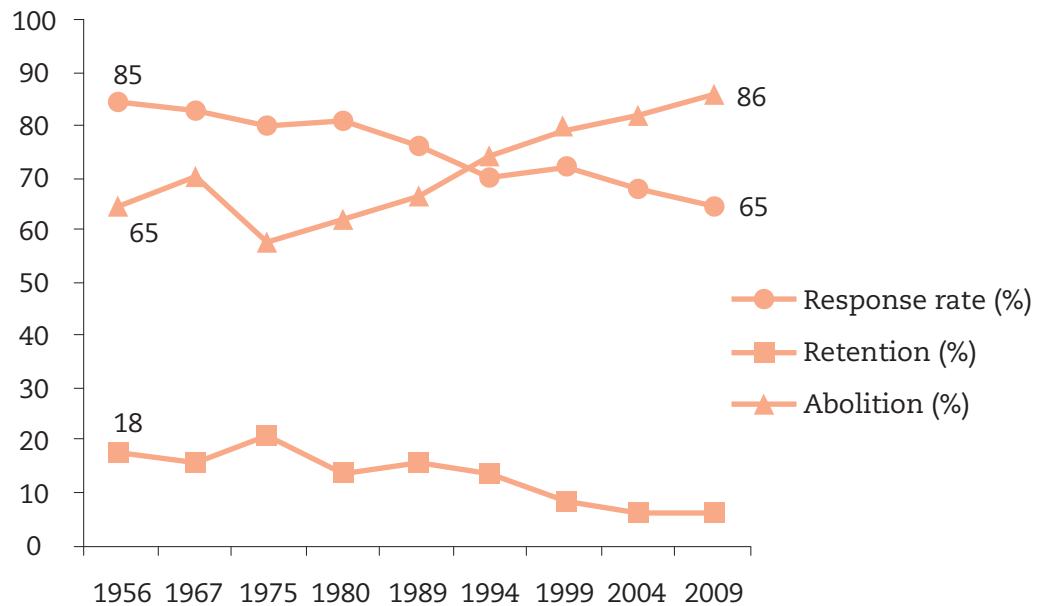


Note: 1) Data not available for 1956 government survey.
 2) Line indicating “60-69” for the 1967, 1975, and 1980 government surveys include those who were 70 and over.
 3) See note 1) and 2) in Figure 8 for the definition of “abolitionists”.

What follows from this finding is that the rising proportion of retentionists in the government survey may not be reflected in the views of the Japanese public. The lack of correction made on non-response could be linked to what appears to be the increase in majority support for the death penalty. Figure 5 shows that as response rates go down, so do proportions of abolitionists and the reverse trend for retentionists.

In order to examine the effect of non-response and the under-representation of certain groups on the overwhelming support towards the death penalty, the following formula was used to provide a confidence interval for proportions of retentionists. This was done by applying corrections to the resulting sample, based on the non-response rate calculated from the theoretical sample.⁸¹

⁸¹ It was not possible to make estimations for the population due to the unavailability of the micro-data. If the data had been available, it would have been possible to correct the estimates using weighting techniques.

Figure 5: Response rate and death penalty attitudes

The confidence interval provides two proportions. The upper interval provides the proportion of retentionists if all non-respondents were retentionists. The lower interval provides the proportion of retentionists if all non-respondents were *not* retentionists. The true proportion of retentionists should lie between these values, based on the theoretical sample. In other words, the difference between the two intervals will expose the accuracy of the proportion of retentionists reported by the government survey: the wider the interval the less accurate the proportion of retentionists reported by the government survey, and vice versa.

$$LL = \left[W_1 \left(P - 2\sqrt{\frac{P^*Q}{n}} \right) \right] + W_2(0), \quad UL = \left[W_1 \left(P + 2\sqrt{\frac{P^*Q}{n}} \right) \right] + W_2(1)$$

Where:

LL: Lower limit

UL: Upper limit

n: Resulting sample

*W*₁: Response rate (*n*/theoretical sample*)

*W*₂: Non-response rate (number of non-response/theoretical sample)

P: Proportion of retentionists (number of retentionists/*n*)

Q: Proportion of non-retentionists (1-*P*)

Note: * "theoretical sample" = *n* + non-response

Table 1 displays the result. *P* is the proportion of retentionists reported by the government survey. *L* and *U* indicate the intervals of lowest and highest possible proportions when taking into account the non-responses. In the 2009 survey, 86% of respondents were reported to be retentionists. However, taking into account non-responses, the proportion of retentionists could range between 54% and

92%. This is the largest range (37 percentage points) in comparison to other sweeps, which is due to the lowest response rate (65%) measured by the 2009 survey.

In addition, it was established in the 2009 survey that males in the 20-29 age group were the most under-represented group in the sample, but also the group with most abolitionists. Table 1 (2009 survey by gender and age) shows this group is also the one with the largest interval (61 percentage points), with the true value of retentionists that could range from 34% to 95%.

Table 1: Confidence intervals for retentionists

By year

Year	W_1	P	LL	UL	UL-LL
1967	83%	71%	57%	77%	20
1975	80%	57%	45%	66%	21
1980	81%	62%	49%	71%	22
1989	76%	67%	49%	76%	27
1994	70%	74%	51%	83%	32
1999	72%	79%	56%	86%	30
2004	68%	81%	54%	88%	34
2009	65%	86%	54%	92%	38

Note: 1) Necessary information not available for the 1956 government survey to calculate confidence intervals.

2) *LL*: Lower limit, *UL*: Upper limit, W_1 : Response rate (n /theoretical sample), and *P*: Proportion of retentionists (number of retentionists/ n).

2009 government survey by gender and age

Male	W_1	P	LL	UL	UL-LL	Female	W_1	P	LL	UL	UL-LL
20-29	47%	81%	34%	95%	61	20-29	48%	84%	36%	96%	60
30-39	47%	90%	40%	98%	58	30-39	63%	87%	51%	95%	44
40-49	52%	90%	45%	97%	52	40-49	73%	87%	60%	94%	34
50-59	61%	86%	49%	95%	46	50-59	68%	86%	55%	94%	39
60-69	71%	87%	59%	94%	35	60-69	81%	86%	66%	92%	26
70+	74%	84%	58%	92%	34	70+	76%	80%	57%	89%	32

Response rates do matter. They matter because where response rates are low, they result in a wide confidence interval which reduces the reliability of the officially reported proportion of retentionists in the government surveys. Any analyses produced from the government survey should include the correction of the bias present in their sample, or at least the bias to be acknowledged, before presenting the results.

Access to data

Micro-data from the government surveys are not made public, making secondary analysis impossible. Access to data is restricted to aggregated descriptive statistics in the form of government reports.⁸² Taking into consideration the existence of two data archives in Japan – Social Science Japan Data Archive and Japanese Data Archive – there is no reason why the Japanese government cannot use these to make the micro-data of government surveys public. Transparency is important, especially if the government wishes to continue using the result as evidence for legitimising retention.

Findings from three surveys

Methodology

Between 2008 and 2010, the author designed and carried out three separate empirical surveys in Japan. The surveys were designed to measure Japanese public attitudes to the death penalty, using an alternative question to that of the government survey – and hopefully a less biased one – to offer counter-evidence, as well as to evaluate the quality of the government survey question empirically.

The fieldwork for the first study was a large-scale online panel survey (N=20,769) carried out by a survey company and administered to their panel of respondents⁸³. The term “online panel survey” is used to refer to surveys conducted online and administered to a “panel of respondents registered with a survey company”, rather than an online survey that could be administered to anyone depending on the sampling framework. Users of online panel surveys have expanded in the last few years from private companies mainly conducting market research, to government institutions and academic institutions conducting research (Honda, 2006, p. 32). The panel – the sampling framework for the survey – was made up of 681,991 people at the time of the survey.⁸⁴

The second study used an experimental design that involved drawing two sub-samples from the first survey.⁸⁵ The sub-samples were designed to have equal numbers of retentionists, abolitionists and those who chose the “cannot say” option in the first survey. Only one of the sub-samples was given information about the death penalty. Both sub-samples were then asked to complete the same questionnaire to compare the impact of information. The survey included seven information items, each followed by a question measuring how informed they already were in relation to the item:

- International movement towards abolition
- Relationship between the death penalty and crime rates

⁸² Comparison can be made with the UK where, for example, the micro-data from the British Crime survey carried out by the Home Office are made accessible to academic researchers through the UK Data Archive

⁸³ Intage administered the preliminary survey (<http://www.intage.co.jp/net/>)

⁸⁴ Due to the low representation of elderly people in the survey company's panel, a request was made to obtain a sample of male and female aged between 20 and 49. The resulting sample (N=20,769) was randomly drawn from the panel, stratified by sex and age. The distribution of sex and age from the resulting sample was compared with the population estimates from the Japanese population survey published by the Ministry of Internal Affairs and Communications. The distribution was very similar but calibration weights were applied nonetheless to the resulting sample to minimise sampling bias. All analyses presented have been conducted using weighted data

⁸⁵ Subjects were randomly assigned to the experimental and control groups (N=542 in each), using a randomised block design. The sample from the first survey was split into blocks according to two independent variables (age and sex) and one dependent variable (attitudes to the death penalty) and then randomly allocated *within blocks* to the experimental and control groups. This design maximised comparability between the two groups, in terms not only of sex and age, but also in their attitudes to the death penalty, prior to the experimental intervention

- Possibility of miscarriages of justice in death penalty cases
- Execution process
- Information disclosure concerning the death penalty
- Trends in murder rates
- Possibility of parole for life prisoners

The third study used both quantitative and qualitative methods, referred to as deliberative consultation in this chapter, to measure the role of deliberation in support for retention.⁸⁶ Participants were assembled to learn about the Japanese death penalty system, discuss and exchange opinions on the issue, answer pre- and post-consultation surveys, and take part in a follow-up interview. The study was also designed to measure how people understand and interpret new information.

The sample consisted of 50 Japanese participants, 25 males and 25 females, aged between 20 and 58 living in the Tokyo metropolitan area.⁸⁷ These participants were drawn from a panel of people registered with a Tokyo-based market research company (different from the company used for the first and second surveys).⁸⁸ The resulting sample was a stratified random sample drawn from the panel based on their sex, age, and attitudes to the death penalty. The selection of participants by death penalty attitudes was roughly based on the results from the preliminary survey, where retentionists comprised the majority and abolitionists the minority. This uneven distribution of attitudes was used to create a “mini Japanese society”, rather than create what one may find in a “debating contest” with equal numbers of retentionists and abolitionists. The resulting sample was divided into four discussion groups. At least two abolitionists were allocated to each discussion group to promote a lively discussion amongst participants.

Each group discussion consisted of 12 or 13 participants in a small classroom led by professional moderators.⁸⁹ Participants took part in two discussion sessions, one in the morning and one in the afternoon, with the expert session in between. The expert session was conducted in the lecture hall with all participants in one room. The two guest speakers were invited to give a short speech and debate their positions on the death penalty. The guest speakers were: a journalist (Mr Seiji Fujii) who was a retentionist and a lawyer (Mr Makoto Iwai) who was an abolitionist. There was also time allocated for participants to engage in a dialogue with the experts. They did this by asking them questions which were prepared during group discussions.

Findings from the first survey

A different question from that in the government survey was used (see Figure 6). The first survey offers five positions, dividing the retentionist and abolitionist options into two levels of commitment: “should *definitely* be kept [or abolished]” and “should *probably* be kept [or abolished]”.

⁸⁶ The deliberative consultation was organised by four researchers. It was led by Dr Mai Sato, and Dr Takeshi Honjo from Hitotsubashi University, Mr. Masato Kimura from Takachiho University and Ms Tomoko Maeshima from the Japanese Ministry of Justice

⁸⁷ The Tokyo metropolitan area (“Itto sanken”) refers to Tokyo, Kanagawa, Chiba and Saitama

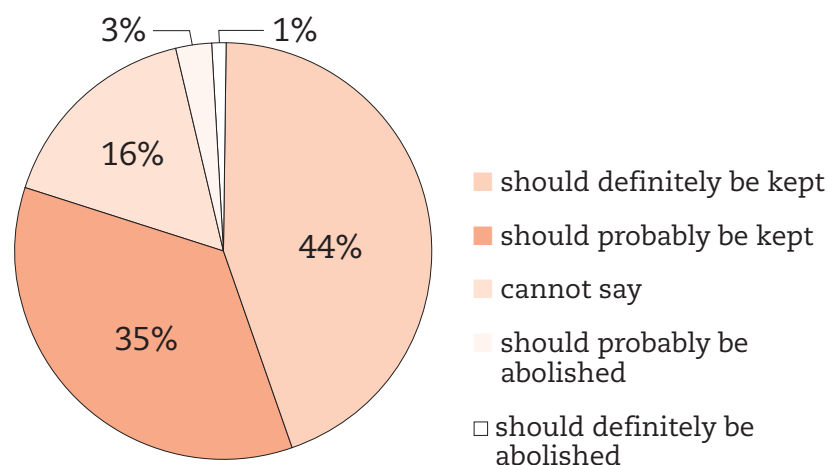
⁸⁸ The market research company was called IRC (<http://www.i-rc.co.jp/index.html>). The company holds approximately 75,000 people on its panel and updates its information twice a year

⁸⁹ Four moderators were hired from a market research company, NStyle (<http://www.nstyle.co.jp>)

The results from the 2009 government survey show that the vast majority of respondents (86%) are retentionists (“the death penalty is unavoidable in some cases”) with small proportions of respondents who are undecided (9%) or opposed to the death penalty (6%). On the face of it, these figures lead to the conclusion that the Japanese public is strongly in favour of the death penalty, with little dissent. Examining results from the preliminary survey, however, offered a less black-and-white picture of public attitudes.

Having two retentionist options, rather than one, yields a substantial proportion of respondents (35%) who are tentatively committed to retention. Less than half (44%) are determined to keep the death penalty. It is the groups of respondents who are either “unsure”, or who “do not really have an opinion” about the death penalty, which the preliminary survey successfully captures, and this is what differentiates it from the government survey. Respondents who selected options with a degree of uncertainty towards the death penalty – “should *probably* be kept”, “should *probably* be abolished” and “cannot say” – amounted to the majority (55%). This means that just over half of the Japanese public were “undecided” or “lukewarm” in their attitude towards the death penalty. This finding is consistent with those of Hamai (2007, 2008) who found that, in Japan, a majority of respondents (65%) had qualified views about the death penalty, and a minority of respondents (33%) strongly supported it.

Figure 6: Survey 1



Notes: 1) N=20,769.

2) The total percentage for the preliminary survey does not add up to 100% due to rounding.

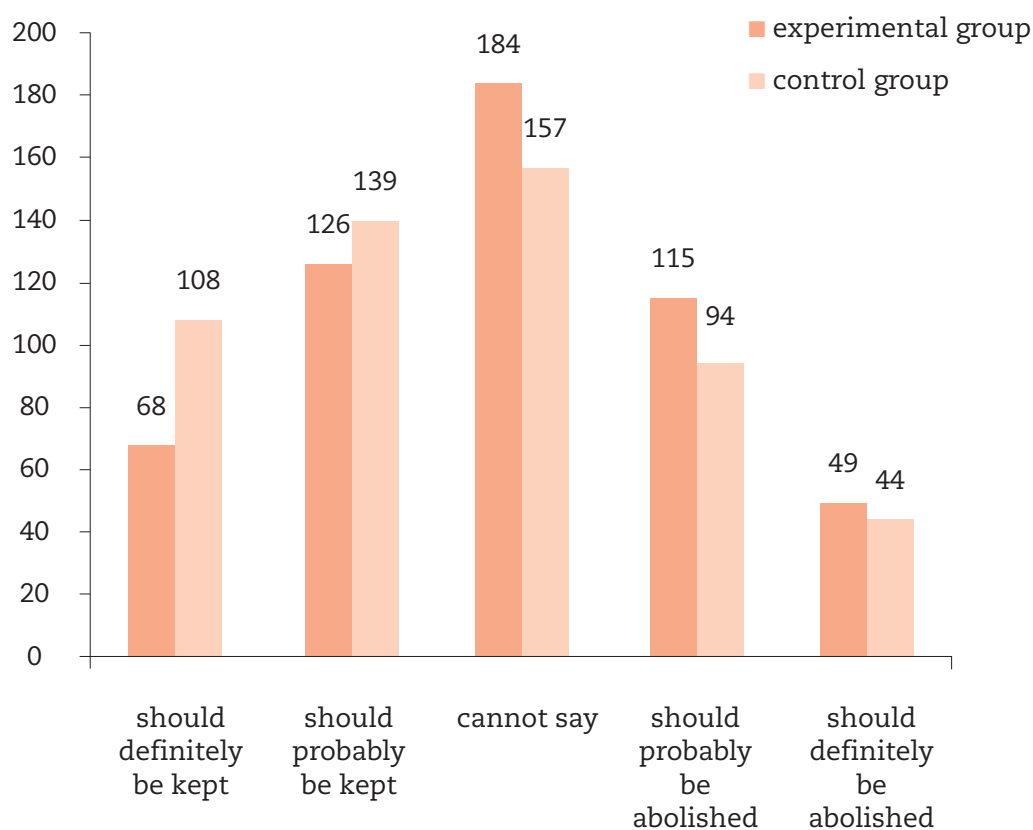
The first survey showed that the Japanese public is not uniformly supportive of the death penalty, and that many are undecided or unsure about their position. This was demonstrated by the fact that over half of the respondents (55%) were undecided or had qualified views on the topics. It could be argued that these “weakly-held views” show the death penalty to be an issue that people “know little about, do not think much about, and do not care about” (Unnever, Cullen & Roberts, 2005, p. 207). The range of death penalty positions demonstrated by the preliminary survey undermines the claim of “majority support” used by the Japanese government to justify retention.

While it is important to find out the proportion of those in favour or against the death penalty, and the degree of support for abolition, it is as important – if not more so – to look beyond “majority support” to highlight factors that *explain* patterns of death penalty attitudes. Using block-wise binary logistic regression, in order to predict which respondents would be definite retentionists, it was found that death penalty attitudes are explained by the wider social outlook, such as people who trust in people and institutions. In addition, what is of particular relevance to the Japanese case is knowledge-based attitudinal factors. The model found that those who held inaccurate views about murder rates – mostly thinking that they had significantly increased in recent years when they have not – were more likely to be definite retentionists. This prompts questions about whether the Japanese people hold other inaccurate knowledge, not only in general criminal justice matters, but concerning the death penalty, which was examined in the second survey.

Findings from the second survey

First, Figure 7 compares the distribution of each death penalty position for the two groups. Since respondents in the experimental and control groups had been selected from those in the first survey to comprise equal proportions of retentionists, abolitionists and those answering “cannot say”, any differences observed in death penalty attitudes after intervention are to be attributed to the provision of information.

Figure 7: The effect of information



- Notes: 1) Experimental group: n=542. Control group: n=542
 2) Figures indicate the number of respondents who selected each position

The experiment showed that the number and proportion of retentionists⁹⁰ in the experimental group ($n=194$, 36%) differed from the control group ($n=247$, 46%), with the experimental group showing less support for the death penalty. The proportion of abolitionists⁹¹ was correspondingly larger in the experimental group ($n=164$, 30%) in comparison to the control group ($n=138$, 25%). The remaining position – “cannot say” – was also higher in the experimental group ($n=184$, 34%) than the control group ($n=157$, 29%). The differences found in each death penalty position are the result of the provision of information being effective in reducing support for, and increasing opposition to, the death penalty. The higher level of uncertainty found in the experimental group – those who selected “cannot say” – could be the result of their increased knowledge, or because their misconceptions were challenged, leading them to doubt their initial position on the death penalty.

The largest difference in proportions between groups was found for definite retentionists (“should definitely be kept”) – and not in groups showing qualified views. The experimental group ($n=68$, 13%) showed lower levels of support for this position than the control group ($n=108$, 20%). This finding from the experimental survey indicates malleability in all levels of attitude, and points to the possibility of using exposure to information as a means of changing the views of even the most committed retentionists. These differences between the experimental group and the control group were highly statistically significant at $p<.01$ level, using the five-point scale question.⁹²

Second, the survey extends the critical analysis of the government survey by testing this question empirically within the structure of the experimental survey. The exact wording from the government survey question was used, and Figure 8 compares the responses of the two groups. The rationale behind asking the government survey question to both groups is to see if the differences in opinion between groups, observed in the five-point scale question which reflected the impact of information, are also reflected in the government survey. In other words, this tests whether the government survey question is sensitive to the differences in levels of commitment in death penalty attitudes. The proportion of retentionists under the government survey definition (“death penalty is unavoidable in some cases”) is identical (16%), and the proportion of abolitionists – those who believe the “death penalty should be abolished under all circumstances” – is similar (experimental group: 30%, control group: 26%). A Chi-Square test confirmed that there was no difference between groups.⁹³

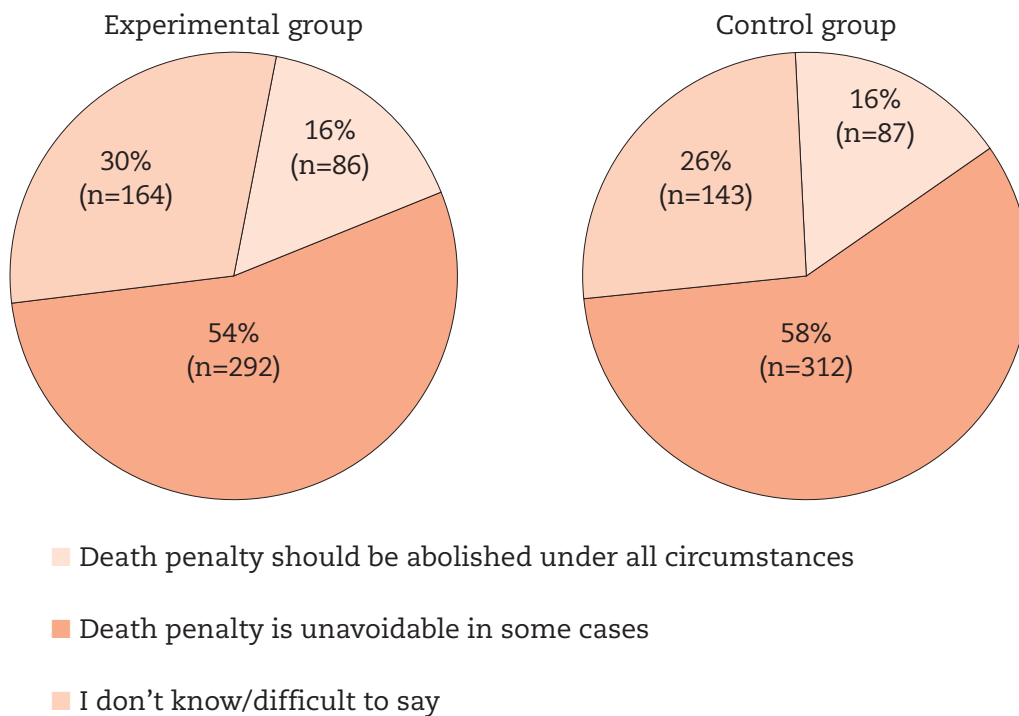
⁹⁰ “Retentionists” refers to respondents who selected “should definitely be kept” and “should probably be kept”

⁹¹ “Abolitionists” refers to respondents who selected “should definitely be abolished” and “should probably be abolished”

⁹² Control group ($M=2.91$, $SD=1.14$), and the experimental group ($M=2.68$, $SD=1.21$), $t(1079)=3.21$, $p<.01$, 2 tailed

⁹³ Pearson's Chi-Square $X^2(2, N=1084)=2.105$, $p>.05$

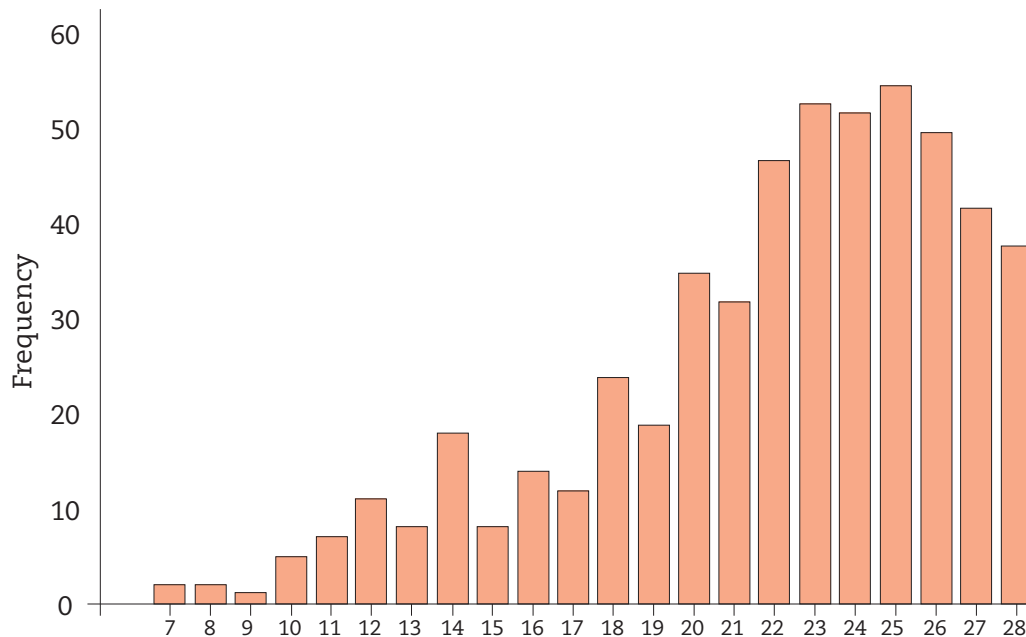
Figure 8: Government survey question



Note: Total number of respondents in the experimental group: n=542
 Total number of respondents in the control group: n=542

The findings shown in Figure 8 indicate the poor quality of the government survey question. The fact that no statistically significant difference was detected between the experimental group and the control group demonstrates clearly that the question is not sensitive enough to capture the differences in opinion which were clearly visible with the other question. As noted, the wide definition of a retentionist (“the death penalty is unavoidable in some cases”) and the narrow definition of an abolitionist (“the death penalty should be abolished under all circumstances”) can be considered to be the reason why the government survey question did not adequately capture the flexibility as well as the less committed respondents’ views in supporting the death penalty. This finding carries important implications for death penalty policy. The results produced by the government survey question should – at best – be interpreted with caution as they are likely to over-represent retentionists.

Thirdly, the survey confirmed the hypothesis that respondents were not informed about the death penalty. As noted in the methodology section, seven information items were presented to respondents in the experimental group, and they were asked to state how much they knew about each item in a four-point Likert scale (ranging from item, 1: “I knew all about it” to 4, “It was new information to me”). Using all seven information items, a new Likert scale was created to measure total knowledge. The reliability of the scale was measured by Cronbach alpha (.856). Since each item comprised a four-point scale, the total knowledge scale ranged between 7 and 28. The experimental group had a mean value of 22 in the total knowledge scale, indicating an uninformed group. Figure 9 shows the frequency of the total knowledge scores, with a distribution curve skewed towards high scores.

Figure 9: Distribution of knowledge scores for the experimental group

- Notes: 1) Total number of respondents: n=535
 2) Knowledge scale ranged between 7 and 28
 3) Mean=21.95, median=23, standard deviation=4.62, minimum=7 and maximum=28

When examining knowledge of each information item, less than half of the respondents answered that they were informed about all items (“I knew all about it” and “I roughly knew most of it”; see Figure 30). Out of a total of 535 respondents who answered all information items from the experimental group, there were only two who selected “I knew all about it” for all seven items.⁹⁴ The highest knowledge recorded was of the “execution process”, though only 16% of respondents selected that they knew “all about it”.

Respondents were least aware of the “possibility of parole for life prisoners”, with only 1% claiming “I knew all about it”. This information item may have increased respondents’ knowledge when looking at the reasons for retention selected by the experimental group. The item “Japan does not have life imprisonment without parole” was one of the reasons for retention which was statistically significant, with a smaller proportion of respondents in the experimental group selecting this option.

Similarly, the item “relationship between the death penalty and crime rates” (where only 4% selected “I knew all about it”) could also have influenced respondents in the experimental group in their selection of justifications for retention. While general deterrence was the third most selected reason for retention in the control group (42%), the same option was not as popular in the experimental group (25%), and the difference was found to be statistically significant.

⁹⁴ The two respondents were abolitionists who believed that the death penalty “should definitely be abolished”

While information gain and its interpretation are beyond the scope of this survey, an association between the level of previously acquired knowledge and death penalty attitudes is clear. The distribution of death penalty attitudes for those defined as informed (scoring between seven and 17 in the total knowledge scale) and uninformed (scoring between 18 and 28) was statistically significant at $p < .01$ level (see Table 2).⁹⁵ Respondents who were abolitionists tended to be better informed (49%) than retentionists (27%) – a difference that was large and statistically significant (two-proportion Z-test at .01 level, $Z=3.974$). Those participants who were informed were also more likely to have a firm opinion – whether believing in retention or abolition – than to select “cannot say”.

Table 2: Knowledge score by death penalty attitudes

	‘Should definitely be kept’ & ‘Should probably be kept’	‘Cannot say’	‘Should definitely be abolished’ & ‘Should probably be abolished’	Total
Informed	35%	16%	49%	88 (100%)
Uninformed	36%	37%	27%	447 (100%)
Total	192	180	163	535

Notes: 1) “Informed” had total knowledge scores between seven and 17

2) “Uninformed” had total knowledge scores between 18 and 28

Findings from the third survey

In both pre- and post-surveys, respondents were asked to state their position on the death penalty using the same five-point scale question featured throughout this chapter. When focusing on the changes in attitudes (defined as the selection of different options in pre- and post-surveys⁹⁶), 30 out of a total of 50 participants did not change attitudes. The remaining 20 participants moved in one or other direction, 11 towards abolition and nine towards retention.

Table 3: Changes in opinion between pre- and post-survey

Pre-survey \ Post-survey	Definitely keep	Probably keep	Cannot say	Probably abolish	Definitely abolish	Total
Definitely keep	8	2	0	0	0	10
Probably keep	5	8	5	2	0	20
Cannot say	0	1	9	0	0	10
Probably abolish	0	2	2	4	0	8
Definitely abolish	0	0	0	1	1	2
Total	13	13	16	7	50	50

⁹⁵ Pearson’s Chi-Square $\chi^2(2)=21.559$, $N=535$, $p < .01$

⁹⁶ For example, participants who changed their opinion from “should definitely be kept” to “should probably be kept”, and from “should probably be kept” to “should probably be abolished”, are both considered to have changed their attitude

The quantitative analyses presented above should not be interpreted as conclusive. The sample size was relatively small ($n=50$) – especially in comparison to the experimental survey that produced statistically significant results. Nonetheless, two points are noteworthy. The majority of participants did not change their opinion on the death penalty after deliberation. Those who changed did not all move in one direction – for example, towards abolition – but in both directions in almost equal proportions. The following section further analyses the effect of deliberation on death penalty attitudes qualitatively. Statements from the follow-up interviews were used to look beyond seemingly fixed views on the death penalty.

In a follow-up interview, a participant who remained a definite abolitionist (“should definitely be abolished” selected in both pre- and post-surveys) stated that “the application of the death penalty is a repeat of murder committed by the state”.⁹⁷ However, the same participant answered “I don’t know” to a post-survey question which asked if he would be able to pass a death sentence if he was selected as a lay-judge. Although this response may seem surprising coming from someone who is strongly and consistently opposed to the death penalty, it was explained during the follow-up interview that “faced with a heinous crime, I [he] may be influenced by emotion and wish for the defendant to be sentenced to death”. While he maintained that “the death penalty is not a matter of emotion” and stuck to his principle that “even the state should not be given the power to take away one’s life”, he admitted there were several occasions during the group discussions when he was tempted to accept the death penalty due to “sympathy towards victims’ families”.

A participant who remained a definite retentionist stated in the follow-up interview that he had become even more convinced of his position after deliberation. He gave as his reason that he had learnt that prisoners serving life imprisonment could be released on parole, and he felt that the death penalty should not be abolished under these circumstances. While his commitment to the death penalty seems solid, he stated in the same interview that he would support future abolition if life imprisonment without parole were introduced. For him, the most important goal of punishment for murder was for “the offender to reflect on the gravity of the offence committed in prison for life”. In other words, his support for the death penalty was not itself principled, but reflected the absence of his preferred option.

A participant who remained undecided (by selecting “cannot say” in both surveys) displayed perhaps the most conflicting views that swung between retention and abolition during the follow-up interview. From a retentionist’s perspective, she gave “victims’ families” as a reason to keep the death penalty, but expressed her reservation about this by stating: “What the victims’ families want may be the offender to be punished by the most severe punishment under law rather than by death”. On a similar note, she stated the importance of “making the offender remorseful for the offence committed by living and not resorting to another death by execution”. However, she also contradicted her earlier view by expressing her doubts as to the likelihood of “atonement without sacrificing their own life”. The same participant also added that information regarding “the anguish of prison officers who are ordered to carry out executions” was new to her and had moved her to lean towards abolition.

The three examples above focused on those who did not change their views. The next example is a participant who changed from “cannot say” in the pre-survey to “should probably be kept” in the

⁹⁷ All quotes by participants have been edited, to correct grammar mistakes and to delete interjections, without changing the content. Translation is as faithful as possible

post-survey. This change in opinion may be regarded as a sign of a statement that “something” has happened during deliberation that changed her mind towards retention by one point of the scale, but the follow-up interview showed a similar state of mind that shaped the three previous participants. Asked about her shift from “cannot say” to “should probably be kept”, she stated that she was “still hesitating over her decision” but nonetheless defended her now qualified retentionist position by referring to “respect for the victims’ families”. That said, towards the end of the interview, she also stated that the reason she changed her position to “should probably be kept” in the post-survey was because she came to the conclusion that “the death penalty should be kept as a symbol of the most severe punishment for the general public, but there should be a stop to executions and an introduction of life imprisonment without parole”. This statement showed her distaste for execution but also demonstrated her – questionable – belief that the existence of the death penalty under law should act as general deterrence for future offenders.

The findings presented from the follow-up interviews also echoed the impressions drawn by the moderators from the group discussions that they led. One of the moderators stated that with more information and exposure to different views, participants became less certain of their original position chosen in the pre-survey, and were unable by the second group discussion to defend themselves in definite terms. A clear example can be found in a participant’s doubt expressed in the discussion group as to why the Japanese people support the death penalty, and his suggestion that it may simply be “because we have it, we want it”. Another moderator stated that the atmosphere of group discussions changed from one of “conflict” in the first discussion to one of “neutralised” – i.e., “your view is different from mine but I can see what you mean”.

Qualitative analysis from the follow-up interviews illustrated a complex and often contradictory set of opinions held by participants torn between abolition and retention – even though these two positions represent different ends of the spectrum. Conflicting and nuanced attitudes which were not present before deliberation can be attributed to the provision of information and dialogue. Attitudes which embrace both retentionist and abolitionist perspectives can be interpreted as signs of tolerance and understanding of other opinions. However, this is not to totally discredit the quantitative analysis presented above: answers filled in for the post-survey after a day-long deliberation should be taken seriously. That said, qualitative data certainly paint a fuller picture of what went on behind participants’ decisions to stick to – or change – their opinion. It is fair to say that what may have been an easier task, to choose from a five-point scale death penalty position in the pre-survey, became a more complex and ambivalent task in the post-survey, making the five positions offered to participants no longer an adequate index of opinions.

An argument which repeatedly surfaced throughout the deliberation process – in group discussions, the expert session and follow-up interviews – was the need to retain the death penalty for the sake of victims’ families. This argument was not only used by retentionists but was accepted as a valid argument by some abolitionists. The most popular reason given for supporting the death penalty in both pre- and post-surveys was the “feelings of the victims’ families”.

In group discussions, there were no pre-organised topics that participants were required to discuss. Under this arrangement, participants spent a considerable amount of time discussing the lack of attention paid to victims’ families in death penalty cases. Transcripts from group discussions clearly demonstrate that participants were focused on the victims’ families’ perspective while dismissing

consideration for offenders or their families.⁹⁸ What was observed was participants viewing offenders as “others” and victims as one of “us”, where the “deviant other” must be “socialized, rehabilitated, cured until he or she is like ‘us’” (Young, 1999, p. 5) or in the death penalty context, simply executed.

On the other hand, it was also clear that many – if not all – of the participants did not have a proper understanding of criminal trials. They were unclear about the role of victims in sentencing, and did not understand the difference between a “defendant” and an “offender”. Analysis of participants’ statements in group discussions and follow-up interviews showed they were likely to think of criminal courts as a battleground for fights between “defendants” and “victims”. Participants also found the phrase “offenders’ rights” puzzling and felt that “victims’ rights” were infringed in the current criminal justice system. One participant stated that “it is strange why defendants get a lawyer but victims do not get one”. Participants see criminal courts as places where “victims should win justice”, and “justice” is served when the defendant is found guilty (i.e., sentenced to death). For participants, courts were not places for testing evidence about guilt or innocence, for example, or places where judges made normative declarations about the crime that had been committed.

Conclusion

Two conclusions stand out from Part Two of this report. First, the results of the government survey, which show very high levels of support for capital punishment in Japan, should be interpreted with extreme caution. Second, the concept of public ‘support’ for capital punishment is multifaceted. The findings of the three studies discussed above demonstrate that a considerable proportion of the Japanese public do not have strong opinions about the death penalty, and that even those who express strong support for capital punishment modify their views in response to new information. Thus, what separates retentionists from abolitionists in Japan is more nuanced and subtle than commonly supposed. Japan’s government needs to look beyond the superficial representations of public opinion derived from its own surveys. Using survey evidence as a social barometer is essential for informing government of public preferences in a democratic setting, but if Japan’s government and judiciary want to continue relying on ‘public opinion’ to justify retention, their evidence must be sound. Similarly, if the purported ‘deterrent effect’ of capital punishment continues to be employed as justification for this form of state killing, there should be an independent academic inquiry into the issue, rather than continued reliance on unquestioned beliefs and public perceptions.

⁹⁸ Only one participant in the discussions asked her group to put themselves in the offenders’ families’ point of view.

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About the Death Penalty Project

For more than 20 years, The Death Penalty Project has worked to protect the human rights of those facing the death penalty. Although the Project operates in all jurisdictions where the death penalty remains an enforceable punishment, its actions are concentrated in those countries which retain the Judicial Committee of the Privy Council in London and in other Commonwealth countries, principally in the Caribbean, Africa and Asia.

The Project's main objectives are to promote the restriction of the death penalty in line with international minimum legal requirements; to uphold and develop human rights standards and the criminal law; to provide free and effective legal representation and assistance for those individuals who are facing the death penalty; and to create increased awareness and encourage greater dialogue with key stakeholders on the death penalty.

The provision of free legal representation to men and women on death row has been critical in identifying and redressing a significant number of miscarriages of justice, promoting minimum fair trial guarantees, and establishing violations of domestic law. The Project has also submitted numerous complaints to the United Nations Human Rights Committee, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights on behalf of prisoners sentenced to death alleging breaches of international human rights standards.

Some of the Project's landmark cases which have restricted the implementation of the death penalty in the Caribbean include *Pratt & Morgan v the Attorney General of Jamaica* [1994] 2 AC 1, *Lewis v the Attorney General of Jamaica* [2001] 2 AC 50, *Reyes v the Queen* [2002] 2 AC 235, *The Queen v Hughes* [2002] 2 AC 259, *Fox v the Queen* [2002] 2 AC 284 and *Bowe & Davis v the Queen* [2006] 1 WLR 1623. Other landmark cases include *Mutiso v Republic*, judgment of the Court of Appeal at Mombasa, 30th July 2010 (abolition of the mandatory death penalty for murder in Kenya); *Attorney General v Kigula et al.*, judgment of the Supreme Court of Uganda, 21st January 2009 (abolition of the mandatory death penalty and delay on death row in Uganda); *Kafantayeni et al. v Attorney General* 46 ILM 564 (2007) (abolition of the mandatory death penalty in Malawi); *Boyce et al. v Barbados*, decision of the Inter-American Court, 20th November 2007 (savings clause, mandatory death penalty and prison conditions found to be in violation of the American Convention on Human Rights) and *Cadogan v Barbados*, decision of the Inter-American Court, 24th September 2009 (mandatory death penalty and lack of psychiatric evidence at trial).

Summary

This report examines Japan's death penalty from two perspectives. The first is a doctrinal approach to capital punishment based on human rights principles enshrined in international human rights law. The second perspective critically explores the notion that majority public support for the death penalty is an obstacle to abolition.

Part One of the report highlights significant gaps between Japan's obligations under the International Covenant on Civil and Political Rights (ICCPR) which Japan ratified in 1979 and *The Safeguards Guaranteeing the Protection of the Rights of those Facing the Death Penalty*, first agreed by the United Nations in 1984, and current Japanese law and practice. It makes many recommendations for change, including these:

- Eliminating the death penalty for crimes not involving deliberate intent to kill
- Abolishing the system of “substitute imprisonment” (*daiyo kangoku*) and replacing it with a system that provides effective judicial control over the use of pre-trial detention, the length of which needs to be dramatically reduced
- Strengthening procedural protections in the trial and appellate processes
- Providing all persons sentenced to death with an effective and mandatory right of appeal, and with the provision of legal assistance at all stages of the appeals process, including retrial
- Providing full access to a fair and functioning process of executive mercy
- Staying all executions while a retrial or application for clemency is pending
- Improving conditions on death row and the treatment of death row prisoners

Part Two of the report describes differences between the apparent “strong public support” found by government surveys and the more complex sensibilities revealed by more sophisticated assessments of public attitudes toward capital punishment. It argues that:

- Japan's governmental surveys have serious methodological problems. Thus, the government should recognise the superficial representations of public opinion derived from its own surveys
- Findings from three independent studies demonstrate that a considerable proportion of the Japanese public do not have strong or firm views toward capital punishment
- People who express strong support for capital punishment often modify their position in response to new information
- There should be an independent academic inquiry into issues related to the death penalty and deterrence rather than continued reliance on unquestioned public beliefs

In sum, this report demonstrates an urgent need for Japan's government and judiciary to reform several of their current positions on capital punishment, prior to its complete abolition.