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**Governmental Justification for Capital  
Punishment in Japan:  
Case Study of the *de facto* Moratorium  
Period from 1989 to 1993**

**By**

**Mika Obara**

**Doctoral Thesis**

**Submitted in partial fulfilment of the requirements  
for the award of  
Doctor of Philosophy of Loughborough University**

**17 June 2013**

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## ABSTRACT

Whilst studies on capital punishment in Japan have been conducted by various scholars from various perspectives, empirical research on the *de facto* moratorium period is largely unavailable.<sup>1</sup> This thesis aims to investigate how consistently the Japanese government justified capital punishment during the execution-free period from 1989 to 1993. Its primary goal is to throw light on the elite-driven nature of the capital punishment system where important decisions are made within the closed institutional dynamic, often irrespective of domestic or international factors. It will also highlight that capital punishment policy has been dealt with by the Japanese government as an issue of law and order, which does not necessarily invite criticism from human rights perspectives. The thesis then proceeds to empirically examine the governmental discourse on capital punishment from 1980 to 2002. It will contend that investigations from an appropriate approach can make clear the elite-driven nature of capital punishment policy in Japan. Finally, it will suggest implications for the international and domestic anti-death-penalty advocates regarding their campaigns over Japan, and reflect on how this thesis can help tackle future research.

**KEY WORDS:** JAPAN, CAPITAL PUNISHMENT, *DE FACTO* MORATORIUM PERIOD, GOVERNMENTAL JUSTIFICATION, MINISTRY OF JUSTICE, PUBLIC PROSECUTOR'S OFFICE

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<sup>1</sup> The few works that briefly touch upon this era include: (1) *Capital Punishment in Japan* by Petra Schmidt (2002); and (2) 'Japan's Secretive Death Penalty Policy: Contours, Origins, Justifications, and Meanings' by David T. Johnson (2006).

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## INTRODUCTION

There is a worldwide declining trend in the number of states retaining capital punishment today, and more than two thirds of the states in the world have abolished this system in law or practice (Amnesty International 2010:1). International society has also created a series of benchmarks for modern democracies regarding the abolition of capital punishment. They are represented by relevant covenants<sup>2</sup> of the United Nations (UN) and the *acquis communautaire* that states must conform to before they can be admitted into the European Union (EU). Given that states tend to adhere to international norms in order to be recognised as legitimate members of international society (Axelrod 1986:1105; Finnemore and Sikkink 1998:895), it may appear that it is in states' interests to comply with the anti-death penalty norm. Nonetheless, since capital punishment deprives people of their right to life, it cannot be simply justified as a domestic cultural manifestation or by reference to national sovereignty.

Currently, the US and Japan are the two remaining industrialised democracies that retain capital punishment against the international trend. However, Japan recently experienced a *de facto* moratorium on executions from 28 July 2010 to 29 March 2012, for one year and eight months; and there was also a longer execution-free period which lasted for three years and four months from 1989 to 1993 (see Appendix I).

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<sup>2</sup> For example, Article 3 of the Universal Declaration of Human Rights stipulates that 'Everyone has the right to life, liberty and security of person'; Article 5 stresses that 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'. Moreover, the Second Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR) clearly aims at the abolition of capital punishment.

This thesis addresses how the Ministry of Justice in Japan justified capital punishment policy during the *de facto* moratorium period from 1989 to 1993. Although studies on capital punishment in Japan have been conducted by various scholars from various perspectives (Johnson 2002; 2006; Schmidt 2001; Sato 2008; Johnson and Zimring 2009; Fuse 2009), very few works have primarily focused on this period. Indeed, the existing literature (Schmidt 2001; Johnson 2006) is often conceptually flawed and is not backed up by detailed empirical evidence. There has been no serious attempt to conceptualise this period, or to investigate the implications of this phenomenon to understand Japan's capital punishment policy. The existing research tends to overestimate the influence of one of the then Ministers of Justice, who did not authorise executions because of his personal belief, and it does not provide detailed analysis of how the capital punishment system had been discussed by a wider sphere of actors such as bureaucrats in the Ministry of Justice and the general public. Hence this thesis aims to fill the gap in the existing literature and empirically explain the *de facto* moratorium from 1989 to 1993.

With regard to a writing style, I employed a Japanese way. All Japanese names are presented in Japanese order, with the family name first; and Japanese terms are written in italicised *romaji* (English transliteration of Japanese) throughout this thesis.

## RESEARCH QUESTIONS

The primary goal of this thesis is to provide a better understanding of the elite-driven nature of the capital punishment system in Japan. It is concerned with three research questions: (1) Who are the real actors who get involved in capital punishment policy? (2) To what extent are domestic and cultural factors reflected in this process?; and (3) How was this policy justified by the Ministry of Justice during that execution-free period?

The Ministry of Justice often cites five intertwined domestic factors in its official statements on justification of the capital punishment system: (1) maintenance of legal order; (2) deterrent effect; (3) Japanese culture; (4) public opinion; and (5) victim satisfaction.<sup>3</sup> However, in-depth investigation of each claim provides alternative views. Firstly, the government claims that capital punishment should take place as laid down in legal provisions in order to keep Japan *hochi kokka* (law-abiding country); capital punishment and the execution method used have been declared constitutional by the Supreme Court since 12 March 1948, and hanging is stipulated by Article 11 of the Penal Code. However, the constitutionality and legality of this system are still controversial today. Whilst Article 31 of the Constitution of Japan stipulates that ‘No person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, *except according to procedure established by law*’, Article 36 of the Constitution provides that ‘[t]he infliction of torture by any public officer and cruel

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<sup>3</sup> Ministers of Justice who proclaim these factors include Okuno Seisuke (1980b:8); Sakata Michita (1982b:20); Sumi Eisaku (1984:8); Gotoda Masaharu (1993b:3); Moriyama Mayumi (quoted in *Japan Times*, 4 October 2002).

punishments are absolutely forbidden'. Moreover, whilst the responsibility of Ministers of Justice regarding authorising execution orders is stipulated by Article 475 of the Code of Criminal Procedure, the legality and propriety of this provision have been debated amongst legal scholars.

Secondly, although governmental opinion polls indicate wide public support for retention of capital punishment, based on belief in its deterrent effect, the methodological defects of the survey questions have been pointed out by various scholars (Sato 2008; 2009). Finally, the government tends to proclaim that the capital punishment system has been retained in order to respect the feelings of the victims' bereaved families and a social norm, which treats death as a price worth paying for serious crimes (Moriyama quoted in *Japan Times*, 4 October 2002). However, opposing opinions by the anti-death penalty victim lobby have been ignored. Rather, it appears that it is (1) the governmental officials' recurring use of language, which makes reference to Japanese culture, and (2) the media's excessive focus on the pro-death-penalty victim lobby that have been making the public believe that the capital punishment system is deeply embedded in the Japanese culture and can deter crimes. By unpacking the real key actors who are involved in this policy, and by examining how they try to construct a dominant discourse on capital punishment referring to domestic and cultural factors, this thesis will clarify the real motive of the Ministry of Justice in justifying retention of the capital punishment system even during execution-free periods.

The claim to originality of this thesis lies in this: (1) it offers a better understanding of the institutional and cultural dynamics where capital punishment is justified by policy elites; and (2) it provides rich empirical data on the government's arguments to justify the existence of the death penalty during the *de facto* moratorium period from 1989 to 1993 in Japan. Firstly, none of the existing research has combined institutional and cultural frameworks in order to investigate the capital punishment system in Japan. The decision making procedure regarding capital punishment policy has been researched by scholars of criminal justice (Johnson 2002, 2006; Kikuta 2002a); the social norm which treats death as a price paying for crimes by scholars of the Japanese view on life and death (Lifton 1977); and other Japanese cultural features, such as consciousness of human rights and the law, by legal scholars (Johnson 2002, 2006; Kawashima 1967). However, these study areas have not been combined in order to investigate capital punishment policy in Japan comprehensively. By doing so, my thesis will clarify that the capital punishment system is primarily elite-driven, and decisions regarding this policy are made independently from a social norm or other cultural factors.

Secondly, no one has systematically investigated the *de facto* moratorium period from 1989 to 1993. The scant literature which briefly touches upon this era includes *Capital Punishment in Japan* by Petra Schmidt (2002) and 'Japan's Secretive Death Penalty Policy: Contours, Origins, Justifications, and Meanings' by David T. Johnson (2006). However, Schmidt (2001:63–73) merely cites parliamentary proceedings during this period in the sub-section 'The Justice



Minister', and the specific reference to the *de facto* moratorium period is only the following sentence: 'The reasons for this, amongst others, included the refusal of former Justice Minister and a Buddhist priest, Sato Megumu, to sign execution orders' (Schmidt 2001:64). Her book is more of a very informative book grasping the big picture of the capital punishment system in Japan chronologically, and does not investigate the *de facto* moratorium period in depth or provide discussion of the wider public. Similarly, Johnson only refers to the way the *de facto* moratorium came about:

for the 40 months from November 1989 to March 1993, the Japanese state executed no one because four successive Ministers of Justice refused to sign (or had no opportunity to sign) the requisite death warrants. The third of those Ministers, Megumu Sato, was a Buddhist priest who believed that the death penalty violates the sanctity of life (Johnson 2006:88–9).

As for the reason why there is little existing literature on the *de facto* moratorium, two factors can be mentioned. Firstly, capital punishment policy is characterised by confidentiality and secrecy (Johnson 2005; 2006), which has been making it challenging for activist groups or researchers to conduct empirical studies through access to the pro-death-penalty norm entrepreneurs, such as bureaucrats in the Ministry of Justice, or death row inmates. According to Kaga Otohiko, a former technical official at the Tokyo Detention Centre, 'postwar democracy was valid in the 1950s' (Kaga and Yasuda 2008:127): researchers

could even interview death row inmates in person and publish their works freely. Indeed, the issue of capital punishment was actively discussed within the Ministry of Justice. For example, the *Keibatsu to Shakai Kairyō no Kai* (Criminal Punishment and Social Reform Association) was founded in 1955 by staff of the Ministry of Justice such as Masaki Ryo and Yoshikawa Eiji; and prison guards and detention centre custody officers also debated capital punishment passionately (Kaga and Yasuda 2008:129). They wrote to the newspaper stressing the importance of abolishing the system, and presented such ideas in the Diet as well (Kaga and Yasuda 2008:129).

However, after a *tsutatsu* (circular) imposing restrictions on death row inmates' communication was issued on 15 March 1963,<sup>4</sup> a secretive policy was employed regarding capital punishment policy, and interviews with death row inmates also became impossible with a few exceptions<sup>5</sup>. When Kaga published the book *Shikeishu no Kioku* (Memory of Death Row Inmates) in 1980, the Ministry of Justice accused him of disclosing some significant information that he would not have known if he did not work in such a post; and public prosecutors also denounced his action as against the Public Service Act (Kaga and Yasuda 2008:127). Therefore, when the International Federation for Human Rights (FIDH) carried out its first investigation in 2001, delegates could only meet senior civil servants from the Ministry of Justice, and their requests for interviews with death row inmates were denied (FIDH 2008:3–4). Similarly, David T. Johnson's

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<sup>4</sup> See Chapter 2 for the details of detention conditions.

<sup>5</sup> For example, a writer, Saito Michinori, has been corresponding with a death row inmate, Odajima Tetsuo, both in person and by post, periodically since July 2006. See Chapter 1 for details.

works on capital punishment in Japan are primarily based on in-depth interviews with public prosecutors, not with bureaucrats in the Ministry of Justice (Johnson 2002:9).

Secondly, it is important to note that the Japanese government does not conceive the *de facto* moratorium period as a political event to be examined academically, and the Ministry of Justice refuses any research-related investigation into this era. In my interviews, two MOFA (Ministry of Foreign Affairs) ministers, one of whom was previously in the Ministry of Justice, were reluctant to discuss this period with a presumption that there was a *de facto* moratorium from 1989 to 1993.<sup>6</sup> They stated that although there was an execution-free period, it was inappropriate to consider it as a kind of politically stable period when bureaucrats refrained from authorising executions.<sup>7</sup> Questioning the existence of the *de facto* moratorium period can be crucial to understand capital punishment policy in Japan. The Japanese government justifies capital punishment on domestic, cultural and legal grounds consistently. Executions tend to take place annually; however, since executions are postponed for years at times, some scholars and anti-death-penalty lobbyists tend to describe this lapse of time a *de facto* moratorium period.

The discussion in the existing literature revolves around the causal relationship between personal convictions of Ministers of Justice and absence of executions; and the anti-death-penalty lobby discusses the possible impact of contemporary

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<sup>6</sup> Interview with two MOFA ministers, Tokyo, 17 June 2011

<sup>7</sup> *Ibid.*

domestic and international events, although such an impact is not proved by any evidence. The important question to be dealt with in my thesis is whether or not there was a period equivalent to a moratorium during this period in Japan. In order to investigate this, it is significant to examine: (1) what the nature of the moratorium period is; (2) who tends to or tends not to call the execution-free period a *de facto* moratorium period; and (3) what factors tend to make an execution-free period look like a moratorium period.

It has been challenging for scholars or anti-death-penalty NGOs to investigate this period with limited access to the primary sources, and they have not completed a systematic study on the *de facto* moratorium period for a better understanding of capital punishment policy in Japan. This thesis is based on empirical research which uses data from fieldwork in Japan from April to June in 2011, and it aims to fill the gap in the existing explanation of Japan's retention and justification of capital punishment. For these two reasons, I believe that my thesis represents a novel departure for the study of capital punishment in Japan.

### **TIME PERIOD AND CASE STUDY SELECTED**

This thesis conducted an empirical research covering 1980-1989; 1989-1993; and 1993-2002. The main focus is on the *de facto* moratorium period from 1989 to 1993, in order to analyse the governmental discourse from parliamentary proceedings. Examining the ten years before and after the *de facto* moratorium era, it seeks to examine the consistency of the Ministry of Justice in justifying capital punishment policy. With regard to the choice of the particular period from

1989 to 1993, it is worth explaining why: (1) my thesis did not select more recent *de facto* moratorium periods in Japan; and (2) it is important to examine what happened nearly 20 years ago even though secondary literature is largely unavailable.

Executions were recently put on hold for one year from 28 July 2009 to 28 July 2010, and for one year and eight months from 28 July 2010 to 29 March 2012. However, the prime reason that my thesis did not choose these periods is the limited access to the latest data. The central reason for executions being put on hold during these periods was that Ministers of Justice did not authorise execution orders. However, it is wrong to give too much prominence to the personal convictions of Ministers of Justice, given the elite-driven nature of the capital punishment system led by bureaucrats in the Ministry of Justice and the Public Prosecutor's Office. Instead of investigating the contemporary periods, this thesis chose to study the *de facto* moratorium period from 1989 to 1993 by analysing the primary sources; challenging the existing claims and hypotheses on this period in secondary sources; and interviewing witnesses of this period. I believe that the case study in my thesis will provide initial findings that the future comparative work can add depth to.

Finally, it should be noted that this thesis does not engage with issues such as the domestic or international impact of the *de facto* moratorium period. Neither does it deal in detail with the government's resistance to the international anti-death-penalty campaigns. Given that the issue of capital punishment

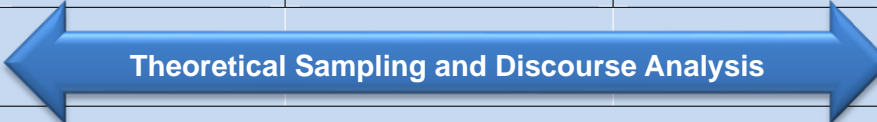

revolves around closed decision making within the Ministry of Justice and the Public Prosecutor's Office, investigating the international influence on the domestic decision making is not necessarily relevant to my thesis. Instead, this thesis primarily deals with the 'language' the Ministry of Justice has been using to justify the capital punishment system even when executions were put on hold.

## **RESEARCH METHODOLOGY**

This thesis employed a triangulation strategy (see Figure 1), and conducted textual and empirical research with the use of theoretical sampling and discourse analysis. This is based on Norman K. Denzin (1970:26)'s claim that 'because each method reveals different aspects of empirical reality, multiple methods of observations must be employed'. This part will explain how exactly these individual methods were combined in a single sequential design.

First of all, this thesis employed a theoretical sampling strategy. According to Jennifer Mason, theoretical sampling refers to 'selecting groups or categories to study on the basis of their relevance to your research questions, your theoretical positions and analytical framework, your analytical practice, and most importantly the explanation or account which you are developing' (Mason 1996:94). Therefore, this thesis took a level-of-analysis approach focusing on two main levels: the government and civil society. This is to capture the rich diversity and fluidity of institutional and social relationships amongst the actors.

**Figure1 Research Design**

<b>TRIANGULATION STRATEGY</b>			
	<b>Early Stage (2008)</b>	<b>Fieldwork (April to June 2011)</b>	<b>Write-up Stage (2013)</b>
<b>Textual Research</b>			
Primary Sources	<ul style="list-style-type: none"> <li>- Parliamentary Proceedings</li> <li>- Governmental Opinion Polls</li> <li>- Periodic Reports by human rights NGOs</li> </ul>		
Secondary Sources	<ul style="list-style-type: none"> <li>- Academic Books</li> </ul>	<ul style="list-style-type: none"> <li>- Academic Books</li> <li>- Monthly/Annual Magazines (in Japanese)</li> </ul>	
<b>Empirical Research</b>			
In-depth Interviews	<p>Interviews to 25 people:</p> <ul style="list-style-type: none"> <li>- Governmental Officials</li> <li>- NGO workers</li> <li>- Anti/pro-death-penalty advocates</li> <li>- Scholars</li> </ul>		

The main actors that this thesis will examine at each level are: (1) officials and ministers in the Ministry of Justice and the Public Prosecutor’s Office, and Diet members; and (2) public opinion, and anti- and pro-death-penalty NGOs/advocates. What merits some attention is that the capital punishment system has been the province of a narrow elite in the Ministry of Justice and the Public Prosecutor’s Office, and the role that actors at the civil society level can play in this tightly-knit institutional dynamics is limited. However, re-investigation

of public opinion, and the way in which the Japanese government strategically cites domestic factors for the justification of capital punishment, can help illuminate the elite-driven nature of this policy. Similarly, although anti-death-penalty NGOs do not possess official status to get involved in capital punishment policy making, it is beneficial to contrast their approach on capital punishment from human rights perspectives with the governmental approach based on the issue of law and order.

### ***Textual Research***

Focusing on these actors at two levels, most of the initial research was conducted through an analysis of official documents from the Japanese government such as parliamentary proceedings, public opinion surveys conducted by the Prime Minister's Office, and periodical reports by both international and domestic human rights NGOs. Secondary sources range from academic books to monthly/annual magazines that contain articles by politicians, researchers, and journalists such as *Sekai (World)* and *Nenpo Shikei Haishi* (Annual Report: Abolishing Capital Punishment). The *Nenpo Shikei Haishi* series follows the domestic and international trends on capital punishment and local activities of human rights NGOs in particular, and it was helpful in collecting the vast volumes of documentation needed to evaluate death penalty-related movements during and after the *de facto* moratorium. Since this series was first published in 1996, it does not fully cover the ten years before the *de facto* moratorium period. However, an interview with the editor allowed me to get



first-hand information about the missing period.

In handling these documents, discourse analysis was conducted in order to evaluate 'how political concepts, ideas, language, behaviour and institutional arrangements are loaded with assumptions about the nature of the social and political world and our understanding of it' (Burnham et al. 2004:242). This is primarily to assess what 'language' the Japanese governmental officials had been using during the *de facto* moratorium period in order to construct a dominant discourse on capital punishment as legitimate. As Peter Burnham et al. (2004:244) argue, politics can be understood as 'a struggle to control the dominant political language' since:

language can be used to deceive and to manipulate those to whom it is addressed. Language and discourse are dominated by the powerful in society who can impose meanings and explanations of social reality which protect their interests and undermine those of the rest of society, by spreading confusion and deceit in discourses that allow oppression and exploitation of the weak to continue (Burnham et al. 2004:242–3).

Furthermore, as Colin Robson (2011:372) argues, '[i]n discourse analysis, it is not only the substance of what is said (which forms the basis for conventional analysis) that is important but the styles and strategies of the language users – how they say things'. This holds true of capital punishment policy in Japan, and the Ministry of Justice appears to be using particular language to domestic and

external actors. In other words, it tends to claim the significance of domestic and cultural factors consistently in order to gain public support to back up this policy, and to avoid taking responsibility to comply with international norms. Therefore, it is important to analyse the governmental discourse on the issue of capital punishment, mainly using parliamentary proceedings.

### ***Empirical Research***

Besides such documental analysis, in-depth interviews<sup>8</sup> were conducted with 25 people, including government ministers, NGO staff, pro- and anti-death-penalty advocates, and scholars from April to June 2011 in Japan (see Appendix II). Its primary aim was to investigate the social and political background of the case study period in order to gain better understanding of how the Ministry of Justice had been justifying the capital punishment system, citing domestic factors. As Robson claims, conducting interview was beneficial since:

‘[f]ace-to-face interviews offer the possibility of modifying one’s line of enquiry, following up interesting responses and investigating underling motives in a way that postal and other self-administered questionnaires cannot. Non-verbal cues may (end of 280) give messages which help in understanding the verbal response, possibly changing or even, in extreme cases, reversing its meaning’ (Robson 2011:280–1).

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<sup>8</sup> In to encourage cooperation to be interviewed on this sensitive subject, I agreed in my initial contacts with interviewees that they would remain anonymous in my thesis. For this reason, unless otherwise stated, interviewees’ real names are not mentioned.

The interviews were semi-structured,<sup>9</sup> and although the script had previously been sent to the interviewees by post or e-mail, extra questions were also added as the conversation developed. Regarding the interview questions (see Appendix III), they were not standardised but customised, depending on the interviewees' views on capital punishment, expertise, and professional standing. Whilst asking all the interviewees the same questions can make comparison easier, it is not necessarily helpful to put questions about the *de facto* moratorium period to people who were not witnesses or participants in events of that period. In addition, my interview sought to avoid simplistic 'for or against' questions on the issue of capital punishment. Whilst the issue of capital punishment tends to divide people into two extremes – retentionists and abolitionists – a great amount of agreement is often observed at a certain point or at a more fundamental level, and disagreement can be observed even within each lobby. By customising questions depending on interviewees, the interviews sought to capture various opinions on the capital punishment system. This helped highlight that there exist various views about capital punishment in civil society, whilst the Japanese government proclaims wide public support as justification for its continuation.

With regard to the selection of interviewees, most of them were people who have

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<sup>9</sup> Semi-structured interview refers to that 'The interviewer has an interview *guide* that serves as a checklist of topics to be covered and a default wording and order for the questions, but the wording and order are often substantially modified based on the flow of the interview, and additional unplanned questions are asked to follow up on what the interviewee says' (Robson 2011:280).

either basic or sufficient knowledge concerning the key governmental actors in capital punishment policy. This is because:

‘[t]he qualitative interviewer conducting a long, in-depth interview with a respondent whose background he has studied is less likely to mismeasure the subject’s real political ideology than [...] interview[ing] with a randomly selected respondent about whom he knows nothing’ (King et al. 1994:31).

Firstly, it was critical to access the pro-death penalty norm entrepreneurs, or governmental officials in the Ministry of Justice since my thesis aims to investigate the governmental justification for capital punishment. However, they were very reluctant to be interviewed since this policy area is characterised by confidentiality and secrecy. For example, most of the ministers were consistent in reproducing the governmental view and showed cautious attitudes towards questions that had not been provided in advance. Although they also questioned me about my own view or how it has been discussed in Europe, this does not necessarily indicate that they showed any interest in the European view on this issue for their reference. Rather, they appeared unwilling to engage with the issue since they considered me as an abolitionist.

Regarding the MOFA, it appeared to have another reason for not being eager to discuss the issue with a third party. According to a MOFA minister, the MOFA is not in a position to express any independent opinion on capital punishment, and

it only reproduces the policy of a particular Ministry that is in charge – the Ministry of Justice in this case – as a dominant voice of the Japanese government.<sup>10</sup> This supports the argument of Glenn D. Hook et al (2001:45) that although the MOFA is responsible for the day-to-day running of Japanese diplomatic policy and functions as Japan’s window upon the world, ‘its ability to direct and manipulate Japanese foreign policy is constrained by its own internal organizational limitations’.

On the other hand, NGO workers, attorneys, academics and so on expressed their own views more freely, and emotionally at times. Their passion appeared to result from very personal experiences such as their religious views or the media coverage of capital punishment including false charge cases or serious murder cases. Most of their remarks were independent from ‘public opinion’ that can be observed in the media reports. Finding this out was very beneficial since it can support my hypothesis that it is the Japanese government that is the actual supporter of capital punishment, and ‘public opinion’ can greatly vary depending on how people are asked questions on this issue and their level of understanding of this system.

In particular, despite the nature of my research into events of approximately 20 years ago, witnesses to or participants in those events were very co-operative with my interviews: a former death row inmate, a former Minister of Justice, and senior members of human rights NGOs. With regard to a former death row

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<sup>10</sup> Interview with a MOFA minister, Tokyo, 9 May 2011

inmate, Menda Sakae,<sup>11</sup> his first-hand information on life in detention, including his dialogues with prison guards helped illuminate the elite-driven nature of the capital punishment system. Secondly, postal correspondence with Sato Megumu, who had been a Minister of Justice during the *de facto* moratorium period, was a great opportunity to contrast his official statement on capital punishment, which can be found in the parliamentary proceedings, with what he can currently say freely with his own words. Thirdly, interviews with NGO workers were also essential to complete my research given that:

DNGOs (domestic NGOs) have access to information on the ground through extensive contacts that INGOs (International NGOs) could not possibly get access to on their own, and have access to political and legal strategies within national jurisdictions that INGOs would normally not have the knowledge or contacts to employ (Calnan 2008:11).

Senior members of anti-death-penalty NGOs, in particular, were very cooperative in providing me with first-hand information about the social and political background of the *de facto* moratorium, which I could not have known from the existing literature. Those who are not necessarily witnesses to or participants in the *de facto* moratorium, but have been engaging in the current anti-death-penalty activities, or those who are keenly involved on the issue of

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<sup>11</sup> Although it was difficult to approach Menda for interviews at the first stage, the contact was achieved through the help of senior NGO staff: Shimaya Naoko, a core member of Forum 90; Tagusari Maiko, the Secretary General at the Center for Prisoners' Rights; and Yamazaki Hiroyuki, a representative of *Tanpopo no Kai*, a local anti-death-penalty NGO in Fukuoka Prefecture. In particular, Shimaya has currently been acting on behalf of Menda, and postal and e-mail correspondence with Menda was achieved through her help.

capital punishment in general, were also interviewed. For example, they include a representative of a victims' group; senior writers at newspaper agencies; a senior staff member at the Delegation of the European Union to Japan; and academics in law, sociology, and EU-Japan studies. The aim of interviewing them was to examine how the wider public have been discussing the issue of capital punishment in their own personal or professional approaches, whilst it has been treated by the Ministry of Justice as one of the governmental policies to be implemented in a dutiful manner. I believe that my interviews in Japan helped me test the considerable amount of secondary source analysis I have completed, and added tremendous value to my thesis.

## **THESIS OUTLINE**

Finally, this section summarises the content of my thesis and the main arguments discussed in each chapter. Chapter 1 will present an analytical framework to understand Japan's capital punishment policy. The existing research poses various hypotheses on Japan's retention of capital punishment considering historical, external, and internal factors. However, this chapter will examine the bureaucratic decision making mechanism in Japan, and clarify the elite-driven nature of capital punishment policy. It will also examine the divergence between the Japanese government and anti-death-penalty bodies in approaching the issue of capital punishment.

The first part of Chapter 2 will critically examine the validity of the governmental

justification for capital punishment on cultural grounds. Through reconsidering what kind of cultural features have been claimed to be associated with the capital punishment system in Japan, it will clarify how policy elites' recurring use of language that makes reference to culture has been influencing the public and scholars to believe that capital punishment policy is domestically and culturally determined. The second part will propose a better approach to investigate the *de facto* moratorium period in Japan's capital punishment policy. Whilst some scholars and activists treat the execution-free period as a politically significant phenomenon, as if it was not in line with government policy, the thesis will clarify that executions were not put on hold because of any political initiatives. It will contend that appropriate investigation of this period can provide a better understanding of the elite-driven capital punishment policy in Japan.

Chapters 3, 4, and 5 will empirically examine how the Ministry of Justice justified the capital punishment system from 1980 to 2002. Chapter 3 focuses on the period from 1980 to 1989, when the government was legitimising the system despite the emergence of criminal justice issues including the disclosure of successive miscarriages of justice. Chapter 4 examines the *de facto* moratorium period from 1989 to 1993. It will investigate how consistently the Japanese government justified the system even when executions were being put on hold for more than three years. Chapter 5 focuses on the period from 1993 to 2002. It will examine how the government tried to maintain the dominant discourse on crime and punishment for the justification of capital punishment after executions were resumed. Finally, the Conclusions will summarise the main findings of the



thesis, set out implications for the international and domestic anti-death-penalty advocates regarding their campaigns to Japan, and present a future research plan.

## **CHAPTER 1**

### **Capital Punishment Policy Decision Making: A Framework for Analysis**

#### **1.1. INTRODUCTION**

The existing research poses various hypotheses on Japan's retention and justification of the capital punishment system. In particular, David T. Johnson (2011) demonstrates nine hypotheses from three perspectives: historical, external, and internal. However, too many variables have currently been considered as factors potentially influencing the governmental decision making process, even though capital punishment policy is primarily elite-driven. The aim of this chapter is to fill the gap in this area of knowledge, and to provide an appropriate analytical framework to understand Japan's capital punishment policy. In order to do this, it will examine the Japanese decision making mechanism, and critically investigate the extent to which it accounts for the power dynamics surrounding capital punishment policy.

The first part of this chapter will review the current academic approach on Japanese government's retention of capital punishment. It will use the same nine sub-headings as Johnson's work. In order to test the validity of each claim, the second part will introduce the Japanese decision making model called the Iron Triangle, which is composed of: (1) bureaucrats of the economic ministries and agencies, (2) politicians of the ruling party, and (3) leaders of the business community (McCargo 2004:110).

The third part of this chapter will then apply this decision making mechanism to capital punishment policy, and re-define the power relationships between the actors. The first two actors can be: (1) bureaucrats in the Ministry of Justice and the Public Prosecutor's Office; and (2) Ministers of Justice and politicians of the Liberal Democratic Party (LDP) (1955 to 2009; 2012 to today) and the Democratic Party of Japan (DPJ) (2009 to 2012). However, since important decisions tend to be made by the former actors, often irrespective of the latter, this part will explain why bureaucrats exert tremendous power over capital punishment policy. Furthermore, this part will argue that the third actor, which replaces the business community, has not been systematically established in the existing literature. Although pressure groups which support the government's pro-death-penalty policy may be suggested, capital punishment is a primarily bureaucrat-led policy, and it is dubious to locate the pressure groups in the triad as actors of equal influence or power with the other two. Unpacking the key actors in the institutional framework within which policy elites operate, this part will clarify the applicability of the Iron Triangle model to capital punishment policy.

Having illuminated the elite-driven nature of capital punishment policy, the second part of this chapter will examine the governmental approach to capital punishment. The ineffectiveness of the anti-death-penalty lobby in getting involved in capital punishment policy can be partly explained by its limited role in the bureaucrat-led decision making process. However, it also appears to stem

from a divergence between the Japanese government and anti-death-penalty advocates on the approach to the issue of capital punishment. Through investigating detention conditions and the execution procedure in detail, this part will highlight the fact that the Japanese government has been treating capital punishment policy as an issue of law and order, not as an issue of human rights.

## **1.2. EXISTING HYPOTHESES ON THE GOVERNMENT'S RETENTION OF CAPITAL PUNISHMENT**

### ***Historical Factors***

Johnson (2011:141–4) poses the following three factors as the historical explanation of Japan's retention of capital punishment: (1) the US occupation; (2) the characteristics of Japanese political parties; and (3) Japan's geographical position and its stability as a democratic country. Firstly, the US occupation intended to disarm the military, eradicate imperialist thinking, and root democracy in Japan. The aims included 'the downsizing of the emperor from "god" to mere "symbol of the State and of the unity of the people", the renunciation of war, the creation of due process rights, and the establishment of the principle of equality of the sexes, of the Diet as the highest organ of state power, of the power of judicial review, of land redistribution, and so on' (Johnson and Zimring 2009: 60–1). However, since capital punishment remained in Japanese criminal justice, Johnson introduces a hypothesis that the US may have left the system intentionally in order to execute seven war criminals in the Tokyo War Crime Trial in 1948 (Johnson and Zimring 2009:60–1; Johnson

2011:142). In other words, his assumption is that Japan would have abolished capital punishment in the post-war period if that had been included in the then US policy (Johnson 2011:142).

Secondly, Johnson mentions the characteristics of Japanese political parties and their resistance to political changes including the abolition of capital punishment. The Japanese government was ruled by a pro-death-penalty LDP for approximately 54 years from its foundation in 1955 to when the Democratic Party of Japan defeated it in 2009; and the LDP has regained power from 2012 again. In his hypothesis, the government's retention of capital punishment stems from the LDP's policy on this issue and its perpetual dominance (Johnson 2011:143). Thirdly, Johnson points out Japan's geographical position and its stability as a democratic country. For example, since Japan is geographically distant from Europe, the EU's anti-death penalty norm may not appear to appeal to the Japanese government (Johnson 2011:144). Another hypothesis he suggests is that since Japan is in a geographically important area and has already established its status as a democratic country, international society does not appear to want to punish Japan for not complying with international norms (Johnson 2011:144).

### ***External Factors***

Secondly, with regard to external factors, Johnson mentions Japan's relationship with two states and one region: the US, South Korea, and Asia. Firstly, given that

the US and Japan are the two remaining industrialised democracies that retain capital punishment against the international trend today, it is often discussed amongst scholars that if all the 50 states in the US abolish capital punishment, Japan will follow suit (Johnson 2005:253; 2011). Secondly, South Korea is being raised as a possible key country that could influence Japan's policy making. The last execution in South Korea took place on 30 December 1997, and its government has been implementing a *de facto* moratorium until today. Therefore, Johnson's hypothesis is that Japan would mirror South Korea's policy once that country abolished capital punishment in law, since he believes that Japan wants to protect its self-image as a leader in Asia, and does not want to allow Korea to stand out in any policy area (Johnson 2011:147; 2005:253, 266). Thirdly, Johnson suggests a linkage between Japan's retention of capital punishment and a lack of regional organisations in Asia such as an East Asian Community. His claim is that there do not exist any Asian organisations that can make the abandonment of capital punishment a criterion to which Japan must conform before being admitted as a member, as the EU does (Bae 2008:79; Johnson 2011:148)<sup>12</sup>.

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<sup>12</sup> Although there are already various organisations in this area such as: (1) the Association of Southeast Asian Nations (ASEAN); (2) ASEAN+3 that include China, Japan, Korea; (3) the East Asia Summit (EAS); and (4) Asia-Pacific Economic Cooperation (APEC), their main focus is on the economy and security, not human rights (Bae 2008:79; Johnson 2011:148).

### ***Internal Factors***

Finally, Johnson raises three internal factors: (1) strong public support for capital punishment; (2) a unique Japanese view on sin and human rights; and (3) a 'punitive' way of thinking from the perspective of victims' bereaved families. First of all, public opinion is one of the primary reasons for the Japanese government to retain capital punishment. Governmental opinion poll results have revealed that the vast majority of Japanese citizens, 85.6 per cent in 2009, support the system (Appendix IV). Secondly, it is often said amongst governmental officials that it is a unique Japanese mentality on life and death that has been contributing to Japan's retention of capital punishment (Okuno 1980c:8; Goto 1989:3; Moriyama quoted in *Japan Times*, 4 October 2002). In their argument, the Japanese public believes that execution through capital punishment is the only way for some offenders to atone for their crimes, and that it functions as social justice for the victims' bereaved families. Thus, Johnson suggests that domestic factors have been playing a significant role in the government's retention of capital punishment in Japan.

Whilst these hypotheses cover a wide range of domestic and international factors comprehensively and may appear helpful to understand Japan's retention of capital punishment, the actual decision making is conducted by selected bureaucrats in the closed institutional framework irrespective of cultural features or external pressures. In order to challenge each hypothesis, the following part will first clarify who get involved in the capital punishment policy

making.

### **1.3. JAPANESE DECISION MAKING: THE IRON TRIANGLE MODEL**

First of all, it is important to clarify how the Constitution of Japan lays down where power rests in Japanese decision making. According to Article 1, sovereignty resides with the people; and Article 65 stipulates that the executive power is vested in the Cabinet. The Cabinet is composed of (1) the Prime Minister, who is elected by members of the Diet; and (2) other Ministers of the State (Article 66). Regarding the selection of the Ministers of State, the Prime Minister appoints them, and a majority of them must be chosen from amongst the members of the Diet (Article 68) in order 'to insure a government accountable to the electorate' (Thayer 1969:180). As Nathaniel B. Thayer (1969:183) states:

After the prime minister has decided what sort of a cabinet he intends to choose, he will call for recommendations of lower house members from the faction leaders and of upper house members from party leaders in the House of Councillors. Factional balance and the selection of able men will be the two principles which guide the prime minister in the selection of his new cabinet. Particular attention will be paid to the economic posts. After the prime minister has selected his new officers, they will be attested to by the emperor, a proclamation of the new cabinet will be issued, and the cabinet will formally be set in motion.



During this process, 'the staff rarely proposes candidates on its own initiatives, but restricts itself to commenting on the proposed cabinet lineup given it by the prime minister' (Thayer 1969:185). In the meantime, cabinet changes stem from the following two factors. Firstly, Article 69 stipulates that 'If the House of Representatives passes a non-confidence resolution, or rejects a confidence resolution, the Cabinet shall resign en masse'. Secondly, 'The Prime Minister may remove the Ministers of State as he chooses' (Article 68) considering the fact 'that the present cabinet is not working well, that the present government policies are not going smoothly, or that the public is tired of the same old faces and the same old voices' (Thayer 1969:182).

Thus, the constitutional provisions promise that Japan is a parliamentary democracy (Article 65, 66, 68); and the Prime Minister exerts a key role in making a cabinet. However, the existing research has shown that Japan is a 'bureaucratic authoritarian' country (Van Wolferen 1989:272) in reality. In other words, it is a cluster of bureaucrats, or higher civil servants, who play significant roles in the Japanese government. In fact, cabinet reshuffles carried out approximately every year do not allow cabinet members to play executive power, and the Prime Minister has practically:

'no explicit legal authority enabling him to insist on policy innovation outside his Office, force a Cabinet colleague to take a particular course of action or even divulge a particular piece of information' (Neary 2004:

675).

A discrepancy between theory and practice can be observed in the actual power dynamics within the Japanese government. Instead, a model that has been widely used to account for the power dynamics in the Japanese decision making process is the Iron Triangle, which consists of bureaucrats, party politicians, and the business community, which is represented by the *Keidanren*<sup>13</sup>, the Japan Business Federation (McCargo 2004:110). Of the three, bureaucrats play a significant role in both policymaking and policy implementation in Japan. Approximately 80 per cent of all legislation passed is drafted by bureaucrats, and Diet members merely rubber-stamp the documents (Van Wolferen 1989:33, 145).

As Karel van Wolferen (1989:145) argues, '[t]he law-making process is usually over by the time a bill is submitted to the Diet'. This may appear at first sight a simple result of the bureaucrats' long tenure of office in contrast to party politicians. Whilst bureaucrats are usually employed for life, 'LDP cabinet ministers rotate their jobs on average about once a year, and are rarely in post long enough to stamp their ideas on a particular ministry, even if they were minded to do so' (McCargo 2004:105). However, bureaucrat-led decision making system has also been strengthened by other intertwined factors: (1) the fluidity of

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<sup>13</sup> *Keidanren* is 'a federation of leading industrial organisations such as the automobile manufacturers' association, the shipbuilders' association, the iron and steel federation, the petroleum association and the chemical industry association, together with trading companies, wholesale business, banks, insurance companies and securities companies' (Van Wolferen 1989:34).

bureaucrats within the triad; (2) their power relations with the business community; (3) the standardised educational background of bureaucrats; (4) the Japanese decision making process, which prefers 'group consensus'; and (5) the continuous domination of the LDP. Through examining these aspects, this section will clarify why bureaucrats tend to play a significant role within the Iron Triangle.

Firstly, bureaucrats tend to occupy important posts in the business community and the ruling party through a system of *amakudari*, or descent from heaven. *Amakudari* is a custom of outplacement by which senior high-profile bureaucrats from governmental agencies such as the Ministry of International Trade and Industry move to the private and public sectors such as the Bank of Japan, commercial banks, trade and industry associations, and the boardrooms of private enterprise (Boyd 1987:68). Also, about 25 per cent of the LDP Diet members are ex-bureaucrats under a similar system (Krauss 1989:53), and they try 'to represent the interests of their former ministry [...so that] their [...] personal connections with their former colleagues would [not] fade' (Van Wolferen 1989:143).

Secondly, whilst the business community provides the government funding, bureaucrats tend to influence their activities through a practice of *gyosei shido*, or administrative guidance. According to Krauss (1989:51):

Administrative guidance is a general term that encompasses formal and

informal methods of implementing policy, from the issuing of formal administrative ordinances that have the force of law, to informal communication that attempt to persuade social groups to go along voluntarily with a policy.

Although this practice is not legally binding, the business community tends to abide by it. This is because:

‘Governmental officials are responsible for approval of applications for almost every conceivable business activity. If they do not like an applicant, for whatever reason, they can hold off a decision on that person’s applications’ (Van Wolferen 1989:344).

Therefore, although administrative guidance only requires ‘voluntary co-operation’ from the business community in theory, it is almost compulsory in practice (Van Wolferen 1989:344–5).

Thirdly, what characterises bureaucratic decision making is that the bureaucrats tend to act on precedents (*senrei shugi*) (Mori 2008:18) and make conservative decisions without inviting new ideas from various people of various backgrounds or experiences. What makes it possible is that they are a standardised elite group. Bureaucrats tend to be recruited disproportionately from Japan’s most prestigious universities through competitive examination (Krauss 1989:51; Campbell 1989:115; Ramseyer and Rosenbluth 1998:60; Richardson 1998:109),

and the prime example is the Law Faculty of Tokyo University. As John C. Campbell (1989:116) contends, 'attracting the best students from the best universities makes the Japanese bureaucracy more effective in terms of sheer talent, and public respect encourages self-confident leadership'. Furthermore, this not only helps them agree to follow precedents but also helps make the consensual decision making smooth when a new proposal is made. Since 'new graduates can readily plug into the established alumni network' (Van Wolferen 1989:111), it is easy for them to build human connections, which becomes useful for this process.

Indeed, what also symbolises the Japanese decision making process is that bureaucrats maximise the use of available measures in order to reach consensus in advance. What creates an 'illusion of consensus' (Van Wolferen 1989:339) in particular is the *ringi* system with a use of *nemawashi*. Under the *ringi* system, a proposal is passed around the ministry to get approval from superior officials (Yamada 1985:102). Stamps indicate approval, and those who disapprove do not put a stamp on the proposal, while those who want to give conditional approval put it either sideways or upside down (De Mente 1975:87; Ruch 1984:71). However, what deserves some attention regarding this system is that: (1) it does not expect an open objection during this process; and (2) the top authority dealing with the issue usually approves the proposal considering the long process it must have taken. A practice of *nemawashi*, or 'binding the roots of a plant before pulling it out' (Vogel 1975:xxii), is often held in order to help reach a 'group consensus'. As van Wolferen (1989:338) argues:

*Nemawashi* involves talking with the concerned parties so as to prepare them to 'accept' a plan, as one prepares the ground for planting something. Such spadework does not invite 'democratic' objection (with the option of rejection), as a similar process would in the West.

Moreover, '[w]hether or not a *ringi* proposal is approved by the [...head] is primarily determined by who has approved it by the time it gets to him' (De Mente 1975:88). Considering the long process, which could take a month until it reaches the top authority, he usually approves the proposal (Ruch 1984:72). In addition, what characterises the bureaucrat-led decision making system is that the *ringi* system is not always used for the aforementioned purpose for less important matters but 'serves to circulate information about decisions already made' (Ruch 1984:72).

Finally, what has made the triad highly interdependent is the perpetual domination of the LDP (Krauss 1989:39, 52) from 1955 to 2009 (with 1993 as exception) and from 2012 to today. As Duncan McCargo (2004:114), argues, '[t]o a large extent, studying the politics of Japan means studying the politics of one leading party, the Liberal Democratic Party (LDP)'; and post-war economic reconstruction could never have been achieved without this mechanism (McCargo 2004:106, 110).

This section has introduced the Iron Triangle model – discussing bureaucrats'

significant role in this triad, in which they make the most of their personal networks within the ruling party and the business community – and the Japanese decision making tradition and the stability of the ruling party. Having examined the elite-driven decision making mechanism in Japan, the subsequent section will move on to evaluate the extent to which the Iron Triangle model fits into the decision making mechanism regarding capital punishment policy in Japan.

#### **1.4. APPLICATION OF THE IRON TRIANGLE MODEL TO CAPITAL PUNISHMENT POLICY**

In order to investigate the applicability of the Iron Triangle model to capital punishment policy, it is important to examine which people in which governmental agencies (1) underpin the legal legitimacy of the system, (2) get involved in the actual running of the system, and (3) represent and justify the policy on legal, domestic, and cultural grounds both internally and externally.

Firstly, it will clarify the role that the Supreme Court plays in the governmental justification of capital punishment. Although the constitutionality and legality of the capital punishment system and the execution method used have been controversial in Japan, the Supreme Court consistently declares that they do not conflict with any legal provisions. Examining the people who serve as judges at the Supreme Court, this part will clarify why they tend to make decisions in favour of the government. Secondly, it will highlight the role that the Public Prosecutor's Office plays in this system. Even though it is the Ministry of Justice that is responsible for capital punishment policy, the public prosecutors in

practice get involved in the crucial part of the policy. This section will explore how the Public Prosecutor's Office, which is a subordinate institution of the Ministry of Justice, runs the capital punishment system in reality.

Relating to this fact, the third part will examine the limited power of Ministers of Justice, at the head of the Ministry of Justice, in capital punishment policy. Given that non-authorisation by Ministers of Justice can delay executions, their personal convictions may appear crucial factors in the policy at first sight. However, this section, mentioning the short tenure of Ministers of Justice as one reason, will clarify that it is employed-for-life bureaucrats in the Ministry of Justice who get involved in the actual decision making process. Finally, it will critically investigate whether or not pressure groups can fit into the triad regarding capital punishment policy. Although the pro-death-penalty lobby's claims may appear to have been reflected in governmental decision making, that is not the case in practice. This section will argue that capital punishment policy is primarily elite-driven, and important decisions are made irrespective of the voice of pro-death-penalty NGOs or the victim lobby.

#### **1.4.1. The Supreme Court**

First of all, it is the Supreme Court that consistently proclaims the constitutionality and legality of the capital punishment system, and makes the final judicial decisions regarding death sentences. Given that Article 76 of the Constitution of Japan stipulates that judicial power is vested in the Supreme



Court,<sup>14</sup> and Article 77 also provides that: 'Public prosecutors shall be subject to the rule-making power of the Supreme Court', the Supreme Court is theoretically independent from bureaucratic control. Having said that, it merits particular attention that all the 15 judges in the Supreme Court, who are appointed by the Prime Minister, have previously worked as public prosecutors (McCargo 2004:103). This can lead the Supreme Court to make decisions favouring the positions of the Public Prosecutor's Office on capital punishment, and in fact the Supreme Court has overturned decisions on capital cases or the constitutionality of the capital punishment system made in lower-level courts.<sup>15</sup> Keeping the bureaucratic control by the Public Prosecutor's Office in mind, this section will examine how the Supreme Court has been resisting domestic debate on the constitutional and legal issue of the capital punishment system; and why legal ambiguity is observed regarding the death sentences imposed by the Supreme Court.

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<sup>14</sup> According to Article 76: The whole judicial power is vested in a Supreme Court and in such inferior courts as are established by law. No extraordinary tribunal shall be established, nor shall any organ or agency of the Executive be given final judicial power. All judges shall be independent in the exercise of their conscience and shall be bound only by this Constitution and the laws.

<sup>15</sup> This also holds true of other government policies. For example, whilst lower-level courts sentenced major companies guilty of causing hazardous pollution in the 1960s, the Supreme Court overturned their decisions and 'helped precipitate new legislation and the setting up of an environmental agency' (McCargo 2004:103).

## ***Constitutionality of the Capital Punishment System***

Firstly, as briefly discussed in the Introduction, capital punishment has been declared constitutional by the Supreme Court since 12 March 1948, and so is the execution method, which is specified as hanging in Article 11 of the Penal Code.<sup>16</sup> However, domestic debate on the constitutionality and legality of this system is still open-ended in Japan. For example, whilst Article 31 of the Constitution of Japan stipulates that ‘No person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, *except according to procedure established by law*’; Article 36 of the Constitution provides that ‘[t]he infliction of torture by any public officer and cruel punishments are absolutely forbidden’. The key point regarding this debate appears to be that the Japanese government has not solved or does not intend to solve a ‘legitimacy problem’ regarding the cruelty of hanging. As Austin Sarat (2002:19) argues:

To be legitimate at all, state killing must appear to be different from the violence to which it is opposed and to which it is seen as a response. A crucial part of this difference is in the way law deals with those accused of capital crimes and those who are sentenced to death.

In order to justify state killing, or to distinguish it from homicide which states criminalise, most states of the US, the other remaining industrialised democracy

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<sup>16</sup> Although the execution method in Japan varied from strangulation or decapitation, to *seppuku* or ritual disembowelment, after the Meiji Restoration in 1868 Japan made hanging the official execution method, importing the Western criminal system.

which retains capital punishment, have been employing lethal injection, since it is meant to kill death row inmates 'more softly and humanly' without unnecessary pain (Sarat 2002:60; Johnson 2005:259). On the other hand, the Japanese government has been sticking to the claim that 'state killing is state business' (Johnson 2005:260) on the basis of Article 31 of the Constitution of Japan and Article 11 of the Penal Code. This is because the Japanese government treats capital punishment policy as an issue of a criminal justice, and believes that it has the right to choose its own criminal justice system without interference from international society (Moriyama 2001b:8).

However, the constitutionality and legality of the capital punishment system are not only a concern amongst the legal experts but also for death row inmates, and the latter have fought against the Supreme Court. For example, Matsushita Kesatoshi, then a death row inmate in the Tokyo Detention Centre, took a legal step in 1958 claiming that hanging is in conflict with Article 36 of the Constitution of Japan. However, the Supreme Court rejected this case in 1960, referring to its previous decision in 1955. In more recent case, a claim by attorneys for Takami Sunao<sup>17</sup> was also turned down on 31 October 2011; and Wada Makoto, presiding judge at the Osaka District Court, declared that hanging is constitutional (*Nikkei*, 31 October 2011). The Supreme Court, which is filled with former public prosecutors, appears to simply represent government positions on this issue and proclaim the constitutionality and legality of the capital punishment system.

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<sup>17</sup> Takami, 41 at the time of the crime, set fire to a *pachinko* parlour in Osaka on 5 July 2009, and killed five people and injured 10. He was sentenced to death on 31 October 2011.

### ***Criteria for Capital Punishment***

With regard to death sentences, it is also the Supreme Court that makes the final decisions based on the Penal Code. However, there does not appear to exist a clear borderline between capital punishment and life imprisonment in reality (Schmidt 2002:45, 55), and public prosecutors tend to influence the judicial decision making. First of all, capital punishment is applied to the following crimes in Japan, all specified in the Penal Code:

- (1) insurrection (Article 77(1));
- (2) instigation of foreign aggression (Article 81);
- (3) assistance to the enemy (Article 82);
- (4) arson of inhabited buildings (Article 108);
- (5) detonating explosives (Article 117);
- (6) damage to inhabited buildings by flood (Article 119);
- (7) overturning of trains (Article 126(3));
- (8) endangering traffic by overturning of a train (Article 127);
- (9) pollution of water supplies with poisonous materials and causing death (Article 146);
- (10) homicide (Article 199);
- (11) robbery causing death or injury (Article 240);
- (12) rape at the scene of a robbery causing death thereby (Article 241),

Besides these, the following crimes are also deemed to merit capital punishment:

- (1) organised homicide (Article 3 of the Act on the Partial Revision of the Act on the Punishment of Organized Crime, Control of Crime Proceeds and Other Matters; and Article 199 of the Penal Code);
- (2) hostage murder (Article 4 of the Act on Punishment of Compulsion and Other Related Acts Committed by Those Having Taken Hostages);
- (3) aircraft hijacking (Article 2 of the Act on Punishment of Unlawful Seizure of Aircraft);
- (4) acts of piracy (Article 4 of the Law on Punishment of and Measures against Acts of Piracy);
- (5) illegal use of explosive substance (Article 1 of the Criminal Regulations to Control Explosives)

Currently, the vast majority of death row inmates have been charged for the crime of robbery causing death or injury (The Supreme Court 2012b:1); and the Nagayama Criteria have been used as a standard for the Supreme Court to impose capital punishment on offenders since 1983. Between October 1968 and April 1969, 19-year-old Nagayama Norio stole a gun from a US military base, and shot two security guards and two taxi drivers with a handgun in Tokyo, Kyoto, Hakodate, and Nagoya (Métraux 2009:283–4). The Juvenile Law stipulates that those younger than 19 cannot be punished with death, and Nagayama was 19 and ten months at the time of the crime. In accordance with the Juvenile Law,

Nagayama was sentenced to death in 1979.

Debate shortly arose amongst the legal experts on whether or not there should be a clear borderline between 18 and 19, and those over 18 should be punished harder (Hara 1998:54–5, 65). Nagayama also tried to defend himself by linking the motivation for the murder and robbery to his poverty and ignorance, and published a best-selling book, *Muchi no Namida* (Tears of Ignorance), with over 270,000 copies in print in 1990. His claim was considered in the trial, and the Tokyo High Court overturned the sentence of capital punishment and sentenced Nagayama to life imprisonment in 1981. The decision was based on the following claim: ‘The government should have saved the accused from his poor surroundings, It would be unfair to ignore the lack of proper welfare policies and lay all the responsibility to him’ (*Japan Times*, 1 August 2007).

However, the Supreme Court reversed the High Court’s decision, and on 8 July 1983 issued the Nagayama Criteria with nine main factors to be taken into account in imposing capital punishment (The Supreme Court 1983). According to the Supreme Court Criminal Report (*Saiko Saiban sho Hanrei*) Vol. 37, No. 6, ‘The death penalty can be applied only when the criminal’s culpability is extremely grave and the ultimate punishment is unavoidable from the viewpoint of balance between the crime and the punishment as well as that of crime prevention effects, taking into account’ the following nine factors:

- (1) the nature of the homicide in question;

- (2) the motivation behind it;
- (3) the method employed in the killing;
- (4) the number of people killed;
- (5) the feelings of the bereaved family toward the culprit;
- (6) the magnitude of the social implications of the case;
- (7) the age of the defendant;
- (8) whether the defendant has a prior criminal record; and
- (9) whether the defendant has demonstrated any remorse for what he or she has done (The Supreme Court 1983:609, translated in Métraux 2009:6)

On the basis of these newly established criteria, Nagayama's death sentence was finally upheld in 1990, and he was executed at the age of 47 on 1 August 1997. According to Sonobe Itsuo, one of the four judges in the Nagayama Case, not all of the factors have equal weight in the death sentence: high importance is attached to the method of killing and the number of those killed in particular (*Yomiuri*, 8 March 2009). Therefore, after the Nagayama Criteria were issued, there emerged a general understanding that the number of the victims in murder cases is the crucial factor in handing down capital punishment.

## ***Legal Ambiguities Regarding Death Sentences***

In the meantime, it deserves some attention that the Supreme Court has been imposing capital punishment in a few cases which involved a sole victim, as if the sixth criterion – the magnitude of the social implications of the case – has been reflected in the ruling. The first case is that of a 36-year-old male, Kobayashi Kaoru, who kidnapped, sexually assaulted and murdered a seven-year-old girl in Nara prefecture on 17 November 2004. Considering the nature of this crime,<sup>18</sup> Kobayashi was sentenced to death on 26 September 2006. In a second case three men, who had met through a mobile Internet site, kidnapped, robbed, and murdered a 31-year-old woman in Aichi prefecture on 24 August 2007. The misuse of the Internet was highlighted in the rulings (*Japan Times*, 27 August 2007), and the death sentence of one of them was finally upheld in 2009 whilst the rest were sentenced to life imprisonment in 2011 and 2012 respectively.

A third case is that of an 18-year-old male who broke into a house in Hikari city in Yamaguchi prefecture on 14 April 1999, and strangled a woman and her baby; this case will be discussed in detail in Chapter 2. He was initially sentenced to life imprisonment in consideration of his age and the possibility that he could be rehabilitated. However, the Supreme Court rejected an appeal by the defendant,

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<sup>18</sup> According to the *Japan Times* on 27 September 2006, 'He took a photo of the dead girl and sent it to her mother over the girl's mobile phone, and about a month later sent her a message threatening to target the girl's younger sister as well'. He had already spent three years in prison for his attempted killing of a five-year-old girl in October 1991, and had been paroled from 1996 (*Asahi*, 31 December 2004).



and the death sentence was finally upheld on 20 February 2012.

The legal ambiguities regarding death sentences may suggest at first sight that the Supreme Court reflects the domestic criminal situation and public sentiment sensitively. Through a case study of England and Wales, Michael Hough, Helen Lewis, and Nigel Walker (1988:1) proclaim the influence of public opinion in the judiciary process: 'In theory the severity and proportionality of tariffs are determined by legislatures and judiciaries; but in practice both have an eye on the audience [...who is] the man in the street'. Having said that, as Julian V. Roberts (2002:22) cautions, it is not necessarily right to overestimate such social factors in the Supreme Court rulings. Rather, more attention needs to be paid to: (1) how public sentiment on crimes tends to be shaped and measured; and (2) how Supreme Court decisions are made independently from these factors in Japan in reality.

According to the results of the Opinion Poll on the Public Image of Japanese Society (*Shakai Ishiki ni Kansuru Yoron Chosa*), the proportion of the Japanese public, who thought crime was worsening, increased from ten per cent in 1990 to 32.4 per cent in 1995; and it also stayed over 30 per cent from 2002 to 2009, reaching 47.9 per cent in 2005 (Hamai and Ellis 2008a:67; The Prime Minister's Office 1990; 1995; 2000; 2005; 2009b). However, scholars argue that the increase in public fear of crime mainly stemmed from an increase in reported crimes during this period; and that the rapid increase in reported crimes itself was a result of a change in the police policy of counting crimes after the

Okegawa Stalking Murder Case<sup>19</sup> in 1999 (Hamai and Ellis 2006:162). Since this murder incident could have been avoided if the police had dealt with the victim's claim more carefully, relatively trivial crimes, which would have previously been ignored, started to be formally reported (Hamai and Ellis 2006:163–4). This generated a sudden and drastic increase in overall recorded crime and decreased clear up rate in statistics (Kawai 2004:39; Hamai and Ellis 2006:166). The media only highlighted the statistics, and the public anxiety about the current state of society appeared to have surged and influenced the opinion poll results.<sup>20</sup>

Furthermore, what is important to acknowledge regarding the weight of public opinion on Supreme Court decisions is the elite-driven nature of capital punishment policy. As Hamai and Ellis (2008a:73) argue, 'If public prosecutors recommend the death sentence in court, which they do increasingly frequently [...], it has recently become more certain that this will be the sentence of the court'. It may still appear that the public prosecutors reflect the criminal situations at the time and public response to them. However, 'the Japanese prosecutors [a]re much more independent from political pressure and the public opinions than their American counterparts' (Johnson 2002 cited in Hamai and Ellis 2008a:83) since they pay no electoral price for being nonresponsive. Therefore, whilst public outcry about criminal situations may appear to be reflected in the

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<sup>19</sup> On 26 October 1999, a 21-year-old woman was stabbed to death by a man hired by her former boyfriend and his brother, at Okegawa Station in Saitama prefecture. Although the victim had filed complaints to the police that her former boyfriend was stalking her and defaming her and her family, they had been turned down by the police since they would cause an extra paperwork to them (*Japan Times*, 21 December 2005).

<sup>20</sup> With regard to media coverage of crime and its impact on the public, see Chapter 5.

Supreme Court rulings on capital cases, it is important to acknowledge the mechanism by which public fear is generated, and who uses such expressions of fear in order to recommend the death sentence in court in reality.

The following part will further investigate how the Public Prosecutor's Office exerts tremendous power in capital punishment policy.

#### **1.4.2. The Public Prosecutor's Office**

As already mentioned, both the Ministry of Justice and the MOFA have maintained that capital punishment comes under the aegis of the Criminal Affairs Bureau in the Ministry of Justice,<sup>21</sup> and the Public Prosecutor's Office is merely a subordinate institution within the Ministry of Justice. However, public prosecutors practically possess the strongest power in judicial issues (Van Wolferen 1989:222). This part will highlight the fact that public prosecutors get involved in the crucial part of capital punishment policy through: (1) generating confessions from offenders in order to result in sentences of capital punishment; (2) hindering measures for death row inmates to be proved innocent; (3) preparing documents that notify the Minister of Justice on who is to be executed next and when; and (4) taking initiatives regarding executions.

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<sup>21</sup> Interview with two MOFA ministers, Tokyo, 17 June 2011

### ***Interrogations to Generate Confessions***

Drawing on the existing work on the ‘exceptional efficiency’ of the Japanese criminal justice system,<sup>22</sup> where public prosecutors obtain confessions from suspects at a rate of over 90 per cent (Johnson 2002: 15, 243), Johnson has compiled an empirical study detailing how Japan’s two thousand prosecutors exercise their formidable powers. He calls Japan a ‘paradise for prosecutors’ because:

prosecutors have virtually unlimited discretion in deciding whether or not to prosecute. [...] [W]hatever they decide, they are free to go by their own rules, or those of their superiors, regardless of the evidence in hand or their personal belief regarding the suspect’s guilt (Van Wolferen 1989:220–1).

Firstly, despite the fact that Article 38<sup>23</sup> of the Constitution of Japan specifies that forced confession cannot be used as evidence, it lies at the heart of the Japanese criminal justice system:

In Japan confessions are the king of evidence, and prosecutors are given wide legal latitude to compose them in their own words and to use

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<sup>22</sup> Consistent writers on this issue include C. Johnson 1972; Clifford 1976; Aoyagi 1986; Foote 1992a; 1992b; Haley 1992; Mukherjee 1994.

<sup>23</sup> According to Article 38 of the Constitution of Japan: No person shall be compelled to testify against himself. Confession made under compulsion, torture or threat, or after prolonged arrest or detention shall not be admitted in evidence. No person shall be convicted or punished in cases where the only proof against him is his own confession.

them as evidence at trial [...] [T]he law gives investigators many tools to *extract* confessions: time, the single most effective instrument in their arsenal; a convenient place (police detention cells); control over meetings between suspects and defense counsel; and so on (Johnson 2002:39).

Suspects are detained in *daiyo kangoku* (police detention cells) for up to 23 days for interrogation, and there are no rules governing human rights standards for treatment of suspects. For example, prosecutors are not required to tape or video-record interrogations.<sup>24</sup> According to the interviews conducted by Jiji Press with interrogators, this is *to respect the wills of offenders*: some offenders demand to be interrogated only in private with a single investigator, so that matters revealed will remain in the interrogation room (Jiji Press, 1 May 2010). In other words, they may not tell the truth to the investigators if the whole interrogation is to be videotaped, since the real motive is usually something private or embarrassing, which they do not want to be known to members of their families or to the general public when they are released from the prison (Jiji Press, 1 May 2010). However, scholars challenge such a claim and argue that interrogations are not videotaped because what often takes place in *daiyo kangoku* is torture in order to generate confessions (Johnson 2002:279).

Indeed, 'The prosecutor's activities are not directed by the principle of *in dubio*

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<sup>24</sup> This is in contrast to the practice in states such as the UK, Canada, Australia, and many states of the US. For example, it became mandatory to video-record in the UK in 1986, in Alaska in 1985, and Minnesota in 1994 (Johnson 2002:273).

*pro reo* ('when in doubt, favour the accused') (Van Wolferen 1989:222). Rather, the degree to which suspects make a display of remorse is an important factor for public prosecutors in recommending sentences (Van Wolferen 1989:188), and interrogations are carried out for days and nights during this period until confessions are extracted. Furthermore, since prosecutors are evaluated in terms of their efficiency in solving the cases (Johnson 2002:243–4), 'once he has decided to prosecute, he will not accept being shown in the wrong' (Van Wolferen 1989:221). Therefore, public prosecutors even resort to using the right to submit immediate appeals against retrials<sup>25</sup> in order not to lose face, which results in miscarriages of justice. In fact, besides the four major retrials in the 1980s,<sup>26</sup> there are still unsolved cases in the process of pleading for retrials, some going back decades.

### ***Public Prosecutors and False Charge Cases***

Okunishi Masaru, aged 87, is currently the longest-serving inmate in Japan, having been detained for 52 years since 1961. He has been on death row on the charge of poisoning five women, and may have made a forced confession resulting from long interrogation sessions (Amnesty International 2011).

Secondly, a former boxer, Hakamada Iwao, aged 77, has been on death row for

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<sup>25</sup> According to Article 448 (1) of the Code of Criminal Procedure, 'When there are grounds for a request for a retrial, a ruling shall be rendered to commence a retrial, and Article 448 (2) also provides that 'When a ruling to commence a retrial has been rendered, a ruling may be rendered to suspend execution of the sentence'. However, public prosecutors can submit immediate appeals against this decision since Article 450 stipulates that 'An immediate appeal may be filed against a ruling as prescribed in Article 446, paragraph (1) of Article 447, paragraph (1) of Article 448, or paragraph (1) of the preceding Article.

<sup>26</sup> They are the Menda case, the Saitagawa case, the Shimada case, and the Matsuyama case, which will be discussed further in Chapter 3.

45 years since 1968 for the murder of a family of four in 1966 (Amnesty International UK 2012). He has been suffering from a mental illness after decades of imprisonment and is not even in a fit condition to meet his family or attorney to discuss opening a retrial.

In the most recent development in this case, an official meeting was held on 3 February 2012 at the Shizuoka Regional District as a part of the process of pleading for a second retrial. The main focus of the discussion was to conduct a DNA analysis all over again to examine the victims' blood found on five pieces of clothing that Hakamada allegedly was wearing at the time of the crime (*Japan Times*, 24 December 2011). However, the Public Prosecutor's Office protested against the proposal, claiming that 'it would breach the confidentiality if the DNA examiner comes into the detention centre for taking some samples from Hakamada. It has to be staff of the National Research Institute of Police Science who conduct such job' (*Mainichi*, 4 February 2012).

The response of the Public Prosecutor's Office to Hakamada's defence team in 2011 implied that securing confidentiality can override proving the guilt or innocence of a man who has been on death row for more than four decades on a false charge.<sup>27</sup> As already discussed, public prosecutors endeavour to gain confessions in order to solve cases 'efficiently', and recommend sentences to the court. However, when their decision is about to be challenged by the defence

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<sup>27</sup> On 13 April 2012, a DNA analysis result revealed that Hakamada's DNA was not found on any of the clothes used as the evidence of the crime. Hakamada's defence lawyer has currently been preparing for retrials, which can be permitted on the submission of newly discovered evidence (*Chunichi*, 16 April 2012).

team, they appear to try to hinder this in order not to lose face. This case can indicate that the priority of the Public Prosecutor's Office has been given to 'solving' the cases efficiently in order to maintain a high conviction rate, and capital punishment policy does not appear to have been dealt with as an issue concerning human life.

Although the Fukawa case recently highlighted the necessity for a visual record of interrogation in *daiyo kangoku*, the Public Prosecutor's Office has not tackled this issue until today. The Fukawa case concerns a murder-robbery incident in Ibaraki prefecture on 30 August 1967; Sakurai Shoji and Sugiyama Takao, aged 20 and 21 respectively at the time of the crime, were suspected in the murder of a 62-year-old carpenter (*Mainichi*, 24 May 2011). Despite the fact that neither their fingerprints nor their hair were found at the murder scene, they were forced to make confessions after a series of long interrogation sessions, and sentenced to life imprisonment on 3 July 1978 (*Mainichi*, 14 July 2008). After being released on parole in November 1996, they repeatedly submitted petitions for retrials, and their petition was finally accepted in September 2005. Tape recordings of their 'confessions' were found to have been edited in 13 places, and a new DNA test confirmed the innocence of the two men in June 2011 some 44 years after the initial guilty verdict (*Mainichi*, 24 May 2011). The then Minister of Justice, Eda Satsuki (January to September 2011), demanded that, in light of this case, tape and video-recording of interrogations should be mandatory (*Jiji Press*, 8 April 2011). The Parliamentary League to Realise the Visualisation of Interrogations within the Democratic Party of Japan, also supported his initiative. However, no



progress has been made until today.

### ***Public Prosecutors' Initiatives on Executions***

Finally, it must be made clear that prosecutors are also responsible for the preparation of documents that notify the Minister of Justice on who is to be executed next and when. This is based on Article 472 of the Code of Criminal Procedure, which provides that execution is carried out on the initiative of the head of the Public Prosecutor's Office. It appears inappropriate for public prosecutors to be in charge of this task, especially given the fact that it is prison guards in the Correction Bureau under the Ministry of Justice who deal with death row inmates on a daily basis and are intimately aware of their health and mental condition. However, it is important to note again that prosecutors have a near monopoly on important posts in the Ministry of Justice. The positions of the Director-General of the Criminal Affairs Bureau and the Correction Bureau in the Ministry of Justice are regularly filled by former prosecutors, not by senior prison officers; and in many cases, the latter post tends to be given to someone with no practical experience in correction. Since they are prime candidates, within a few years, for promotion to the Chief Public Prosecutor, they merely try to ensure that offenders cause no trouble during their periods in office (Kikuta 2002a:22).

In the meantime, the highest position given to those with practical experience in correction is head of the Regional Correction Headquarters (Kikuta 2002a:22). Since holders of this post will be transferred to another prison after several years,

naturally they also place emphasis on avoidance of trouble or incidents during their term. Thus, the Correction Bureau does not tend to have an environment that welcomes new ideas or opinions from prison officers to improve the current situation. It is considered best to follow what has been the rule for decades, and their prime objective is to seek (1) to discourage offenders from seeking redress, initiating a lawsuit, or disclosing information about prison life; and (2) to keep death row inmates in good health and mental condition *so execution will be carried out smoothly* (Kikuta 2002a:22; Mori 2008:216). Consequently, whilst capital punishment policy has been dealt with under the aegis of the Criminal Affairs Bureau in the Ministry of Justice, the Public Prosecutor's Office plays a prominent role in the running of this policy, from generating confessions from suspects to taking initiatives regarding executions.

#### **1.4.3. The Ministry of Justice**

Having examined the way that the Public Prosecutor's Office gets involved in practice in the crucial part of capital punishment policy, this section will move on to examine the limited role that Ministers of Justice can play, in contrast to the bureaucrats in the Ministry of Justice and the Public Prosecutor's Office. The first part will examine the legal responsibility and rights of Ministers of Justice regarding this policy. More precisely, through examining Article 475 of the Code of Criminal Procedure, which specifies the responsibility of Ministers of Justice regarding authorisation of executions, it will discuss the legality and propriety of some Ministers' refusal to authorise executions because of their personal beliefs.

The second part will divide past Ministers into three types according to their interpretations of the aforementioned Article, and their attitudes towards capital punishment in general. Highlighting a divergence amongst Ministers of Justice in their views on capital punishment on legal, moral, and cultural grounds, the third part will clarify why personal convictions of Ministers of Justice cannot have significant influence on capital punishment policy.

### ***Legal Responsibility of Ministers of Justice Reconsidered***

The pro-death-penalty advocates' claim is that non-authorisation by Ministers of Justice is a neglect of their official duty, and is against the legal provision in Article 475 and 476 of the Code of Criminal Procedure. According to Article 475 (1), 'Execution of the death penalty shall be ordered by the Minister of Justice. Article 475 (2) provides more details and requires the Minister to do this 'within six months from the date when the judgment becomes final and binding' although this excludes the period that applications or requests for a retrial or pardon are being made. In other words, Article 475 (2) 'grants the Minister broad discretion to extend this period almost indefinitely depending on various factors, such as requests for a retrial or pardon' (The Advocates for Human Rights 2012:7). Furthermore, Article 476 provides that executions shall be conducted within five days upon the order by the Minister of Justice.

Based on these legal provisions, bureaucrats in the Ministry of Justice tend to argue that non-authorisation can create 'unfairness' amongst death row inmates

and their families, and amongst the bereaved families of the victims, especially when a pro-death-penalty Minister takes over from one who is opposed to the death penalty (*Yomiuri*, 21 September 2009). On the other hand, it deserves some attention that some scholars on law and the Constitution of Japan contend that Ministers of Justice are not necessarily bound by the provisions of Article 475 of the Code of Criminal Procedure. Firstly, Mizutani Norio (2010:1092), professor of law at Osaka University, notes that Article 32 of the Act on Penal Detention Facilities and Treatment of Inmates and Detainees (*Keiji Shuyo Shisetsu oyobi Hishuyosha no Shogu ni Kansuru Horitsu*) stipulates:

(1) Upon treatment of an inmate sentenced to death, attention shall be paid to help him/her maintain peace of mind. (2) Measures such as counseling or lectures which may contribute to helping the inmate sentenced to death to maintain peace of mind shall be taken by obtaining cooperation from nongovernmental volunteers (The Ministry of Justice 2007a).

Therefore, Mizutani (2010:1092) argues that Ministers of Justice do not have to authorise executions until death row inmate's peace of mind is secured. Secondly, he suggests it is reasonable that Ministers of Justice do not authorise executions when debates on capital punishment are taking place both inside and outside the country (Mizutani 2010:1092). Internationally, there is a broad and growing consensus against the death penalty, represented by various covenants of the UN and the *acquis communautaire* established by the EU. Domestically, it

should be noted that Japan introduced *saiban-in seido* (quasi-jury system) on 21 May 2009. Under this newly introduced system,<sup>28</sup> panels usually composed of three judges and six lay assessors,<sup>29</sup> and lay assessors chosen from the electoral register, determine both guilt (or innocence) and the sentence to be imposed.<sup>30</sup> Since the public, who do not necessarily have sufficient knowledge of law or criminology, started to get involved in imposing death sentences, a new legal system has raised public consciousness on capital punishment policy (Johnson 2010).

Similarly, in interviews with a professor of law and a researcher on the Japanese constitution,<sup>31</sup> both scholars defended the legality of decisions by Ministers of Justice not to comply with Article 475, since it is a mere advisory provision (*kunji kitei*). Firstly, Article 13 of the Constitution of Japan provides that ‘All of the people shall be respected as individuals. Their right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs’. Secondly, Article 99 of the Constitution of Japan stipulates that ‘The Emperor or the Regent as well as Ministers of State, members of the Diet, judges, and all other public officials have the obligation to respect and uphold this Constitution’.

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<sup>28</sup> In Japan, the jury system was used from 1928 to 1943. Under this system, jurors used to determine guilt or innocence, and the sentence to be imposed was determined by the judges.

<sup>29</sup> According to Article 2 of *Saiban-in no Sanka suru Keiji Saiban ni Kansuru Horitsu* (The Lay Assessor Act), panels are composed of one judge and four lay assessors for certain cases such as those where guilt seems beyond doubt.

<sup>30</sup> Article 13 of *Saiban-in no Sanka suru Keiji Saiban ni Kansuru Horitsu*.

<sup>31</sup> Interview with two constitutional scholars, Tokyo, 13 May 2011

Therefore, according to the constitutional scholar,<sup>32</sup> it is not necessarily illegal for Ministers of Justice to refrain from authorising executions, even though it may seem to be against the Code of Criminal Procedure: it is rather mandatory for Ministers of Justice to be extraordinarily careful with decisions that relate to matters of life or death, as stipulated in Article 13 of the Constitution of Japan. It is also their responsibility to encourage debate in the Diet or in the public amongst order to amend the law if necessary.<sup>33</sup>

Thus the 'responsibility' of Ministers of Justice provided in Article 475 of the Code of Criminal Procedure has been interpreted in various ways by scholars in reference to the relevant articles in the Act on Penal Detention Facilities and Treatment of Inmates and Detainees, and the Constitution of Japan. Similarly, whilst most Ministers of Justice appear to construe this provision as an official duty, others stress its 'advisory' nature. The subsequent section will illuminate a divergence amongst Ministers of Justice regarding their views on Article 475 of the Code of Criminal Procedure and the issue of capital punishment in general.

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<sup>32</sup> *Ibid*

<sup>33</sup> *Ibid.*

### ***Ministers of Justice: Different Views on Capital Punishment***

According to Petra Schmidt, there are roughly three types of Ministers of Justice: the doves, the hawks and the in-betweens. More precisely, they are: (1) those who are opposed to the death penalty and refuse to authorise executions because of their personal convictions or religious beliefs; (2) those who are in favour of the death penalty and authorise the executions; and (3) those who are opposed to the death penalty but dutifully authorise the execution of one or two inmates annually (Schmidt 2001:63–73) (see Table 1).

**Table 1 Three Types of Ministers of Justice**

<b>Name</b>	<b>Sex</b>	<b>Year</b>	<b>Length of Appointment</b>	<b>Numbers of Executions</b>	<b>Party</b>
<b>The Doves</b>					
Eda Satsuki	Male	14 Jan 2011 to 2 Sep 2011	8 months	0	DPJ
Hiraoka Hideo	Male	2 Sep 2011 to 13 Jan 2012	4 months	0	DPJ
Tanaka Keishu	Male	1 Oct 2012 to 23 Oct 2012	23 days	0	DPJ
<b>The Hawks</b>					
Hatoyama Kunio	Male	27 Aug 2007 to 2 Aug 2008	1 year	13	LDP
Yasuoka Okiharu	Male	2 Aug 2008 to 24 Sep 2008	1 month	3	LDP
Mori Eisuke	Male	24 Sep 2008 to 16 Sep 2009	1 year	9	LDP
Yanagida Minoru	Male	17 Sep 2010 to 22 Nov 2010	2 months	0	Democratic Party of Japan (DPJ)

Ogawa Toshio	Male	13 Jan 2012 to 4 Jun 2012	5 months	3	DPJ
Taki Minoru	Male	4 Jun 2012 to 1 Oct 2012,	4 months	4	DPJ
		24 Oct 2012 to 26 Dec 2012	2 months	0	DPJ
<b>The In-between</b>					
Chiba Keiko	Female	16 Sep 2009 to 17 Sep 2010	1 year	2	DPJ

\*Full data from 1980 to 2013 can be found in Appendix IV.

Firstly, the prime examples of the doves are Eda Satsuki (14 January 2011 to 2 September 2011) and Hiraoka Hideo (2 September 2011 to 13 January 2012). Eda was outspoken on the issue of capital punishment and showed his anti-death-penalty sentiment clearly throughout his term of office. In his first press conference on 15 January 2011, he described capital punishment as a 'defective' (*kekkan no aru*) penalty, raising the possibility of wrongful executions (*Financial Times*, 21 January 2011). Although he was criticised for this remark and promptly retracted it, he only rephrased the term 'defective' to 'troublesome' (*nayami ga ooi, nayamashi*) (Eda 2011b:6) in the Legal Affairs Committee on 9 August 2011, and proclaimed his opinion.

Moreover, in the Legal Affairs Committees on 9 March and 9 August 2011, Eda posed a fundamental question over the responsibility of Ministers of Justice regarding authorisation of executions: why must the death penalty be authorised by the Minister of Justice whilst other criminal affairs are dealt with by



administrative officers through administrative procedures? Eda (2011b:6) suggested that the reason for final decisions regarding executions being left to Ministers of Justice was presumably that they had in their position to consider the domestic and international trend comprehensively; and it was not right for them to authorise executions mechanically. Moreover, like the constitutional scholars,<sup>34</sup> Eda claimed that Article 475 of the Code of Criminal Procedure was a mere advisory provision, and argued that there was no legal problem in not authorising execution orders (Eda 2011a:5).

Furthermore, the subsequent Minister, Hiraoka Hideo, showed a similarly critical attitude towards the issue of capital punishment in Diet meetings. In the Legal Affairs Committee on 25 October 2011, he stressed that it was important for Ministers of Justice to consider various factors regarding capital punishment; and should not authorise execution orders in a simply dutiful manner (Hiraoka 2011:13). Firstly, he spoke of the international trend that the Japanese government should bear in mind: (1) only three out of 34 Organisation for Economic Co-operation and Development (OECD) countries retain capital punishment; (2) one of those three, South Korea, has abolished the system in practice; and (3) 16 [now 17]<sup>35</sup> out of 50 US states have abolished the system (Hiraoka 2011: 13). Secondly, regarding the interpretation of Article 475 of the Code of Criminal Procedure, Hiraoka expressed the same view as Eda and implied that ministers' non-compliance with this provision would not necessarily

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<sup>34</sup> *Ibid.*

<sup>35</sup> Currently 17 US states have abolished the death penalty: Alaska, Hawaii, Illinois, Iowa, Maine, Michigan, Minnesota, New Jersey, North Dakota, Rhode Island, Vermont, West Virginia, Wisconsin, Massachusetts, Connecticut, New Mexico, and New York.

generate legal problems such as apparent neglect of an official governmental duty (Hiraoka 2011:13).

Secondly, examples of those categorised as the hawks include: (1) Gotoda Masaharu, (2) Mikazuki Akira, (3) Hatoyama Yukio, (4) Ogawa Toshio, and (5) Taki Minoru. Firstly, Gotoda Masaharu (12 December 1992 to 9 August 1993) showed a consistent pro-death-penalty attitude, and resumed the authorisation of executions in March 1993 for the first time in three years and four months. He insisted that once a judge sentenced a convicted criminal to capital punishment, the Minister of Justice should authorise the execution as specified in the law: this was to maintain legal order in Japan, and those unhappy with this responsibility should resign immediately (Gotoda 1993b:3). This approach was also followed by his successor, Mikazuki Akira (9 August 1993 to 28 April 1994), who authorised executions for four death row inmates, believing in the deterrent effect of capital punishment.

Thirdly, Hatoyama Kunio (27 August 2007 to 26 September 2008) ordered executions of 13 detainees in less than a year. Since this was the largest number of executions since Gotoda resumed them in March 1993, *Asahi*, a major Japanese newspaper, condemned his behaviour by calling him *Shinigami*, or the Grim Reaper on 20 June 2008. As the number of executions began to invite foreign criticism, especially from human rights groups such as Amnesty International, Hatoyama stressed that capital punishment was a strictly domestic issue. He defended it not only on utilitarian grounds, saying that it was

necessary to achieve social justice, but also on cultural grounds declaring that capital punishment was an indigenous system deeply rooted in Japan's own history and culture (Hatoyama 2008:25): hence, he said, outside parties should have no say.

In a more recent case, in his inauguration speech as Minister of Justice on 13 January 2012, Ogawa Toshio (13 January 2012 to 4 June 2012) expressed a similar attitude and said it was the legal responsibility of the Minister of Justice to authorise execution orders. With the number of death row inmates in Japan now reaching about 130, the largest number since the end of World War II, Ogawa stated: 'It's a very hard duty, but I want to take job responsibility. [...] It isn't in line with the spirit of the law for the number of death row inmates to continue increasing without executions' (*Japan Times*, 15 January 2012). In the Legal Affairs Committee on 16 March 2012, he also showed his pro-death penalty attitude by saying:

Non-authorisation within six months of the final verdict has been a kind of a trend since the end of the war, and I do not intend to authorise executions of all of them at once. However, I have not changed my mind to fulfill my official duty to authorise executions (Ogawa 2012a:11).

During his term, Ogawa authorised three executions in total. Finally, Taki Minoru (4 June 2012 to 1 October 2012; 24 October 2012 to 26 December 2012) also took a similar approach to Ogawa's, and tried to justify capital punishment on

legal grounds. Firstly, he stressed in the Legal Affairs Committee on 15 June 2012 that capital punishment was a fair system equipped with an opportunity to open retrials, and a reprieve could also be granted when appropriate (Taki 2012b:44). Secondly, on 28 August 2012, he emphasised the legal responsibility of Ministers of Justice regarding executions as follows:

It is not in line with the legal provisions that Ministers of Justice neglect the duty of authorising executions due to personal convictions. Once the Supreme Court handed down a death sentence after going through the agony of judging whether a person should live or die, the Ministry of Justice should respect the decision (Taki 2012a:5).

Although Taki stayed in office for only about four months in his first term, he authorised executions of four inmates – two each on 3 August and 27 September 2012.

Thirdly, Chiba Keiko (16 September 2009 to 17 September 2010) is an example of an ‘inbetween’ Minister of Justice. Chiba has a long history as an outspoken anti-death-penalty advocate and member of the Parliamentary League for the Abolition of the Death Penalty. Although she resigned from the Parliamentary League when she was given the appointment, for nearly one year she managed to avoid authorising executions. Members of several NGOs opposing the death penalty looked forward to celebrating one year free of executions.<sup>36</sup> However,

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<sup>36</sup> Interview with two NGO staff, Tokyo, 17 May 2011

on 28 July 2010 two death row inmates were executed without prior notice, much to the chagrin of anti-death-penalty activists. Newspaper and television coverage shed light on positive aspects of the event. Chiba became the very first Minister of Justice to witness a hanging, and in press conferences she stressed the need for a fundamental debate on capital punishment:

It is not that I changed my mind [...] I attended the executions as I believe it is my duty to see them through. [...] Witnessing [them] with my own eyes made me think deeply about the death penalty, and I once again strongly felt that there is a need for a fundamental discussion (*Christian Science Monitor* 2010:1).

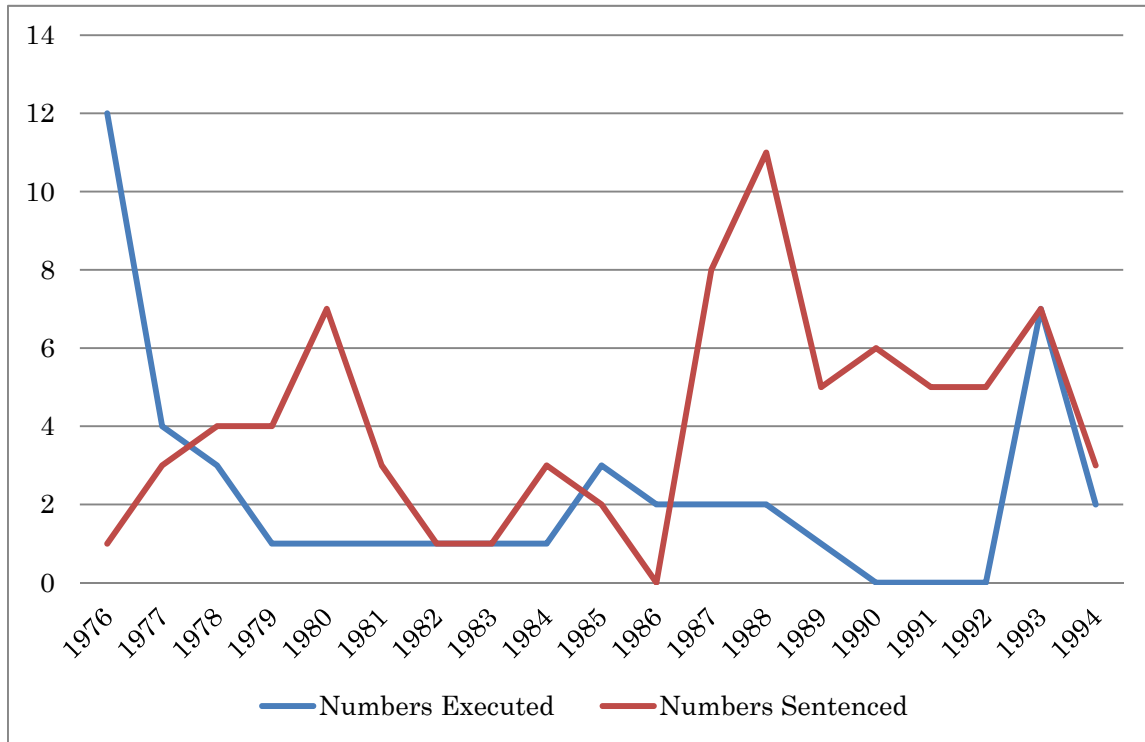
She showed her enthusiasm to set up a study group on the issue within the Ministry of Justice and to allow the media access to the execution sites in order to spur domestic debate (*Asahi*, 28 July 2010). Based on testimony from prosecutors who witnessed the hangings, details of how death row inmates are brought to the venue and exactly how they are executed were disclosed officially on television for the first time, though most of these details had been available in existing literature compiled by NGOs. Nonetheless, anti-death-penalty NGOs were disappointed with her political decision. They saw this as nothing but a performance by the Ministry of Justice to show that a *de facto* moratorium would not occur even under a Minister who opposed the death penalty (Center for Prisoners' Rights 2010). They complained that Chiba's achievements (setting up a study group, allowing media access to the execution chamber, and disclosing

execution details) could have been made without authorising even one execution.

From examination of the three different types of Ministers of Justice, it may appear at first sight that personal convictions of Ministers of Justice can influence capital punishment policy: pro-death-penalty Ministers tend to authorise executions in a businesslike manner; and anti-death-penalty Ministers tend to postpone this decision in reference to the 'advisory nature' of Article 475 of the Code of Criminal Procedure. Having said that, in reality, Ministers of Justice cannot influence capital punishment policy in the long run, and it is bureaucrats in the Ministry of Justice, most of whom are former prosecutors with a substantial personal network within the Ministry, who exert a tremendous role.

Firstly, as McCargo (2004:105) argues, cabinets are shuffled almost yearly, and Ministers do not stay in office long enough to root new ideas within the Ministry. This holds true in the Ministry of Justice, and even if Ministers of Justice are minded to bring a conscious change to the Ministry aiming to abolish capital punishment, they cannot do so within their short term, which only lasts for one year on average (see Figure 2).

**Figure 2 Numbers of Inmates Sentenced and Executed from 1976 and 1994**



\*What can be observed in this table is few executions from 1979 to 1984, no executions from 1990 to 1992, and a rapid rise in numbers of execution in 1993. However, it needs to be noted that (1) Ministers of Justice do not stay in office for more than one year on average; (2) the average time between sentence and execution is approximately a decade or longer in Japan, and a rise in execution numbers may have been a result of a delay from previous years.

For example, Chiba contributed to set up a study group on the issue of capital punishment within the Ministry of Justice; allowed media access to the execution chamber; and disclosed execution details to the public officially. However, she appears to have failed to set either short-term goals such as placing a moratorium period, or long-term goals such as the introduction of alternative penalties or the abolition of capital punishment. Indeed a later Minister of Justice,

Ogawa, claimed that the original purpose of the internal study group within the Ministry of Justice must have been to simply discuss the abolition and retention of capital punishment or to recognise the current situation, and not necessarily to create an alternative system (Ogawa 2012a:32). Although study group meetings have taken place ten times since 6 August 2010, none has been held since 19 December 2011 (Ministry of Justice 2013).

Similarly, former Ministers such as Eda denounced the capital punishment system as 'defective' (*Financial Times*, 21 January 2011); and Hiraoka introduced the subject of the the international trend of abolishing capital punishment in the Legal Affairs Committee (Hiraoka 2011:13). However, neither of them appeared to have succeeded in promoting abolitionism within the Ministry of Justice, because of their short tenure of office. As a result, most of the Ministers naturally tend to focus on following precedents during their terms. In other words, they tend to proclaim the retention of capital punishment on legal, domestic, and cultural grounds, and complete their official 'duty' or authorise executions in a business-like manner before the end of the calendar year.

Consequently, even if the personal characteristics of Ministers of Justice may appear to determine the future course of capital punishment policy, it is important to acknowledge that they can only play a limited role within the institutional framework where the bureaucrats operate with a substantial network in the long run. After examination of the elite-driven decision making system governing capital punishment policy in Japan, the next section will move on to investigate



what actors can or cannot replace the business community in the Iron Triangle model in its application to capital punishment policy.

#### **1.4.4. Pressure Groups**

Given that Ministers of Justice such as Moriyama tend to justify the capital punishment system on the grounds of respecting the feeling of the bereaved families (*Japan Times*, 4 October 2002), pro-death-penalty pressure groups such as the victim lobby may appear to fit into a position to complete the triad. However, the decision making takes place within tightly-knit institutional dynamics, where selected elites in the Ministry of Justice and the Public Prosecutor's Office have a near monopoly, and there are problems in locating pressure groups in the triad as actors of equal influence or power. This section will examine where exactly NGOs can be situated regarding capital punishment policy.

Firstly, through examining the legal standing of Japanese NGOs compared with those in the rest of the world, it will clarify the limited role that pro-death-penalty pressure groups can play in the governmental decision making dynamics in Japan. Secondly, it will investigate the lack of partnership amongst the Japanese government, the business community and anti-death penalty NGOs. In order to avoid or solve false charge cases in practice, it would be helpful to the government if campaigners outside the judiciary could 'intervene' in capital punishment policy. However, this section will clarify why the bureaucratic

decision making mechanism does not allow anti-death-penalty NGOs to have an official standing in this issue area. Finally, this section will note the difference between Japanese and international anti-death-penalty NGOs in the way they see themselves and the possible outcomes of their campaigns within the Japanese governmental power dynamics.

### ***Standing of NGOs in the International Scene***

According to Claude E. Welch Jr. (2001:263), NGOs have now stepped into the domain traditionally reserved for governments and have been bypassing the nation-state system. For example, NGOs can 'deal[...] with problems that grow slowly and effect society through the cumulative effect on individuals – the 'soft' threat of environmental degradation, denial of human rights, population growth, and lack of development' (Mathews 1997:63). Moreover, they can function as 'checks and balances' or watchdogs for the government. This holds true for the standing of selected NGOs in Japan to some extent: NGOs in the area of international development and humanitarian relief have been working in tandem with the Japanese government (Hirata 2002:37).

However, this does not imply that the standing of NGOs has been significantly increased in Japan, or that they have started to get involved in the governmental decision making mechanism. In reality, these NGOs in Japan are in the hands of the bureaucrats and the business community: senior high-profile bureaucrats tend to occupy the important posts in NGOs under the practice of *amakudari*,

and the business community tends to support those NGOs since they can obtain tax exemption from the government (Lee and Arrington 2008:84). Although NGOs may appear to have been inducing mutual benefit within the Iron Triangle, they are particular groups that the government can use to add legitimacy to their policy through cooperation<sup>37</sup>. Therefore, even if anti-death-penalty NGOs can 'check' Japan's human rights records or function as watchdogs, they have not been allowed to contribute to efforts to 'balance' official policy. In order to further investigate this issue, the following part will clarify (1) why Japanese NGOs in particular fields have been working closely with the Japanese government and the business community; (2) why anti-death-penalty NGOs have not gained a similar status in Japan; and (3) the extent to which domestic and international anti-death-penalty NGOs are aware of this closed power dynamics.

### ***Legal Standing of NGOs in Japan***

Firstly, it is important to acknowledge the striking difference in the legal status of NGOs in Japan and in the rest of the world referring to the provisions of the Constitution and the Civil Code of Japan. As Sook-Jong Lee and Celeste Arrington (2008:76) argue, NGOs in Japan and those in the rest of the world 'tend to operate at different levels of politics, employ distinctive strategies and

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<sup>37</sup> Japanese NGOs in the field of international development have made important progress and gained official status to influence governmental foreign aid policy. Although Japan has been the top donor of foreign aid with Official Development Assistance (ODA), it was often criticised in the 1950s-70s for giving *himotsuki enjo* (tied aid), whereby Japanese grant and loan aid was tied to purchases from Japan. Faced with international criticism, the MOFA started to adopt untied loans, and its focus also shifted to software aid, which includes training local community health practitioners (Hirata 2002:37). The number of Japanese international development NGOs increased following that change in aid policy, and they have become an integral part of ODA policy.

organizational structures, and adopt different stances toward their governments'. For example, whilst Northern counterparts in particular are usually described in Western literature as large, well-funded, and prestigious with either professional or semi-professional staff (Holmén and Jirström 2009:431; Welch 2001:268), Japanese NGOs tend to be smaller and scattered across the nation, lacking sustainable and managerial capability.

It may appear at first sight that this stems from a difference between Asian and Western countries. However, variation can also be observed within Asian countries. In the mid-1990s, Korean presidents sought to involve NGOs in governmental decision making in order to legitimise their democratic reform agendas: as a result, Korean NGOs have been working on political issues nationwide (Lee and Arrington 2008:78). By contrast, the Japanese government inhibited the formation of civic professional groups, which contributed to the formation of small, localised, and volunteer-based NGOs in Japan (Lee and Arrington 2008:77).

Indeed, the inability of Japanese NGOs to function like those in other states stems from the regulations set out in the Constitution and the Civil Code of Japan. As Frank J. Schwartz (2002:195) claims, 'Japan may be the strictest of all advanced industrial democracies in regulating the incorporations of nongovernmental organizations'. Although freedom of association is guaranteed in Article 21 of the Constitution of Japan, Article 34 of the Civil Code of Japan

sets some restrictions on giving NGOs legal status.<sup>38</sup> Therefore, out of two categories of NGOs – incorporated associations (*hojin*), or unincorporated associations (*nin-i dantai*) or civic groups – the majority of NGOs in Japan are in the latter category, not registered with the state. The low standing of NGOs in Japan has been contributing to a lack of professional staff as well. Whilst NGOs in developing countries such as Cambodia, Indonesia, Egypt, and Palestine offer NGO staff salaries and prestige equivalent to those of governmental posts; and Western NGOs also offer competitive salaries to highly skilled personnel, Japanese NGOs offer low salaries and less prestige (Hirata 2002:40). This has been leading qualified personnel to seek job opportunities not in NGOs but rather in international organisations such as the UN (Hirata 2002:40).

Secondly, it deserves some attention that the Japanese government tends to influence the goals of particular NGOs by filling their important posts under a practice of *amakudari*, or by supporting them financially. With regard to unincorporated associations, although Article 89 of the Constitution of Japan imposes some financial restrictions,<sup>39</sup> Article 25 specifies that ‘the State shall use its endeavors for the promotion and extension of social welfare and security, and of public health’. Therefore, Article 89 has become reinterpreted to oblige the state to provide support for private organisations (Schwartz 2002:203).

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<sup>38</sup> According to Article 34 of the Civil Code, ‘Any association or foundation relating to any academic activities, art, charity, worship, religion, or other public interest which is not for profit may be established as a juridical person with the permission of the competent government agency’.

<sup>39</sup> Article 89 of the Constitution of Japan specifies that ‘No public money or other property shall be expended or appropriated for the use, benefit or maintenance of any religious institution or association, or for any charitable, educational or benevolent enterprises not under the control of public authority’.

However, in return, financial dependency on the government can create a patron-client relationship, which can make NGOs quasi-governmental organisations or subcontractors (Schwartz 2002:203–4; Yamamoto 1998:127). Whilst most NGOs in the world tend to be financially independent of the government since the revenue is largely from individual donations, membership fees, and sales of publications, development and humanitarian relief NGOs in Japan tend to accept funding from the government although they face direct supervision (Lee and Arrington 2008:90). For example, the Japan Platform, which aims to provide humanitarian assistance to crisis areas, gets funding not only from the government but also from the business community: the government can impact the goal of the Japan Platform, and the business community can obtain tax exemption (Lee and Arrington 2008:84). Thus, it is only NGOs in particular issue areas that can work in tandem with the government and the business community, since they can help produce mutual benefit within the Iron Triangle.

After a domestic movement to give civic groups incorporated status surged in the 1990s, the NPO law was passed on 25 March 1998, which has made the application process for associations easier. Moreover, although conservative leaders in the LDP, in particular, used to perceive NGOs as adversarial towards the government, party politicians appear to have started to show some recognition of them as important partners of the government (Kato 1995:28). Firstly, Domoto Akiko in the Social Democratic Party of Japan criticised the

bureaucratic decision making system and called for inclusion of NGOs at a meeting of the House of Representatives Committee on Finance on 18 November 1994 (Domoto 1994:25). Similarly, Hatoyama Yukio, one of the core founders of the Democratic Party of Japan, stressed the importance of shifting Japanese society from being state-centred to being citizen-centred (Hatoyama 1996:122). Moreover, Kato Koichi in the LDP stressed in the House of Representatives Budget Committee on 27 January 1995 that LDP leaders had started to acknowledge the utility of NGOs over the past few years (Kato 1995:28). With the introduction of the NPO law, and following changes in governmental officials' attitude towards these entities, NGOs and NPOs have received far more recognition in Japan.

In the meantime, what needs to be noted again is that those considered as crucial partners in Japanese decision-making are still mostly NGOs in the area of international development or humanitarian relief. Human rights NGOs in general or anti-death-penalty NGOs do not enjoy similar prestige to participate in Japanese human rights policy, and the Japanese government tends to resist their pressures. The following part will further investigate why partnership between anti-death penalty NGOs and the Japanese government or the business community cannot be observed.

### ***Lack of Cooperation between Anti-Death-Penalty NGOs and the Government***

Whilst the government is keen on incorporating international development NGOs into its Official Development and Welfare Policies in order to add legitimacy, a similar attitude cannot be observed concerning human rights NGOs and capital punishment policy. This appears to be because (1) building partnership with NGOs, which do not favour the governmental policy, does not lead to mutual benefits within the Iron Triangle; and (2) the Japanese government considers it appropriate to leave this issue of law and order to bureaucrats in the Ministry of Justice and the Public Prosecutor's Office, without inviting criticisms from campaigners outside the judiciary.

In fact, human rights NGOs do not have official consultation status in drafting official reports on human rights record in Japan. For example, regarding the submission of periodical reports to the UN Human Rights Committee, human rights NGOs cannot participate in the drafting process. They get to see the reports submitted by the government after they are published by the UN, and have to submit alternative reports separately (Neary 2002a:66; 2002b:202). Moreover, lack of communication with human rights NGOs regarding their recommendations implies that they have been undervalued as a government's partner. For instance, Amnesty International Japan works closely with domestic anti-death penalty NGOs such as Forum 90 and the Centre for Prisoners' Rights, and issue protest statements in joint names. However, the Japanese



government does not make any formal comments on recommendations made by Amnesty International or other human rights NGOs in written form, except for direct communication at NGO-led seminars. Domestic anti-death-penalty NGOs, in particular, are often seen by the Japanese government as a tiny fraction of the public since governmental opinion poll results indicate a wide public support for the capital punishment system (see Appendix IV).

Anti-death-penalty NGOs can contribute to avoiding or solving false charge cases. This was particularly evident when anti-death-penalty NGOs started to act on behalf of innocent death row inmates in the 1980s. NGO bodies tried to step into the judicial decision making, believing that false charge cases could not be left to the judiciary (Van Wolferen 1989:226), where Supreme Court decisions tend to be heavily influenced by the recommendations given by public prosecutors. However, the Japanese government tends to claim that the Japanese criminal justice system is equipped with a fair retrial system, which can prevent miscarriages of justice (Hatano 1983:23; Hayashi 1984:38; Taki 2012b:44), and hence anti-death-penalty NGOs do not have their say in the triad officially.

What also merits some attention is that most of the NGO staff have been continuing anti-death-penalty campaigns while fully aware that their voice cannot be heard by the government. In other words, domestic anti-death-penalty NGOs appear more objective about their own campaigns compared with international ones, since they acknowledge the fact that capital punishment policy is

elite-driven and NGOs are outside its decision making process. Whereas they continue their grassroots campaigns such as collecting signatures from supporters and submitting them to Ministers of Justice as an alternative voice to the 'public opinion' found in the governmental opinion polls, they appear very objective about the outcome. For example, regarding their possible impact on the execution-free period from 1989 to 1993, most of the NGO workers whom I interviewed denied that they had any impact, referring to the elite-driven nature of capital punishment policy<sup>40</sup>. Therefore, whilst international anti-death-penalty bodies tend to try to urge the Japanese government to abolish capital punishment by pressuring it with reference to the global trend, domestic anti-death-penalty NGOs tend to focus on influencing public opinion through grassroots activities.<sup>41</sup>

### ***Lack of Cooperation between Anti-Death Penalty NGOs and the Business Community***

With regard to the business community, it should be noted that there are some partnerships with human rights NGOs. According to a survey, 'Reality of the Enterprises' Efforts in Respecting Human Rights: Case Study of 70 Enterprises'<sup>42</sup> in 2005', which was conducted by the Buraku Liberation and Human Rights Research Institute (BLHRRI), 81.4 per cent (57 companies) of the companies include respect for human rights in their corporate ethical codes (BLHRRI

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<sup>40</sup> Postal correspondence with an NGO worker, 28 February 2011; and interview with an NGO worker, Tokyo, 12 April 2011.

<sup>41</sup> Interview with two NGO members, Tokyo, 17 May 2011.

<sup>42</sup> 90 per cent of companies that answered the survey are large companies of capital scale with more than 500 million yen (3.85 million pounds).

2005:26-8). Issue areas that they engage in range from personal data protection to non-discrimination at the time of recruitment against people of *buraku*<sup>43</sup> origin, the handicapped, and women. Moreover, the survey result shows that 52.9 per cent (37 companies) have partnerships with NGOs on the *buraku* issue; 20 per cent (14 companies) on issues relating to the disabled; and 11.4 per cent (eight companies) in issues concerning women (BLHRRRI 2005: iv; 84).<sup>44</sup> Furthermore, whilst human rights that companies are required to protect were limited to the domestic employees' working rights until the 1970s, various issues outside of labour-management relations have also been tackled comprehensively nowadays. They include issues of: (1) child labour and forced or bonded labour employed by suppliers abroad; (2) destruction of indigenous people's traditional way of life; and (3) 'taking part' in the human rights violation indirectly by building partnership with companies accused of aiding apartheid in South Africa or making business deals with the military government of Myanmar (Tanimoto 2004:11–2, 15).

In order to raise its profile in the international business scene, Japanese companies have also been keen to build partnership with international organisations through complying with their human rights protection initiatives.

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<sup>43</sup> According to BLHRRRI (2012:1), *Buraku* people are: 'the largest discriminated-against population in Japan. They are not a racial or a national minority, but a caste-like minority among the ethnic Japanese. They are generally recognized as descendants of outcaste populations in the feudal days. Outcastes were assigned such social functions as slaughtering animals and executing criminals, and the general public perceived these functions as "polluting acts" under Buddhist and Shintoist beliefs'.

<sup>44</sup> Other companies also have links with NGOs of several other issue areas such as *zainichi*, or ethnic Korean residents born and brought up in Japan; international human rights; and human rights education, although the breakdown is not disclosed in the survey result.

The prime example is the idea of Corporate Social Responsibility (CSR),<sup>45</sup> which refers to embracing responsibility to further social good adhering to ethical standards and international norms. CSR-related standards have also been set by international organisations and NGOs,<sup>46</sup> and it is worth noting that *Keidanren*, or the Japan Business Federation, also adopted the Charter for Good Corporate Behaviour<sup>47</sup> in 1991, corresponding to the international trend of supporting CSR (Keidanren 2004). Among the internationally recognised human rights initiatives, the Global Impact, which was declared in 1999 by the UN, is based on the idea that ‘open markets and human well-being can go hand in hand’ (UN 2012:3). Its prime objective is ‘to align business operations and strategies everywhere with ten universally accepted principles in the areas of human rights, labour, environment and anti-corruption’ (UN 2008:2), and out of approximately 10,000 in all, 385 Japanese firms and organisations currently support this initiative (UN 2013).

Whilst there exist some partnerships between the business community and human rights NGOs, it is difficult to observe any in the area of capital punishment. This fact appears to be closely related to the question of whether proclaiming abolitionism in companies’ corporate principles would help their

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<sup>45</sup> According to McWilliams, A. et al. (2006:1-2), examples of CSR are (1) to commit to prevent global warming by manufacturing aerosol products with no fluorocarbons, and to reduce emissions and pollution abatement by promoting recycling; (2) to promote employee empowerment by non-discrimination of women and minority; and (3) to work closely with community organisations.

<sup>46</sup> They include: the Global Compact by the UN; the OECD Guidelines for Multinational Enterprises; the ILO Declaration on Fundamental Principles and Rights at Work; Sustainability Reporting Guidelines by the Global Reporting Initiative; and Social Accountability 8000 by Social Accountability International.

<sup>47</sup> The charter was renamed ‘the Charter of Corporate Behaviour’ in 1996.

business interests. In fact, partnership with anti-death-penalty NGOs would not bring any mutual benefits to the Iron Triangle. Provision of funding to anti-death-penalty NGOs, which are not in favour of the governmental policy, would undermine companies' relations with the government. Secondly, given that capital punishment policy has been dealt with as an issue of law and order, it is natural that the business community would not show any interest in opposition to that policy, unless it would provide them with prestige like internationally recognised organisations can offer. Thirdly, since the governmental opinion polls show strong public support for capital punishment, it is natural for companies to estimate that supporting abolitionism in their corporate principles would risk their business opportunities. Consequently, whilst the business community shows some commitment to human rights issues both domestically and internationally, its motive appears to be heavily related to its commercial interests.

#### **1.4.5. Is the Iron Triangle Model Applicable to Capital Punishment Policy?**

Having discerned the actors who (1) underpin the legal legitimacy of the system, (2) get involved in the actual running of the system, and (3) represent and justify the policy on legal, domestic, and cultural grounds both internally and externally, it is important to evaluate the extent to which the Iron Triangle model can account for capital punishment policy making.

Firstly, bureaucrats play a tremendous role in capital punishment policy. Whilst Ministers of Justice are the top authority on this issue, and their personal

characteristics may appear to influence policy making in the short term, it is the bureaucrats in the Ministry of Justice who consistently justify the retention of the system on legal, domestic, and cultural grounds, and ensure continuation of the policy. Given that the ruling party, the LDP, is pro-death-penalty in nature, LDP party politicians may also appear to possess a significant power in the other corner of the triad. However, important decisions regarding this policy are made by the bureaucrats often irrespective of the views of party politicians. As Van Wolferen (1989:33, 145) argues, approximately 80 per cent of all legislation passed is drafted by bureaucrats, and Diet members merely rubber-stamp the documents. This holds true of capital punishment policy: LDP party politicians, who tend not to stay in office for more than one year because of the frequent cabinet reshuffles, cannot get involved in the actual policy making process. The reason why the ruling party, the LDP in particular, appears to be holding power in the triad is that approximately 25 per cent of the LDP Diet members are ex-bureaucrats under the *amakudari* system; and the perpetual dominance of the LDP appears to have been allowing bureaucrat-led policy making (Krauss 1989:39, 52-3).

Secondly, it should be recalled that the Public Prosecutor's Office, a subordinate institution of the Ministry of Justice, gets involved in the crucial part of capital punishment policy, from generating confessions by accused persons to taking initiatives regarding executions. Although the Supreme Court makes the final judicial decisions regarding death sentences, they tend to be heavily influenced by the recommendations of public prosecutors (Hamai and Ellis 2008a:73). This

relates to the fact that all the 15 judges in the Supreme Court are former public prosecutors, and the Supreme Court is not independent of bureaucratic control in practice. Finally, with regard to what can take the place of the business community in the triad model, the pro-death-penalty victim lobby may appear to fit, given that the Japanese government often cites the feelings of the victims' bereaved families. However, NGOs cannot support a corner of the triad, since neither pro- nor anti-death-penalty NGOs have official status to get involved in capital punishment policy. Only selected NGOs are allowed to contribute to the Japanese decision making for mutual benefit within the bureaucrats-politicians-business community triad, and anti-death-penalty NGOs, which are not in favour of the governmental policy, have not been included in this dynamic.

Consequently, the application of the Iron Triangle model to capital punishment policy presents difficulties, given that this policy is primarily elite-driven, and important decisions are made irrespective of the views of party politicians or pressure groups. The following part will go on to examine the governmental approach on capital punishment policy in detail. It will highlight that capital punishment policy has been merely treated as one of the governmental policies on which Ministry bureaucrats make sure precedents are followed.

## **1.5. CAPITAL PUNISHMENT POLICY AS AN ISSUE OF LAW AND ORDER**

First of all, it is important to note that capital punishment policy has been dealt

within the Ministry of Justice as an issue of law and order. There are two government agencies concerned with human rights protection in Japan: the Human Rights Bureau in the Ministry of Justice and the Human Rights and Humanitarian Affairs Division in the MOFA. I approached both of these bodies to see if they would agree to an interview. In January 2011, the Human Rights Bureau declined my request, stating that it was not in charge of capital punishment. I was urged to contact the Criminal Affairs Bureau. In the meantime, two senior ministers in the MOFA division, one of whom was previously in the Ministry of Justice, agreed to be interviewed in June 2011 through the help of the other MOFA minister. Initially, the two former ministers did not respond to my request. However, the latter minister, a vocal anti-death-penalty activist who belongs to the Parliamentary League against the Death Penalty, agreed to my interview cordially, and forwarded my letter to them again. Although the interview with two MOFA ministers in the Human Rights and Humanitarian Affairs Division was thus achieved, they denied any responsibility for dealing with the issue of capital punishment, now or in the future. According to them, ‘there is no such issue on the earth that is *not* related to human rights. However, it is impossible to deal with every single issue in the human rights divisions in governmental agencies, and we had better prioritise major issues and tackle them efficiently’.<sup>48</sup> Both groups thus maintained that capital punishment was not a human rights concern but an issue of legal punishment under the aegis of the Criminal Affairs Bureau in the Ministry of Justice.

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<sup>48</sup> Interview with two MOFA ministers, Tokyo, 17 June 2011



### 1.5.1. 'Institutional Ambivalence' in Japan's Capital Punishment Policy

In the meantime, 'institutional ambivalence' can also be observed in Japan's capital punishment policy. According to David Garland (2010:99–100):

'[t]he visible sign of this ambivalence are laws that go unenforced, sentences that go unexecuted, legal proceedings that create endless delays, and a great deal of discomfort on the part of the judges, government ministers, and penal officials charged with administering the punishment'.

This applies to the case of Japan: (1) the average time between sentence and execution is approximately a decade or longer; (2) a 'hesitant' attitude can be observed in the execution procedure; and (3) the Ministry does not appear particularly enthusiastic about conducting a large number of executions per year (see Appendix I). Firstly, '[c]ondemned inmates are selected for execution on the basis not of longevity on death row but of other ill-defined criteria' (Johnson and Zimring 2009:62). Execution dates may have been strategically chosen in order to gain support from the public.<sup>49</sup> Secondly, although the Japanese government

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<sup>49</sup> For example, regarding the execution of Nagayama Norio on 1 August 1997, Hara Yuji (1998:60), Yasuda (1998:103) and Johnson (2005:258) claim that the Ministry of Justice appeared to have justified his execution when similar juvenile murder cases occurred successively. As will be discussed in detail in Chapter 4, public interest in Nagayama's activities as a novelist through the 1980s to 90s was prominent. Therefore, the Ministry of Justice appeared to have chosen the execution date carefully so that the public would not protest (Yasuda 1998:103). In fact, 1997 was a particular year in which successive violent juvenile crimes started to occur. Among them, the Sakakibara case attracted plenty of media attention and generated a public outcry in particular. After the offender was arrested on 28 June 1997, Nagayama was executed on 1 August 1997, which was within less than two months. Therefore, anti-death-penalty advocates considered that the Ministry had a political

consistently justifies the judicial right to deprive a person of life in order to maintain legal order in Japan, some efforts on behalf of prison guards who get involved in hanging show a hesitant attitude on the part of the Ministry of Justice regarding state killing.

Regarding the execution, Article 472 of the Code of Criminal Procedure provides that it is carried out on the instructions of the head of the Public Prosecutor's Office.<sup>50</sup> Regarding the exact method of execution, prison guards cover the inmate's eyes with a white cloth and tie both arms behind with handcuffs and legs with strings (Hara 2001:17). Once a noose is placed around the prisoner's neck, three prison guards press buttons on the wall, each pressing one: only one of the three buttons really works, a device to relieve the psychological burdens of prison guards (*Mainichi*, 28 August 2010). When the correct button is pressed, the 90 centimetres square plate that the inmate is standing on opens and he falls down for around four metres; the rope becomes taut when he reaches around 15 centimeters from the ground (Hara 2001:25).<sup>51</sup> It is worth noting that even if the door falls instantly, inmates do not die immediately, it takes 15-20 minutes, which violates the UN Convention against the Torture. Prison guards who carry out the execution receive special payment worth 20,000 yen (154 pounds), and

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strategy to justify Nagayama's execution in line with the outbreak of similar crimes.

<sup>50</sup> According to Article 98 (1) of the National Civil Service Law, it is senior staff of the Correction Bureau who get involved in the actual hanging procedure whilst a prosecutor, an assistant public prosecutor, and the Director and other staff of the Correction Bureau are present at the execution, along with a doctor of the Correction Bureau to confirm the inmate's death.

<sup>51</sup> The execution is well-rehearsed, the height and weight of the inmate being measured in advance (Hara 2001:25). The length of the rope that will go around the inmate's neck is adjusted so that it can hold his weight, and a solid metal block which is the same weight of the inmate is used to confirm that the square door on the ground falls instantly (Hara 2001:25).

according to an in-depth interview by Hara (2001:26) usually they either use up the money on drinks to forget what happened at the execution venue, or donate all the amount into the offertory box at the shrine, praying for the executed person to rest in peace. Given that fake buttons have been equipped for hanging and special payment is provided to them to relieve their psychological burdens, the Japanese government appears to have a legitimacy problem about state killing.

Finally, Japan is one of the world's least frequent users of capital punishment.<sup>52</sup> As Ministry bureaucrats are still desperate to conduct at least one execution per calendar year, this does not appear to stem from sympathy towards the victims' bereaved families. Rather, it has been discussed in the existing literature (Kakusho 1991; Mori 2008; Johnson and Zimring 2009) that the Ministry's retention of capital punishment relates to: (1) securing annual funding by acting on precedents; and (2) the lack of legal status and rights of death row inmates as a result of the state's approach to this policy from the viewpoint of law and order.

### **1.5.2. State's Approach on Human Rights of Death Row Inmates**

Firstly, it is suggested that annual executions are linked to the Ministry's survival. In a parallel case, the Ministry of Land, Infrastructure, and Transport conducts roadworks across the nation at the end of the year in order to use up the annual

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<sup>52</sup> China, Vietnam, North Korea, India and Pakistan do not report execution statistics, and the true total number of executions can be higher than being estimated. However, more than 95 per cent of all executions are believed to take place in China, and the estimates range from 2,000 to 15,000 per year (Johnson and Zimring 2009:21).

budget (Mori 2008:18). If the Ministry does not spend the same amount of the funds as in the previous year, a smaller fund could be allocated the following year. Likewise, bureaucrats in the Ministry of Justice appear to seek to execute at least one death row inmate a year in order to keep the capital punishment system in use annually (Johnson and Zimring 2009:48; Mori 2008:18). Of course, this does not necessarily mean that capital punishment would be abolished as a result of lack of funds. It could continue because of the conservative nature of the Japanese bureaucratic decision making system. In other words, the Ministry of Justice has been treating this policy as an issue of law and order; and tends to act on precedents and conduct executions annually in order to leave a record that the system has been in use.

Relating to this point, another argument is that the Ministry's dutiful conduct on the basis of the law appears to relate to death row inmates' lack of legal status or rights. More precisely, since death row inmates do not fall into the category of 'prisoners' in the Japanese government's eyes, executions tend to be conducted as a 'duty' in the arena of law and order. According to Kakusho Toyokazu (1991:13), death row inmates' legal status and rights have not been officially established in Japan. Whilst prisoners in general are supposed to go back to society after correction and rehabilitation, that is not the case for death row inmates unless they are proved innocent in retrials or reprieved (Kakusho 1991:13). Referring to Article 484 of the Code of Criminal Procedure,<sup>53</sup> Kakusho

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<sup>53</sup> Article 484 of the Code of Criminal Procedure stipulates that 'When a person who has been sentenced to death, imprisonment with or without work or a misdemeanor imprisonment without work is not under detention a public prosecutor shall summon that person. If that person does not respond to the summons, the public prosecutor shall issue a

(1991:17) argues that death row inmates have been considered by the government as those who are merely waiting for execution. More precisely, detention is *shikei no shikko no ichibu shikko* (a part of the execution procedure), and what prison guards have to make sure is that death row inmates are in good health so that executions will be conducted in an uneventful manner (Kakusho 1991:16). Indeed, once the inmates are executed, they will be counted as those 'released from prison' in Japan. As Kawai Mikio (2009: 234) analyses, this must be partly to keep statistical coherence in the numbers of inmates that come in and go out after correction and rehabilitation; but partly because there is an idea in the Ministry of Justice that death row inmates can be 'released' only through the execution (Hara 1998:198). Whilst other prisoners complete their sentence through rehabilitation, death row inmates appear to be expected to add to their death sentence by generating a feeling of remorse through being detained in a solitary cell with limited communication with others.<sup>54</sup> The Ministry of Justice does not allow them to atone for deaths they have caused in any other way, and makes prison guards ensure that this process is not disrupted by inmates' suicide (Mori 2008:216).<sup>55</sup>

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writ of commitment'.

<sup>54</sup> According to Article 36 of the Act on Penal Detention Facilities and Treatment of Inmates and Detainees, 'Treatment of an inmate sentenced to death shall be conducted in an inmate's room throughout day and night, except where it is deemed appropriate to conduct it in the outside of the inmate's room. (2) The room of an inmate sentenced to death shall be a single room. (3) No inmates sentenced to death shall be permitted to make mutual contacts even in the outside of the inmate's room, except where deemed advantageous in light of the principle of treatment prescribed in paragraph (1) of Article 32.

<sup>55</sup> For this reason, prison guards notify the inmate one or two hours before the execution in the morning (Amnesty International 2011:1). Therefore, death row inmates 'are given only enough time to clean their cells, write a final letter and receive last rites' (*New York Times*, 30 June 2002). According to *Shi to Kabe* (Death and Wall), published in 1953 by Tamai Sakuro, a former Director-General of the Osaka Detention Centre, notification used to be given to inmates one or two days before the execution, and they could meet their family and order whatever they wanted to eat for the last supper. However, after 3 October 1975 when

Ministry's such stance on death row inmates is evident in detention conditions and the execution procedure in Japan indeed. Firstly, whilst death row inmates are detained isolated from their close families, they can maintain contact with chaplains.<sup>56</sup> This system might at first sight appear to have been prepared by the Ministry of Justice out of concern for death row inmates. However, it needs to be noted that the chaplain system has also been strategically run by the Ministry of Justice in order to conduct executions 'smoothly'. Approximately 70 per cent of chaplains are Buddhists, the remainder being Shinto and Christian. Their purpose is to help inmates develop a feeling of remorse and prepare them to be executed in a peaceful state of mind. However, Menda Sakae, a former death row inmate, is disturbed by the emphasis that Buddhist chaplains place on the teaching of causality: he contends that if inmates are encouraged to believe that they were already doomed by their previous life, they may resign themselves to the inevitable and refrain from fighting against what they know to be false charges (Menda 2004:139).

Limited correspondence between death row inmates and their families or friends, and lack of prior notification to them before executions, appear to be justified by the government on the theory that excessive communication between them can

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Tsuru Shizuo, then a death row inmate, committed suicide on the day of execution, the rule was amended. The Ministry of Justice believed that Tsuru's suicide was directly linked to the fact that he was notified of his execution in the late afternoon before the execution day (Menda 2004:134).

<sup>56</sup> According to Article 68 of the Act on Penal Detention Facilities and Treatment of Inmates and Detainees: 'The warden of the penal institution shall make efforts to make available the opportunities for inmates to participate in religious ceremonies presided over by religious leaders (limited to nongovernmental volunteers; hereinafter the same shall apply in this paragraph), or to receive religious teachings from religious leaders'.

hinder death row inmates from 'concentrating on death'. However, as Johnson (2005:260) claims:

If isolation helps the condemned to 'accept the inevitable' and 'prepare for death,' it does so by killing twice: first socially and then physically. If secrecy is designed to protect the 'honor and privacy' of the offender's family, it does so by sacrificing democratic values [...such as] transparency, accountability, and openness.

### 1.5.3. Japan's Retention of Capital Punishment on Legal Grounds

Kakusho's argument on death row inmates' lack of legal status or rights can also be supported by a recent statement of a judge in the Hiroshima District Court on 23 May 2012. A death row inmate convicted in the Hikari murder case<sup>57</sup> sued an author and publisher of a book, *Fukuda kun wo Koroshite Nani ni Naru?* (What's the Point of Killing Fukuda through Capital Punishment?) (Masuda 2009) over the violation of his right to privacy rights.<sup>58</sup> However, the judge at the Hiroshima Regional District Court, Ueya Shin-ichi, turned down his claim on 23 May 2012, clarifying that: 'Death sentence has been sentenced to the plaintiff, and *there is no risk of great loss to him*' (Nikkei, 23 May 2012). Ueya's remark highlighted the state's approach on capital punishment and its neglect to ensure the basic rights of death row inmates. More precisely, his remarks can be interpreted as suggesting that the violation of the basic rights cannot be a major issue for death row inmates since they are merely waiting for death.

Capital punishment has been treated as an issue of law and order, and has been justified upon the basis of:

- (1) Article 31 of the Constitution of Japan, which allows a legal punishment

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<sup>57</sup> The case of a crime on 14 April 1999, when an 18-year-old male broke into a house in Hikari city in Yamaguchi prefecture, and murdered a woman and her baby.

<sup>58</sup> In the book his real name, several pictures, and letters that Fukuda wrote to the author were disclosed although disclosure of the name of the offender, who was a minor at the time of the crime, is usually withheld. His claim was that he had agreed to be interviewed by the author believing that publication of this book would help him avoid the death sentence. However, since his death sentence was confirmed regardless of the contents of the book, he sued the author and publisher, demanding a halt to publication and financial compensation (Nikkei, 23 May 2012).



to deprive a person of life or liberty exceptionally;

(2) the Penal Code and the Nagayama Criteria, which specify crimes that are punishable by death and set out nine main criteria;

(3) Articles 475 and 476 of the Code of Criminal Procedure, which stipulate the responsibility of Ministers of Justice regarding the timing of authorising and conducting executions;

(4) Article 11 of the Penal Code, which specifies the execution method as hanging;

(5) Article 472 of the Code of Criminal Procedure, which provides that execution is carried out on the instructions of the head of the Public Prosecutor's Office; and

(6) Article 98 (1) of the National Civil Service Law, which specifies that civil servants have to carry out duties set by senior staff.

Whether the Ministry of Justice officially holds executions, abolishes the capital punishment system, or installs an alternative penalty such as life imprisonment without parole, it requires the Ministry to repeal or amend the existing legal provisions. Given that the Ministry of Justice tends to endeavour to act on precedents upon the basis of law, it is unlikely that the Ministry will take such an initiative. It also merits particular attention that whilst the Japanese government thus justifies capital punishment as a legal penalty, 'institutional ambivalence' is observed in the low number of annual executions, ill-defined criteria on the selection of death row inmates, and mental and financial support for prison guards who get involved in the actual execution.

## **1.6. Conclusion**

This chapter overviewed the way in which capital punishment policy has been run within the tightly-knit institutional framework, exploring the applicability of the Iron Triangle model, and clarified the government's approach on this policy through examining detention conditions and execution procedure. After reviewing the current academic approach on Japan's retention of capital punishment, the first part introduced Japan's elite-driven policy making within the bureaucrats-politicians-business community triad. Noting that the three actors are highly interdependent because of the perpetual dominance of the LDP, it examined the extent to which this model fits the decision making process for capital punishment policy. Firstly, it highlighted bureaucratic control of this policy through examining the Supreme Court, key government agencies, and pressure groups. This chapter contended that whilst the Supreme Court is theoretically independent of institutional power dynamics, it tends to make decisions reflecting the Public Prosecutor's Office's approach on capital punishment (McCargo 2004:103). Although the Public Prosecutor's Office is a subordinate institution of the Ministry of Justice, in practice it gets involved in the crucial part of this policy, from obtaining confessions from accused persons to taking initiatives regarding executions.

Secondly, presenting the divergence amongst Ministers of Justice in their personal beliefs on the issue of capital punishment, this chapter argued that

these cannot be a determining factor for retaining or abolishing the capital punishment system. Although the Minister of Justice is a top authority on this policy in theory, each Minister tends not to stay in office for more than a year because of cabinet reshuffles, and cannot influence the capital punishment question in the long run. This chapter argued that it is instead a cluster of employed-for-life bureaucrats in the Ministry of Justice and the Public Prosecutor's Office who exert tremendous power in the actual decision making process.

Thirdly, the chapter critically examined the role that pressure groups can play in this policy. Although the Japanese government tends to justify capital punishment on grounds of respecting the feelings of victims' bereaved families, they do not possess a significant role in the triad in reality. Similarly, anti-death-penalty NGOs have not been included in the decision making system even though they could function as a watchdog and help the judicial authority solve or avoid false charge cases with their own investigations. Since capital punishment has been treated by the government as a criminal justice issue, anti-death-penalty NGOs have not been admitted as appropriate bodies to advise the government.

The applicability of the Iron Triangle model to capital punishment policy was then evaluated. The chapter argued that capital punishment policy is primarily elite-driven, and decision making is conducted by the bureaucrats in the Ministry of Justice and the Public Prosecutor's Office independently of the views of party

politicians or pressure groups. Although the ruling party may appear to play an equal role to bureaucrats, it is because of the fluidity of bureaucrats under the system of *amakudari*, and the long dominance of the LDP has helped bureaucrat-led decision making (Krauss 1989:39, 52-3). With regard to the pressure groups, they do not appear to hold the corner of the triad, since they have not been allowed to get involved in capital punishment policy making. Therefore, in the application of the Iron Triangle model to capital punishment policy, the triad is not a perfect triad, and decision making is primarily bureaucrat-led. In other words, whilst bureaucrats exert tremendous power and the LDP supports that power with intimate personal networks between them, actors in the third corner have been missing, which makes the triad incomplete.

The second part further investigated the governmental approach to capital punishment policy. It showed that the Ministry of Justice has been dealing with this policy as an issue of criminal justice on the basis of law, and not as an issue of human rights. Such a governmental approach can be observed in the detention conditions and execution procedure, which do not place much emphasis on human rights of the death row inmates, but rather on how to detain and execute them in an uneventful manner. Moreover, capital punishment policy leaves some legitimacy problem regarding state violence, as represented by the special consideration shown to prison guards who get involved in the actual hanging. However, this policy has been consistently justified on the basis of law, and it is unlikely that the Ministry of Justice would repeal or amend these provisions to halt executions or abolish the system. This is an important point for

scholars on the issue of capital punishment, and both domestic and international anti-death-penalty lobby, to acknowledge in order to have a better understanding of Japan's capital punishment policy in general or to promote their campaigns in Japan. Although Japan's retention of capital punishment tends to be considered as national resistance to the international anti-death penalty norm, it is important for those scholars and critics to understand that capital punishment is seen as an issue of law and order, on which the government is not willing to invite international criticism from a human rights perspective.

The following chapter will move on to examine how the Japanese government has been justifying capital punishment with reference to domestic and cultural factors, and investigate the validity of its arguments. It will also explore how the study of the *de facto* moratorium period can tell scholars and activists about the elite-driven nature of capital punishment policy.

## CHAPTER 2

### **Governmental Justification for Capital Punishment and the *de facto* Moratorium Period Reconsidered**

#### **2.1. INTRODUCTION**

Chapter 1 has examined the elite-driven nature of Japan's capital punishment policy. It clarified that capital punishment has been dealt with by the Japanese government as an issue of law and order, and important decisions regarding this policy are conducted by bureaucrats in selected governmental agencies. However, the Ministry of Justice tends to justify capital punishment not only on legal grounds but also on domestic and cultural grounds. The first part of the present chapter will critically examine the validity of the governmental justification for capital punishment. More precisely, through reconsidering what kind of cultural features have been claimed to be associated with capital punishment in Japan, it will explore whether or not policy elites' narratives which make reference to culture have been influencing the public and scholars to believe that capital punishment policy is domestically and culturally determined.

Firstly, it will investigate the government's retention of capital punishment on the basis of its deterrent effect and public support for the system. Whilst governmental opinion poll results indicate that the vast majority of the Japanese public support capital punishment believing in its deterrent effect, comparison with other non-governmental opinion polls and an in-depth survey by an

independent research body provides alternative views. This chapter will raise methodological problems with the governmental opinion polls, and highlight the divergence between the public's and the state's official approach on capital punishment.

Secondly, it will clarify the limited role that culture plays in capital punishment policy in Japan. After briefly reviewing theoretical research on the role of culture in rejecting particular international norms and in shaping legal punishment, it will critically examine the application of a cultural value to justification of capital punishment. A former Minister of Justice, Moriyama Mayumi, claims that capital punishment is deeply embedded in the Japanese view of guilt. She invokes the example of a concept, *shinde wabiru*, meaning atonement for one's crime or shameful behaviour by killing oneself (*Japan Times*, 4 October 2002); and other Ministers of Justice such as Okuno Seisuke (1980c:8) and Goto Masao (1989:3) also proclaim the same idea. However, this part will discuss the conceptual and methodological problem in application of this concept to capital punishment policy, highlighting the divergence between pro- and anti-death-penalty victim lobbies in their views on social justice.

Thirdly, it will explore where exactly public resistance to the abolition norm stems from. After investigating Japanese people's human rights and legal consciousness, it will claim that public resistance does not appear to stem from cultural features but from a lack of sympathy towards the activities of domestic anti-death-penalty groups. Through examining domestic and cultural factors

comprehensively, this part will illustrate that although there appears to exist a social norm to treat death as a price worth paying for serious crimes, decisions regarding capital punishment policy are made by selected elites independently of cultural factors. A critical evaluation of the existing hypotheses on the government's retention of the system will then follow. It will address the issue that existing research on Japan's capital punishment policy has been conducted considering irrelevant domestic or international factors without acknowledging the elite-driven nature of the system.

Finally, the second part of this chapter will propose a better approach to investigate the *de facto* moratorium periods in Japan. The existing literature places excessive emphasis on the causal relationship between the personal convictions of Ministers of Justice, or contemporary domestic or international events, and non-execution of people condemned to death; and it tends to overlook how consistently the Ministry of Justice tried to justify the system during this period. This part will clarify that investigation of this period from the appropriate standpoint can provide a better understanding of the elite-driven capital punishment policy in Japan.

## **2.2. 'PUBLIC OPINION' ON THE CAPITAL PUNISHMENT SYSTEM**

The Japanese government frequently cites public opinion poll results for the justification of the capital punishment system. According to the results in 2009, 85.6 per cent of the Japanese public support the system, and 62.3 per cent



believe in its deterrent effect (Appendix IV). Furthermore, a former Minister of Justice, Ogawa Toshio (13 January 2012 to 4 June 2012), has proclaimed the voices of lay assessors in *saiban-in seido* to be 'public opinion'. In the Legal Affairs Committee on 28 March 2012, Ogawa claimed that death sentences which have been imposed in *saiban-in seido* since its introduction in May 2009 demonstrate that lay assessors have been supporting the death penalty (Ogawa 2012b:8–9).<sup>59</sup> Thus, he tried to strategically incorporate the voices of lay assessors, who imposed death sentences, as 'public opinion', as if Ministers' refusal to authorise executions would go against 'the conclusion that ordinary citizens drew after going through the agony (of judging whether a person should live or die)' (Wakasa quoted in *Japan Times*, 6 April 2012).

Whilst the Japanese government claims that the majority of the Japanese public supports capital punishment believing in its preventive effect, mainly through the results of the opinion polls, they do not provide any other data to underpin their claim. The following part will provide alternative view on 'public opinion on capital punishment' through examining the existing literature on the deterrent effect, and analysing opinion polls conducted by governmental and non-governmental bodies.

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<sup>59</sup> After the introduction of *saiban-in seido*, nine people were sentenced to death in the first court in 2009, four in 2010, and nine in 2011 (Japan Federation of Bar Associations 2012; The Supreme Court 2012a). The cases involved include the Pachinko parlour murder case where Takami Sunao, 41 at the time of the crime, set fire to a *pachinko* parlour in Osaka on 5 July 2009, killing five people and leaving 10 injured. Takami was sentenced to death in the first court on 31 October 2011 (*Nikkei*, 31 October 2011).

### 2.2.1. The Deterrent Effect of Capital Punishment

The deterrent effect of capital punishment has been denied by various international scholars.<sup>60</sup> However, the debate is still open-ended in Japan, and findings by Western scholars – in which some of the target periods date back to the 1920s – are still largely cited in the Japanese literature on comparative criminology. Firstly, Torsten Sellin conducted a comparative analysis on homicide rates in the US states with and without capital punishment from 1920 to 1958. According to the results, the homicide death rates trend was similar regardless of the availability of capital punishment (Sellin 1959; Lamperti 2008:4). On the other hand, Isaac Ehrlich and Gary S. Becker (1972), Isaac Ehrlich (1973;1975), Joanna Shepherd (2002), Hashem Dezhbakhsh and Paul Rubin (2003) proclaim the deterrent effect of capital punishment. In particular, Ehrlich challenged Sellin's findings by conducting similar research but with different methodology. He chose the target period from 1933 to 1969, and investigated the preventive effect of capital punishment considering the role of social factors such as unemployment and per capita income (Ehrlich 1975; Lamperti 2008:6). Ehrlich then claimed that a slightly negative relationship was observed between the murder rate and the execution rate.

In Japan, major scholars who deny the deterrent effect are Masaki Akira<sup>61</sup>

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<sup>60</sup> Major classical scholars who deny the deterrent effect of capital punishment are: Raymond T. Bye (1919), Edwin H. Sutherland (1925), Clifford Kirkpatrick (1925), George B. Vold (1932), and Torsten Sellin (1959).

<sup>61</sup> Masaki was one of the main contributors to the awakening of abolitionism in the 1950s through his activities. Masaki issued a magazine, *Shakai Kairyō* (Social Reform), to spread his anti-death penalty beliefs, conducted informal meetings for prison guards and death row inmates, respectively, and published the meetings' outcomes in *Keisei*, a monthly magazine

(1964; 1968) and Tamiya Yu (2000). For example, Masaki, a former Director-General of the Correction Bureau in the Ministry of Justice and public prosecutor, calls the belief in the deterrent effect of capital punishment a superstition, and criticises the government's justification for the system through the example of the World War II (Masaki 1968:70–2). According to Masaki, prison guards' execution of death row inmates upon the order of the state authority is no different from wartime when state killing was justified: since Japan renounced war, it should also renounce the death penalty (Masaki 1968:70–2). Meanwhile, others proclaim the preventive effect of capital punishment: Motoji Shinkuma (1939), Ono Sei-ichiro (1950) and Uematsu Tadashi (1958). For example, Uematsu questions the credibility of the existing research on the correlation between the abolition of capital punishment and the decrease or non-increase in serious crimes. He argues that it is natural that no increase in serious crimes is observed right after the abolition of capital punishment, since he believes that the system is usually abolished when the crime rate is fairly low (Uematsu 1958:316).<sup>62</sup>

Whilst there thus appears to exist a fair amount of literature on the deterrent effect of capital punishment, two main concerns remain about the arguments by proponents of the death penalty in Japan. Firstly, it is not appropriate for Japanese scholars to try to apply decades-old Western findings to the contemporary Japanese context mechanically. Without empirical data collected

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from the Correction Association (Yasuda et al. 1996:107).

<sup>62</sup> However, this contradicts the fact that France abolished capital punishment in 1981 despite the fact that murders of children were occurring successively and there was the highest public support (63 per cent) for the system at the time (Badinter et al. 2008:169).

in modern Japan, foreign research findings are not necessarily a valid reason to proclaim the deterrent effect of Japan's capital punishment system.

The second concern is that most of the Japanese scholars who evaluate the deterrent effect of capital punishment tend to develop their arguments focusing on its psychological effect without empirical data to underpin their claims. Proponents tend to claim that human fear of losing life has been constraining people from committing serious crimes (Motoji 1939; Ono 1950; Uematsu 1958), but what makes their work appear unreliable is that some offenders commit crimes because they do not fear death (Bye 1919: 98). In fact, Takuma Mamoru, who murdered eight pupils and wounded 15 others at Osaka Kyoiku University Ikeda Elementary School on 8 June 2001, is reported to have declared that 'it is such a shame that I murdered *only* eight people. I should have murdered more if I get executed through capital punishment in any way'; and 'I wanted to be executed through capital punishment. I want to die sooner' (quoted in Mori 2008:118; Shinoda 2008:185). Given that there are cases of the existence of capital punishment motivating people to commit serious crimes, the credibility of the deterrent effect of capital punishment is doubtful.

Although there is no systematic empirical research on the deterrent effect of the capital punishment system in Japan, governmental opinion polling indicates that majority of the Japanese public believes in the deterrent effect. The question posed in the opinion poll was 'What do you think about the argument that serious crimes would increase or remain unchanged if capital punishment is abolished?',

and 62.3 per cent of the respondents answered that 'Crimes would increase' (see Appendix IV). Having said that, it is highly problematic that what the general public – most of whom are not experts in criminology or do not have basic knowledge on the capital punishment system – answered in the opinion poll has been used by government officials as a solid foundation to claim the preventive effect of capital punishment. The subsequent section will further investigate how the Japanese government shapes 'public opinion' in order to make its policy look democratic and legitimate.

### **2.2.2. Public Opinion on Capital Punishment Reconsidered**

When capital punishment was declared constitutional by the Supreme Court of Japan on 12 March 1948, supplementary opinions on the role of public opinion on the capital punishment system were also provided by four judges: Shima Tamotsu, Fujita Hachiro, Iwamatsu Saburo, and Kawamura Matasuke. According to them:

The judgment of whether certain punishments are cruel is a question that should be decided *according to the feelings of the people* [...,and] what at one time may be regarded as not being a cruel punishment may at a later period be judged the reverse. In such a situation the interpretation of Article 31 of the Constitution will probably be limited as a matter of course and the death penalty will be eliminated as a cruel punishment which contravenes the Constitution (translated by Maki

1964:161-2).

Supplementary opinions appear to allow public feelings to be a determining factor in discussing the cruelty of capital punishment in Japan. It may appear that capital punishment policy reflects public opinion, which is 'the prime mover in democracies' (Lippmann 1997:161). However, it is questionable whether the level of cruelty in punishment can be left to emotional argument by 'the man in the street' (Bring 2009:2), who does not necessarily have sufficient knowledge in the area of crime and punishment. Furthermore, whilst the climate of public opinion on the capital punishment system in general can be found in the opinion polls, the credibility of findings on 'public opinion' needs re-evaluation before they can be considered as a crucial source of justification for capital punishment.

Firstly, although public support for capital punishment has been consistently high over years, 'these are temperatures taken in a climate of death penalty secrecy and "censored democracy"' (Johnson and Zimring 2009:85). This cannot be a major determinant in shaping capital punishment policy when the public are not fully informed about the system or the degree of the deterrent effect. As Johnson and Zimring (2009:62) claim, 'If transparency and accountability are two hallmarks of a healthy democracy, then the secrecy and silence that surround capital punishment in Japan seem decidedly undemocratic'. Secondly, public opinion can be influenced by governmental behaviour. As Sangmin Bae (2008:119) argues, '[p]olicy changes precede opinion changes, suggesting that the former cause the latter rather than vice versa'. In order to explore how 'public

opinion' is shaped and used for the governmental justification of capital punishment, the following section will examine public opinion polls conducted by the Prime Minister's Office and non-governmental agencies. Through examining the methodological problems in framing governmental opinion polls and comparing their results with those of polls conducted by non-governmental agencies, it will highlight the divergence between the public's and the state's approach to the capital punishment question.

### ***'Public Opinion' in Governmental Opinion Polls***

Since 1956, the Prime Minister's Office has been conducting the Opinion Poll on Basic Legal System (*Kihonteki Hoseido ni Kansuru Yoron Chosa*), every five years since 1994, surveying 3,000 men and women aged 20 or older nationwide. The result in 2009 revealed that public support for capital punishment reached 85.6 per cent, the highest percentage ever, compared with 81.4 per cent in 2004, 79.3 per cent in 1999, and 73.8 per cent in 1994 (Prime Minister's Office 1994; 1999; 2004a; 2009a). Whilst these results appear to demonstrate strong public support for capital punishment, examination of the questions posed leaves room for doubt. In seeking public opinion regarding capital punishment, the poll required participants to choose between three choices: (1) 'it is unavoidable *in certain circumstances*,' (2) 'it should be abolished *in all circumstances*,' and (3) 'I do not know.' The results in 2009 were 85.6 per cent, 5.7 per cent and 8.6 per cent, respectively (see Appendix IV). As Sato Mai (2008:17) analyses, the first two answers appear to have been framed strategically in order to produce

results which would justify the governmental policy. In contrast to the second answer, the first one leaves some room for discussion regarding the level of public support for capital punishment. In other words, those who do not necessarily feel strong support for capital punishment may choose the first answer (Sato 2008:17).

Similarly, methodological problems in framing questions in public polls have also been pointed out by anti-death-penalty Diet members. For example, in the Legal Affairs Committee on 9 August in 2000, Fukushima Mizuho (2000:12) of the Democratic Party of Japan claimed that phrases used in the governmental opinion polls are heavily biased. However, the then Minister of Justice, Yasuoka Okiharu, maintained the validity of the survey, and no change to the phrasing of the questions is planned until today. According to Yasuoka,

the second answer that 'capital punishment should be abolished in all circumstances' exists as one of the opinions in the existing debate regarding this system. In order to grasp public opinion accurately, it is not necessarily inappropriate to set such answer (Yasuoka 2000:12).

However, if the Japanese government desires to grasp public opinion on the issue of capital punishment accurately, what is required is not posing 'for or against' type of questions or answers. Instead, attention needs to be paid to what degree of knowledge the Japanese public possess on the issue of capital punishment, and what factors can influence their opinion. For example, if the



details of detention conditions and execution procedure are provided, or if false charge cases are presented as an example of the downside of the capital punishment system, it would presumably generate different results (Sato 2009:1–2). Secondly, prevailing crime situations can heavily influence public opinion. If the survey dates are close to notable crimes or trials, it may make the public hesitant or resistant to choose the second answer.

Furthermore, it deserves some attention that the preconceived notion from the results of the governmental opinion polls, that ‘the majority of the Japanese public support capital punishment’, may hinder respondents from going against the ‘mainstream’. For example, results of the other questions in the same opinion poll appear to show the public’s tendency to stick to what they are already familiar with in society. With regard to the second question, ‘In case of abolishing capital punishment, which do you think is better?’, results were: ‘abolish it straight away’ 35.1 per cent, ‘decrease the number of the use of capital punishment first’ 63.1 per cent, and ‘I do not know’ 1.8 per cent (see Appendix IV). Regarding the third question, ‘Do you think Japan should not abolish capital punishment in the future; or can abolish the system when the situation changes?’, results were: ‘Japan should not abolish the system’ 60.8 per cent, ‘Japan can abolish the system in the future’ 34.2 per cent, and ‘I do not know’ 5.0 per cent (see Appendix IV).

The public tendency to follow what is considered mainstream in the society is not necessarily unique to the Japanese public. As Walter Lippmann argues, ‘when a

system of stereotypes is well fixed, our attention is called to those facts which support it, and diverted from those which contradict' (Lippmann 1997:78). When the governmental opinion polls show an increasing percentage of public support for capital punishment, it may make the abolitionists seem a tiny fraction of the public, which could affect public views on the existing legal system. 'Public opinion' can fluctuate depending on people's level of knowledge on the capital punishment system, the proximity of the survey dates to certain incidents, and semi-established moods or ideas on the issue questioned (Sato 2009:1–2). In order to demonstrate the diversity in public opinion on the capital punishment system in Japan, the next part will introduce results of opinion polls conducted by newspapers and TV services, and an individual research group.

### ***'Public Opinion' in Non-Governmental Opinion Polls***

Firstly, in opinion polls conducted by the *Yomiuri* newspaper in 1993, 1998, and 2006, surveying 3,000 men and women aged 20 or older nationwide, respondents were asked for their opinion on the abolition or retention of capital punishment. The results in 2006 were: (1) It should be retained, 56.9 per cent; (2) I would rather think that it should be retained, 23.5 per cent; (3) I would rather think that it should be abolished, 9.3 per cent; (4) It should be abolished, 5.3 per cent; and (5) I would rather not answer, 5.0 per cent (see Appendix V). What makes this survey distinct from governmental opinion polls is that choices include neutral answers which start with 'I would rather think'. The Japanese public tend to answer that they 'feel neutral' or 'do not know' when they are

asked about likes or dislikes concerning political matters (Richardson 1998:25), and the survey appears to have been framed to allow some ambiguity in their answers. Having said that, those who support retention outnumbered the other choices in 2008 since the question itself was straightforward.

Whilst the survey conducted by the *Yomiuri* newspaper did not investigate in what circumstances respondents would consider abolition, two other opinion polls presented the option of life imprisonment without parole as an alternative penalty to capital punishment. Firstly, according to the results of the opinion poll conducted by the Japan Broadcasting Corporation (NHK) in 1994, surveying 1,800 men and women aged 20 or older nationwide, 62.8 per cent of the respondents answered that the capital punishment system was necessary in Japan (see Appendix VI). In the meantime, the second question, about the option of introducing life imprisonment without parole as an alternative to capital punishment, revealed that 40.5 per cent agreed whilst a slightly larger number of respondents, 42.9 per cent, called for the retention of capital punishment. Furthermore, in answer to the final question, 'Do you agree with the idea that we put executions on hold and discuss the issue of capital punishment fundamentally?', 37.6 per cent agreed whilst 28.9 per cent disagreed (see Appendix VI). Although the result of the first question tends to be primarily used by proponents in order to justify capital punishment policy, a second look at the rest of the results in this survey indicates a different perspective to the issue.

Secondly, another opinion poll was conducted by the *Asahi* newspaper in 1994

asking 509 members of the House of Representatives their views on capital punishment. Being anti-death-penalty in editorial policy, *Asahi* offered five choices from which respondents chose: (1) It should be abolished right now (8.4 per cent); (2) It should be abolished with introduction of an alternative punishment such as life imprisonment without parole (19.6 per cent); (3) Executions should be put on hold and debate should be spurred meanwhile (19.2 per cent); (4) It should be as it is right now (40.2 per cent); and (5) Others/I do not know (12.6 per cent) (see Appendix VII). Although 40.2 per cent of the respondents answered that the capital punishment system should be retained, it deserves some attention that 19.6 per cent showed support for the introduction of alternative punishment.

Opinion polls conducted by non-governmental bodies did not necessarily show a strikingly different result from the governmental one. The survey conducted by *Yomiuri* in 2006 showed 56.9 per cent public support for retention of the capital punishment system, and the NHK observed 62.8 per cent support in 1994. However, analysis of the other questions and answers can provide alternative views of public opinion on capital punishment in Japan. Whilst the governmental opinion poll tends to suggest that a vast majority of the Japanese public support capital punishment, polls conducted by non-governmental bodies show that the public are not necessarily resistant to the idea of placing an alternative penalty to capital punishment or setting a moratorium period while discussing the future of the system (see Appendix VI). This can illustrate the fact that public opinion can vary depending on how questions are phrased and answers are set, and are

also susceptible to the prevailing public mood.

***'Public Opinion' under the Secretive Policy of the Ministry of Justice***

Finally, for a better analysis of the level of public understanding on the capital punishment system in Japan, findings of an in-depth survey conducted by the Japan-UK Deliberative Public Consultation Project are worthy of close attention. This project has been organised by Mike Hough, Honjo Takeshi, Kimura Masato, and Sato Mai, and it aims to examine the Japanese public's level of knowledge on the criminal justice system (Sato 2009:3). In 2009, the project team conducted a deliberative survey of 50 men and women aged between 20 and 58 who live in the Tokyo metropolitan area (Tokyo, Kanagawa, Chiba, and Saitama). The purpose of this survey was to investigate how the capital punishment system has been construed by the Japanese public and to evaluate their level of knowledge, at the time of the introduction of *saiban-in seido* from 21 May 2009 in Japan (Sato 2009:3). Participants in the deliberative survey followed five main procedures:

- (1) A survey was conducted among the participants online in order to examine their attitudes towards capital punishment;
- (2) A leaflet was shortly delivered to the participants which included detailed information on the capital punishment system;
- (3) Deliberative consultation took place on 4 April 2009 at Waseda University in Tokyo. It included a session to provide information about the

system, two group discussions, and debate and Q&A sessions by guest speakers (both retentionist and abolitionist);

(4) A post-deliberation survey was conducted straight after the previous procedure in order to assess the changes in their attitudes towards the system; and

(5) Follow-up telephone interviews were conducted among 10 participants who changed their views after the deliberative consultation (Sato 2009:5).

Some key findings from this survey are that: (1) 40 per cent of the participants' attitudes towards capital punishment were changed through the provision of information on the system, from retentionists to abolitionists and vice versa; and (2) participants stated that little information regarding capital punishment has been disclosed in Japan and that they were not aware of its problematic nature before the deliberative consultation was conducted (Sato 2009:7). As briefly discussed in the Introduction, Japan's capital punishment policy is characterised by confidentiality and secrecy, and the general public appears to have been supporting the system without sufficient knowledge. According to Johnson (Johnson 2006:70):

Capital punishment in the United States has become increasingly hidden, privatized, and bureaucratized over the last 150 years, but the secrecy and silence that shroud Japan's death penalty are taken to extremes not seen in other nations.

Indeed, it was only from November 1998 that the Ministry of Justice started to disclose when executions took place and of how many convicts, and only from November 2007 that the names of those executed started to be disclosed. Until then, it was anti-death-penalty NGOs that were reporting the names of the executed through their own investigations. Moreover, what merits some attention is that Japan does not usually conduct executions during parliamentary sessions or public and political holidays (FIDH 2008:4).<sup>63</sup> These are the times when the Japanese public are distracted or anti-death-penalty Diet members or NGO members have difficulty voicing dissent (Johnson 2005: 259). This secretive policy in Japan is strikingly different from another retentionist country, the US. Mori (2008:75) gives the example of the North Carolina Department of Correction: all the information about death row inmates has been disclosed on its official website, a convict's face, full name, age, race, and date of sentence of death are disclosed (North Carolina Department of Public Safety 2012). Whilst capital punishment policy is thus 'accessible' to the public there, it is largely hidden in Japan under the name of "protect[ing] the 'honor and privacy' of the offender's family" (Johnson 2005:260).

From the findings of opinion polls conducted by both governmental and non-governmental bodies, and an in-depth survey by an independent research body, two main issues must be noted for a better understanding of public opinion

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<sup>63</sup> Some executions have recently been conducted between parliamentary sessions on the authorisation of pro-death-penalty Ministers such as Ogawa Toshio (13 January 2012 to 4 June 2012), on 29 March 2012; and Taki Minoru (4 June 2012 to 1 October 2012; 24 October 2012 to 26 December 2012) on 3 August 2012. However, this is a recent trend in 2012, and it is hazardous to conclude that the Ministry of Justice has changed its secretive policy.

on the issue of capital punishment in Japan. Firstly, public and Diet members' calls for the retention of capital punishment do not necessarily stem from enthusiastic support for the system. Rather, they appear to come from: (1) their aversion to a change in the existing criminal justice, which they believe to have a deterrent effect with; (2) a lack of option to discuss the alternative penalty to capital punishment in the governmental opinion poll; and (3) a lack of knowledge on the capital punishment system. In fact, although results in the non-governmental opinion polls did not show a strikingly opposite view to that shown in the governmental opinion polls, it showed a variation when life imprisonment without parole was put forward as an alternative penalty to capital punishment (see Appendix VI and VII). In other words, although the Japanese public tend to follow the existing mood and support the existing legal system, they do not necessarily oppose strongly the idea of halting executions to discuss the issue of capital punishment fundamentally. However, two important factors that have been hindering this discussion from gaining root in Japan appear to relate to the bureaucratic decision making, which puts emphasis on following precedents, and to ethical concerns regarding punishment.

Firstly, the capital punishment system has been justified as a legal penalty on the basis of: (1) Article 31 of the Constitution of Japan, which allows a legal punishment to deprive a person of life or liberty exceptionally; (2) Article 11 of the Penal Code, which specifies the execution method as hanging; (3) the Penal Code and the Nagayama Criteria, which specify crimes that are considered suitable for capital punishment according to nine main criteria; and (4) Articles



475 and 476 of the Code of Criminal Procedure, which stipulate the responsibility of Ministers of Justice regarding the timing of authorising and conducting executions. Whether the Ministry of Justice halts executions officially, abolishes the capital punishment system, or installs an alternative penalty, it requires repealing or amending these existing legal provisions. Given that the bureaucrats endeavour to act on precedents, it is unlikely that they take an initiative to go through all these legal changes.

Secondly, it should be noted that some disagreement can be observed within the anti-death-penalty lobby and among death row inmates on the option of introducing life imprisonment. For example, the Japan Federation of Bar Associations and Forum 90, the largest anti-death-penalty NGO in Japan, has been supporting the idea of introducing life imprisonment without parole as an alternative to capital punishment (Japan Federation of Bar Associations 2008).<sup>64</sup> The Japan Federation of Bar Associations passed a resolution calling on the Japanese government to replace capital punishment with life imprisonment without parole in August 2012 (*Japan Times*, 21 February 2013). The Japan Federation of Bar Associations and Forum 90 both acknowledge that the general public will not support the immediate abolition of capital punishment, believing in the myth that this system deters crimes. Therefore, these bodies claim that introducing a penalty of an equivalent amount of suffering can be a compromise and a firm step towards the abolition of capital punishment (Japan Federation of Bar Associations 2008).

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<sup>64</sup> Interview with two NGO workers, Tokyo, 17 May 2011.

By contrast, some NGOs such as the Centre for Prisoners' Rights do not support the introduction of alternative punishment as a temporary solution. Their argument is that: (1) imprisoning prisoners for life can be more cruel than capital punishment, since it deprives them of any chance to get rehabilitated and go back to society; and (2) it is not ethically right to impose another punishment in order to abolish capital punishment in the first place.<sup>65</sup> Furthermore, according to Fukushima Mizuho, leader of the Social Democratic Party, who conducted surveys among death row inmates on this issue in 2012, opinions also vary amongst death row inmates. For example, a death row inmate, Kaneiwa Yukio, supports the introduction of life imprisonment without parole since it can relieve him from fearing every morning if the prison guard will stop at his door for the execution (*Japan Times*, 21 February 2013); but another death row inmate, Okamoto Keizo, claims that such a penalty is more cruel as it will deprive inmates of a purpose to live (*Japan Times*, 21 February 2013). Although the Japanese public are not necessarily resistant to an alternative penalty to capital punishment, the bureaucratic decision making system and internal disagreement within the anti-death-penalty lobby appear to have been preventing constructive discussion of the subject in Japan.

This section compared public opinion found in governmental and non-governmental opinion polls. Although great attention tends to be paid to the percentages of answers given by respondents, it is important to recognise with

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<sup>65</sup> Interview with an NGO member, Tokyo, 12 April 2011.

what intentions questions and choices have been framed, with what degree of knowledge the public chose particular answers, and what social incidents and atmosphere can influence the results of the opinion polls. In order to measure public opinion accurately, it is necessary for the bodies conducting polls to add sufficient information on the capital punishment system and on an alternative punishment. However, the Japanese government has maintained that questions or answers in this survey are not biased, and no change has been made until today. It is very important to acknowledge the fact that 'public opinion on capital punishment' has been shaped strategically and used as a primary source for justification of capital punishment policy, even though it could fluctuate depending on the phrases used and timing of the survey. The following part will move on to examine the validity of the government's justification for capital punishment with reference to Japanese culture.

### **2.3. JAPANESE CULTURE AND THE CAPITAL PUNISHMENT SYSTEM**

Japanese culture is another factor primarily cited by pro-death-penalty Ministers of Justice in order to make capital punishment policy look culturally determined and to deter international pressures. First of all, a former Minister of Justice, Hatoyama Kunio, contends that capital punishment is an indigenous system deeply rooted in Japan's own history and culture (Hatoyama 2008:25). Similarly, at a seminar 'Judiciary and Human Rights in Countries that Hold Observer Status with the Council of Europe' held on 28 and 29 May 2002, Moriyama Mayumi claimed that capital punishment is deeply embedded in the Japanese view on guilt, represented by a concept, *shinde wabiru*, meaning atonement for

one's crime or shameful behaviour by killing oneself (*Japan Times*, 4 October 2002). Relating to this concept, the Japanese government claims that capital punishment functions as victim satisfaction. Government officials frequently use the phrase 'respecting the feelings of the victims' bereaved families' (*higaisha kanjo wo koryo shite*), and cite a pro-death-penalty victim lobby's claim that it is a 'responsibility' for murderers to atone for crimes through death (Moriyama quoted in *Japan Times*, 4 October 2002; Métraux 2009:282). Furthermore, Sakata Michita argues that the Japanese have nurtured their own culture living in the islands for approximately 2,000 years: abolishing capital punishment can go against it (Sakata 1982b:20). This means that outside parties should have no say.

The second part of this chapter will critically examine the role that culture plays in the elite-driven capital punishment policy in Japan. Firstly, it will briefly review the existing theoretical research on the state's rejection of international norms for cultural reasons, and on the relations between legal punishment and culture. Secondly, it will investigate Moriyama's claim that the concept of *shinde wabiru* has been widely accepted as a social norm and supports the retention of capital punishment. After recalling an actual occasion when an act of *shinde wabiru* was committed in Japan, it will present conceptual and methodological problems regarding the application of this cultural value to justification of capital punishment. It will also examine the divergence between pro- and anti-death-penalty victim lobbies in their views of this concept.

Finally, it will clarify where exactly public resistance to the abolition norm stems from. It will critically investigate the degree to which Japanese consciousness on human rights and legal questions has been contributing to shape the public pro-death-penalty sentiment or resistance to the abolition of capital punishment. Presenting the characteristics of the largest anti-death-penalty NGO in Japan, Forum 90, it will then argue that public resistance does not appear to stem from cultural features but from a lack of sympathy towards the activities of domestic anti-death-penalty groups.

### **2.3.1. Culture and Legal Punishment**

First of all, normative theory tries to offer a way to examine the state's reluctance to adhere to international norms, or 'collective expectations about proper behavior for a given identity' (Katzenstein 1996:54). A national attachment to a competing norm and cultural factors have been raised as influential variables in this dynamic (Checkel 1999:6; Hawkins 2001:11; Cortell and Davis 2005:4), and some scholars (Checkel 2012; Sithole 2012) find it useful to apply this framework to the state's non-compliance with anti-death-penalty norm. However, a fundamental question concerning the extent to which capital punishment policy is culturally determined in Japan has been overlooked in the theoretical approach. In order to investigate the degree to which a normative theory would help understand Japan's resistance to abolitionism, this section will first introduce the mechanism through which international norms are transmitted to the domestic arena.

Firstly, Thomas Risse and Kathryn Sikkink (1999:11) present step-by-step procedures of norm socialisation: (1) processes of adaptation and strategic bargaining; (2) processes of moral consciousness-raising, shaming,<sup>66</sup> argumentation, dialogue, and persuasion; and (3) processes of institutionalisation and habitualisation. These procedures can be explained more in detail by a 'life cycle' of norm transplantation that Martha Finnemore and Kathryn Sikkink (1998:895) present: norm emergence, norm cascades, and norm internalisation. In the first stage, norm entrepreneurs/leaders – international organisations, transnational advocacy networks or NGOs, and domestic elites – attempt to socialise other states to become norm followers/takers. This is based on the assumption that the state's compliance with a norm depends on the domestic mobilisation of actors that socialise states to adhere to new norms and values (Moravcsik 1997; Hafner-Burton and Tsutsui 2005:1380).

Norms then cascade in the second stage with 'a combination of pressure for conformity, a desire to enhance international legitimation, and the desire of state leaders to enhance their self-esteem' (Finnemore and Sikkink 1998:895). Although 'international society is a smaller group than the total number of states in the international system' (Risse and Sikkink 1999:11), the embarrassment of not belonging to it; and their desire to obtain a 'social proof' as a legitimate

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<sup>66</sup> Shaming here means creating a tension between norm-abiding and norm-violating countries to make the latter realise that international norm compliance has now become one of the crucial constitutive elements of modern statehood or a member of international society (Risse and Sikkink 1999:8,15; Risse and Ropp 1999:234).

member of it are supposed to make states consider the acceptance of norms (Axelrod 1986:1105). In other words, '[s]tates may obey international norms because doing so is right and moral, helps to shape and maintain an ordered international environment, and gains them respect in the eyes of the world' (Bae 2008:126).<sup>67</sup> Finally, norm internalisation occurs when norms acquire a taken-for-granted quality that does not require a broad domestic debate, such as norms relating to women's voting rights and slavery (Finnemore and Sikkink 1998: 895; Hafner-Burton and Tsutsui 2005:1385).

With regard to denial of international norms in the domestic arena, Andrew P. Cortell and James W. Davis (2005:4) argue that it is not necessarily the case 'in advanced industrial democracies with a history of national attachment to a competing norm [...since] powerful states have strong material incentives to reject international norms'. For example, Jeffery Checkel argues that diffusion is more rapid and smooth when a 'cultural match' exists to a great extent, which varies from positive (+), null (0) to negative (-), indicating a degree of a congruence between international and domestic norms (Checkel 1999:6). Under this assumption, '[i]nternational norms are more likely to have an impact if they resonate with established cultural understandings, historical experience, and the dominant views of domestic groups' (Hawkins 2001:11). Finally, Risse and Sikkink point out 'that denial of the norm almost never takes place in the form of open rejection of human rights, but is mostly expressed in terms of

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<sup>67</sup> Bae (2008:111) takes an example of Ukraine and argues that its 'policy change regarding the death penalty was mainly based on strategic means-ends considerations at both domestic and international levels'.

reference to an allegedly more valid international norm, in this case national sovereignty' (Risse and Sikkink 1999:23-24).

Normative explanation from cultural perspectives may appear useful to examine Japan's resistance to some international norms. For example, the anti-nuclear-proliferation norm is an example of a positive cultural match. Since the end of World War II, Japan has been preserving three main non-nuclear principles: not to make such weapons; not to possess them; and not to bring them into Japan.<sup>68</sup> Also, the anti-whaling norm can be cited as a typical example of a negative cultural match between meat-eating and fish-eating countries (Hirata 2004:188). Similarly, Japan's non-compliance with the anti-death-penalty norm may appear at first sight to be due to a cultural difference. The government tends to claim that this issue should be left to the national criminal justice system, the climate of public opinion, and Japanese cultural assumptions regarding death and guilt. However, what has been overlooked in the existing approach is that the issue of capital punishment is primarily elite-driven in Japan, and important decisions are made by policy elites irrespective of domestic or cultural factors.

As Sato (2009:1–2) argues, 'public opinion' can fluctuate depending on (1) people's level of knowledge on the capital punishment system, (2) the proximity of the survey dates to certain incidents, and (3) semi-established moods or ideas

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<sup>68</sup> However, it should be added that this can also be construed as a socialised norm as a product of the American security guarantee, given that the renunciation of war was included in the US occupation policy (Johnson and Zimring 2009:60–1).



on the issue questioned. Furthermore, what is important to note is that all of these factors appear to have been influenced by the governmental approach on this issue. The secretive policy by the Ministry of Justice does not allow the public to have a correct understanding of the capital punishment system, and the governmental opinion polls appear to have been strategically phrased in order to generate certain answers to justify capital punishment legitimately (Chapter 2). 'Strong public support on capital punishment', which is generated from the governmental opinion poll results, can also affect respondents as a semi-established views (Lippmann 1997:78). Given that it is elite culture that precedes mass culture, it is inappropriate to assume that Japan's non-compliance of the anti-death-penalty norm has been driven by the climate of public opinion or their cultural views on death and life.

Governmental justification of capital punishment on domestic and cultural grounds appears to intend to deter external pressures as an illegitimate intervention in internal affairs. Thus, normative theory from cultural perspectives does not fully account for the actual dynamic regarding Japan's capital punishment policy. Rather, more attention needs to be paid to Japan's institutional structure, where capital punishment policy is treated as an issue of law and order, and pressures from human rights perspectives are resisted.

Furthermore, David Garland's view of the influence of culture in shaping penal regulations and institutions should be noted:

Penal laws and institutions are always proposed, discussed, legislated, and operated within definite cultural codes. They are framed in languages, discourses, and sign systems which embody specific cultural meanings, distinctions, and sentiments, and which must be interpreted and understood if the social meaning and motivations of punishment are to become intelligible (Garland 1993:198).

Since Garland contends that cultural sentiments can frame punishment, the capital punishment system may appear to be embedded in Japanese culture. However, the 'culture' associated with Japan's capital punishment system is not necessarily that of the general public. Rather, it is a routinely held institutional culture of the Ministry of Justice, which has been encouraging death row inmates to resign themselves to the inevitable (Menda 2004:139) and helping prison guards conduct executions in a smooth, efficient and uneventful manner on the basis of law. The following part will reconsider the validity of the governmental justification for capital punishment on the basis of Japanese culture, and argue that cultural sentiment among the general public is an independent variable in this system.

### **2.3.2. Capital Punishment as Social Justice and Victim Satisfaction Reconsidered**

As noted above, a former Minister of Justice, Moriyama Mayumi, claims that capital punishment is deeply embedded in the Japanese view on guilt, represented by a concept, *shinde wabiru*. This part will examine whether or not

such a social norm exists in Japanese civil society with an overwhelming public consensus, and whether the general public and the victim lobby believe that capital punishment functions as victim satisfaction. It will recall the actual occasion when an act of *shinde wabiru* was carried out in Japan, and the Japanese view on criminals relating to this concept. It will then raise conceptual and methodological problems involved in application of this concept to the capital punishment system, and also present divergence within the victim lobby on how they believe criminals should atone for their crimes.

### ***The Social Norm on Atonement through Death, 'Shinde Wabiru'***

General Nogi Maresuke and his wife committed *seppuku* following the state funeral of Emperor Meiji in 1912. His suicide note revealed that it was *junshi* – to commit *seppuku* upon the death of the lord – in order to expiate his disgrace in two main events: the Satsuma Rebellion in 1877 in which he lost the imperial banner to the enemy, and the devastating result of the Russo-Japanese War in 1904-05 where 56,000 lives were lost, including his two sons. In the latter event in particular, although General Nogi was first stationed at Port Arthur with approximately 90,000 soldiers, the Commander in Chief, Oyama Iwao, sensed that defeat was imminent under Nogi's leadership. Therefore, Oyama appointed Kodama Gentaro as the Chief of General Staff of the Manchuria Army at the end of November 1904 instead (Lifton 1977:65).

Since this decision was not announced to the public, Nogi was celebrated as a

national hero following Japan's victory (Lifton 1977:66). He took this as an undeserved honour, and a sense of shame made Nogi plead that he deserved death on each occasion when he was granted an audience with the Emperor, and in his meetings with the major (Lifton 1977:53). However, his death was not permitted since they both knew that Nogi genuinely meant to atone for his disgrace, and Emperor Meiji told him to live at least until his (the Emperor's) death (Lifton 1977:53). On the day of the state funeral of Emperor Meiji in 1912, Nogi committed *seppuku* with his wife in order to atone for his disgrace. Nogi's case drew a great deal of worldwide scholarly attention to the study of the *seppuku* ritual; and this cultural value, *shinde wabiru*, may appear to have been still accepted as a social norm in the contemporary era, relating to the Japanese view on criminals or death row inmates. For example, Komiya Nobuo claims that 'Japan is not a heaven for offenders in terms of rehabilitation because the reintegrative function of Japanese society is limited' (1999:387).

According to Komiya, self-discipline is the virtue admired in Japan, and this has been a key factor not only in maintaining Japan's exceptionally low crime rate but also in 'expelling' criminals from society (Komiya 1999). For example, schools in Japan are often inhospitable to original or critical thinkers since group harmony is highly stressed, and pupils learn to 'restrain selfish behaviour through various small group activities [...and to] continuously monitor[...] one another's behaviour within the group' (Komiya 1999:383). Fearing 'deprivation of membership', pupils become submissive to authority, and this surveillance system also works in society even after they grow up. In the meantime, 'one who

neglects [...this repressive rule] is likely to be labelled as a social misfit and gradually excluded from one's group' (Komiya 1999:373). In other words, whilst self-control makes the group members' bond stronger and contributes to building of a crime-free society, once they become criminals it is less likely for them and their families to be accommodated in the society again.

These 'exclusive' attitudes of the public to offenders may imply that the Japanese public appreciates a social norm of *shinde wabiru* to some extent. However, three main concerns are aroused by Moriyama's claim that the capital punishment system has been underpinned by such Japanese concept in the modern period. Firstly, the *seppuku* ritual is a particular historical and political event linked with a particular set of sociological phenomena, and Nogi's case was also a symbolic suicide, which aimed at appealing to the public in a traditional *samurai* spirit (Lifton 1977:73, 79, 92) – a sentiment not common amongst the contemporary Japanese public. Secondly, it has been overlooked by the Ministry of Justice, the pro-death-penalty lobby, and the general public in the contemporary context that spontaneity is required when an act of *shinde wabiru* is expected. This action is considered meaningful only when it is committed by people on their own initiative after a feeling of remorse has been generated from the bottom of their hearts.<sup>69</sup> If it is conducted by the state's authority on the dates that the ministry bureaucrats choose at their convenience, it is a mere state killing.

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<sup>69</sup> Interview with an attorney, Tokyo, 13 April 2011.

Thirdly, one should note that the existence of another Japanese proverb, '*tsumi wo urande hito wo uramazu*' (condemn the crime rather than the criminal), has been ignored in the governmental justification for capital punishment. If the government proclaims that capital punishment is deeply embedded in Japanese culture, it also needs to account for that proverb, contrasting to *shinde wabiru*. The following section will further investigate this issue and introduce arguments by both pro- and anti-death-penalty victim lobbies. It will summarise the main claims from both lobbies about how criminals should atone for their crimes, and critically examine how frequently the concept of *shinde wabiru* can be found in death sentences or the popular media as a widely accepted social norm.

### ***The Pro-Death Penalty Victim Lobby***

In relation to this concept, it is also important to examine the pro-death-penalty lobby's claim that only capital punishment can bring social justice to the bereaved families. The Hikari case is a high-profile murder incident where the victims' bereaved family proclaimed such an opinion. On 14 April 1999, an 18-year-old male broke into a house in Hikari city in Yamaguchi prefecture. The offender, whose name was withheld until 2012<sup>70</sup> since he was a minor at the

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<sup>70</sup> When several media agencies disclosed the name of the offender in the Hikari case in 2012, the Japan Federation of Bar Associations voiced concerns, stressing that he was a minor at the time of the crime (*Kyodo*, 24 February 2012). *Sankei*, *Asahi*, *Yomiuri* and *Nikkei* disclosed the name when the death sentence was finally upheld in February 2012. It had been withheld considering that he was a minor (the legal age of adulthood is 20 in Japan) and would go back to civil society after correction or rehabilitation. However, these newspaper agencies concluded that the opportunity for that had been lost and there was no need to hide his identity (*Sankei*, 22 February 2012). In the meantime, the *Mainichi* and *Tokyo* newspapers withheld it, considering that it was still important for the offender to be corrected and show remorse towards the bereaved family, and leave the possibility of

time of the crime, raped and strangled a 23-year-old woman, and strangled her baby daughter. What made this case distinct from other juvenile crimes was that: (1) Motomura Hiroshi, husband and father of the victims, called for the death sentence vocally; and (2) Yasuda Yoshihiro, an anti-death-penalty lobby activist and defence attorney for Asahara Shoko – leader of the Aum Shinrikyo responsible for the Aum gas attack on the Tokyo underground railway in 1995<sup>71</sup> – joined the defence team in the Hikari case from March 2006. The media coverage of these two helped create a simplistic picture of a ‘for or against’ argument on capital punishment amongst the public. As Hamai and Ellis (2008a:80) argue:

Motomura had a very charismatic persona as the grieving husband and father that was well attuned to TV chat shows and tabloid styles of approach. In front of TV cameras and reporters, he has often produced emotional attacks on offenders and argued that he would kill the murderer in his own case, if he were released.

Whilst Motomura’s claim as a victim gained much sympathy from the public (Hamai and Ellis 2008a:80), the argument of the defence team, which comprised 20 veteran attorneys including Yasuda, sounded poor and did not garner support from the public towards the offender. The team stressed that both victims died accidentally and that the offender even tried to revive both of them by raping the

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retrials or a reprieve as well (*Sankei*, 22 February 2012).

<sup>71</sup> Sarin gas was spread by the Aum Shinrikyo Sect in the Tokyo underground on 20 March 1995 – the biggest security threat in Japan in decades, in which massive numbers of the Self-Defence Forces with approximately 60,000 policemen were deployed.

dead woman and leaving the dead baby in a cupboard so that *Doraemon*, a robotic cat *manga* character, could make any dreams come true or would do something to them (*Japan Times*, 6 January 2010). The disclosure of the provocative letters which offender wrote about the victims and Motomura also made the public doubt the credibility of the defence team's claim, and this murder case left an extremely negative image of the anti-death-penalty movement in Japan (*Sankei*, 22 February 2012). It was only the Broadcasting Ethics and Programme Improvement Organisation that vocally claimed that the excessive media coverage from the victims' perspective had been producing an unbalanced view of the case (*Sankei*, 16 April 2008).

The offender in the Hikari case was initially sentenced to life imprisonment considering his age and the possibility that he could be rehabilitated. However, right before the ruling on 22 April 2008 when the offender was sentenced to capital punishment at the age of 27, Motomura stated that 'It's his responsibility to let society know about the consequences of killing someone' (quoted in Hamai and Ellis 2008a:81). He implied that the death sentence on the offender could remind society that only capital punishment serves as social justice and can deter further serious crimes. On the other hand, Motomura's campaigns were not all about stirring up pro-death penalty sentiment in the public. His appearance in the media appears to have contributed to make other victims' bereaved families become publicly visible, and brought several changes to the legal provisions (Hamai and Ellis 2008a:79).



Firstly, cooperating with Okamura Isao, an attorney whose wife was murdered on 10 October 1997, Motomura established an NGO, the National Network for Victim Support (*Zenkoku Higaisha no Kai*), on 23 January 2000. Motomura spoke on behalf of victims' bereaved families who could not express their feelings openly, and the Basic Act on Crime Victims was also enacted in order to protect their rights in November 2004. In the meantime, it appears that such victim-driven activism was also strategically used by the Public Prosecutor's Office to amend the Juvenile Law in November 2000 and May 2007. In particular, the amendment of the Juvenile Law in 2000 was the first since World War II (Hamai and Ellis 2008b:33), and it lowered the minimum age for sending minors to reformatories from 16 to 14 in 2000 and from '14 to around 12 (in 2007), stirring concerns among lawyers and legal experts that tougher penalties might infringe on the rights of minors and might not lead to a reduction in juvenile delinquency' (*Japan Times*, 11 April 2008). Harsher punishment of juvenile offenders was thus legalised as if it was influenced by the growing power of the victim lobby.

By contrast, when the Supreme Court rejected an appeal by the defendant and the death sentence was upheld on 20 February 2012, this appears to have put a brake on the pro-death-penalty mood in Japan. According to the judge, Kanetsuki Seiichi, 'Despite a severe sense of victimization by the bereaved family, sincere remorse is not seen as the defendant made irrational pleas', and the death sentence was inevitable (*Mainichi*, 20 February 2012). Following this, an editorial in *Asahi* on 21 February 2012 posed an ethical question to the public,

asking whether taking the life of one who had committed the crime as an 18-year-old boy was social justice and would bring happiness to Motomura.

Death sentence was finalised to the defendant. However, if he had not reached the age 18 at the time of the crime, this court decision would not have been made. The decision was that *there is no other way than death for him to atone for the crime* even considering his immaturity and possibility of correction and rehabilitation. [...] Death sentence is challenging for the judges to give. A modern state, which aims to protect the individual life, deprives an individual of life under the name of law. This is the contradiction that anti-death penalty lobby claims (*Asahi*, 21 February 2012).

*Asahi* thus alarmed the public about the legal legitimacy issue regarding state killing. In fact, in contrast to Motomura, another victim lobbyist in a capital punishment case has been lecturing across the country proclaiming the importance of rehabilitation of offenders: Harada Masaharu. The following section will introduce an alternative voice to what the Japanese government cites as 'the feelings of victims' bereaved families'.

### ***The Anti-Death-Penalty Victim Lobby***

On 24 January 1983, Harada Akio, 30-year-old truck driver, was killed in an incident that proved to be an insurance scam.<sup>72</sup> After Hasegawa was sentenced to death in two trials, he kept sending more than 100 letters to Harada Masaharu, the victim's brother, from death row; most of them were filled with words of apology and hope for the best for his family. He also sent some drawings which were Hasegawa's self-portraits (Mori 2008:51). It was not until around 1986 that Harada finally started reading Hasegawa's letters, and he visited Hasegawa in the detention centre in 1993. Facing Hasegawa who was apologising sincerely, Harada felt a sense of comfort and healing for the first time, if not forgiveness (Harada 2004). Harada also got to know that Hasegawa's sister and son committed suicide as they were ashamed of Hasegawa being arrested. Harada then started to believe that another unnatural death such as suicide should be avoided, and that Hasegawa should compensate for his wrongdoings by living and expressing remorse to Harada for the rest of his life (Harada 2004:104).

Since Hasegawa had already exhausted the appeals process and the death sentence had been finalised by then, Harada handed in a petition on 18 April 2001 to the then Minister of Justice, Komura Masahiko, calling on him to halt Hasegawa's execution. Komura declared in front of a TV crew that Hasegawa's execution would not be authorised so soon (Harada 2004:108–9). However,

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<sup>72</sup> Although his death was initially believed to be a traffic accident, it was discovered on 2 May 1984 that the president of his company was involved in the murder (M. Harada 2004:76–7).

despite the pleas of Harada, Hasegawa was executed on 27 December 2001 under the authorisation of the following Minister of Justice, Moriyama Mayumi. Although the Japanese government often claims that capital punishment is carried out considering the feelings of the victims in Japan, Hasegawa was executed against the feelings of Harada.

Through this experience, Harada claims that executing offenders through capital punishment does not necessarily bring closure to the incident or satisfaction to the bereaved families (Harada 2004). Similarly, Katayama Tadaari, who lost his eight-year-old son in a traffic accident on 28 November 1997, has declared that:

It should be realized that each bereaved family has different views [...], and within a family the father, mother, or the victim's brothers and sisters have their own opinions. We cannot refer to 'victims' or 'bereaved families' in a lump. [...] I want to see a system where victims are fully supported financially and psychologically and they could have a venue for dialogue with offenders, who will return to society in the future, rather than feuding with each other (*Japan Times*, 21 November 2007).

Harada describes crime victims as those who were pushed off a cliff by criminals, and the rest of the Japanese citizens as those who live peacefully on the cliff (Harada 2004:51–2): the latter never say, 'Hang in there! We will lift you up!' but only shouts from above, 'You must be hurt. We will also push the criminal off the cliff so you would feel better' (Harada 2004:51–2). Harada claims that the third

party usually seeks to promote more severe punishment for the criminals without being aware of what they can really do to heal the bereaved families' mental wounds. Thus, there exists some divergence within the victim lobby on the ways criminals should atone for crimes. Whilst the government proclaims that capital punishment is deeply embedded in cultural values concerning death and life, and functions as victim satisfaction, some victim lobby campaigners do not share the same idea. It is only the voice of pro-death-penalty victim lobby that is used as a primary source for the governmental justification of capital punishment. The following section will move on to explore how the media have been contributing to build 'public opinion on capital punishment'.

### ***The Influence of Media in Shaping Pro-Death Penalty Sentiment amongst the Public***

First of all, it appears that the media tend to let the public make up their minds whether to support Motomura's vocal pro-death-penalty campaigns or Yasuda's anti-death-penalty campaigns. They usually report only when an incident occurs, the offender is arrested, and capital punishment is imposed on offenders. These reports give very basic information, yet 'enough' information for the public to build up a myth that capital punishment is social justice, and to develop their fear about abolition of the system. Indeed, the media do not often feature detention conditions or the exact method of execution in detail. As a result, it is difficult for the public to observe psychological changes in offenders' feelings towards the bereaved families or the crimes they committed, as the Harada case shows. In

other words, the public have been supporting capital punishment over years without being provided with sufficient information about the death row inmates.

It is not necessarily the media's fault that the public are not fully informed about the capital punishment system. Rather, it closely relates to the secretive policy of the Ministry of Justice that has been hindering the media from gaining access to Ministry officials for investigation. However, in my interviews with writers of two main newspaper agencies, both stated that writers tend to develop sympathy towards the bereaved families in the process of getting to know about the victims through interviews, and articles tend to be written from the victims' perspectives<sup>73</sup>. Although it is not impossible for them to interview offenders, writers cannot usually spend the same amount of time as they spend to interview bereaved families: it is usually impossible once the offender is detained. It is also crucial for the media to allow some minority victim lobby voices to be heard to the public in order to demonstrate that capital punishment does not necessarily bring justice to all the victims' bereaved families.

Furthermore, it merits some attention that Motomura's and the general public's support for capital punishment appears to come from a simple reason rather than a complex cultural factors: it comes from lack of understanding about the second heaviest penalty, or life imprisonment with parole. According to Article 28 of the Penal Code:

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<sup>73</sup> Interview with a senior writer at a newspaper agency, Tokyo, 12 May 2011; postal correspondence with a senior writer at a newspaper agency, 21 May 2011.

‘When a person sentenced to imprisonment with or without work evinces signs of substantial reformation, the person may be paroled by a disposition of a government agency after that person has served one-third of the definite term sentenced or 10 years in the case of a life imprisonment’.

Therefore, the public tend to perceive life imprisonment with parole as a fairly mild penalty, considering that those convicted of serious crimes can be released within ten to 15 years. However, statistics from 2007 showed that offenders have been released in 31 years and ten months on average; and ‘the chances of release on parole among lifers have almost disappeared and a life sentence really does mean “until death” in Japan’ (Hamai and Ellis 2008a:73; Kiriyaama 2008:171). In order to reduce the ‘gap’ between the heaviest and the second heaviest penalty, there exists a movement promoting the introduction of life imprisonment without parole (Japan Federation of Bar Associations 2008). However, as discussed in the previous part, domestic discussion has not advanced yet. The governmental opinion polls do not pose such questions, and the ethical debate on whether life imprisonment without parole would be as cruel as capital punishment, or more, has not been resolved amongst legal experts or within the anti-death-penalty lobby. Therefore, public support for capital punishment does not appear to stem from a definite reliance on and understanding of the capital punishment system itself. Rather, it is heavily influenced by the media coverage of serious crimes and incorrect understanding of the second heaviest punishment in Japan, which stems from a lack of

governmental effort to discuss the issue fundamentally.

To sum up, what makes the 'retributive' sentiment look Japanese appears to be strategic narratives by the policy elites. Whilst social norms on atonement through death may exist in civil society, influenced by the Japanese public's possession of self-discipline and their views on criminals and death row inmates, the existence of such a norm does not necessarily lead the state to retain capital punishment. Given that the issue of capital punishment is elite-driven, it is the governmental discourse, which refers to the historical and cultural practice, that has been making Japanese culture look like a determining factor for justification of the system. Having examined what cultural features have been proclaimed by the Japanese government to be supporting capital punishment, the following section will investigate what other cultural factors appear to be hindering the Japanese public from complying with the anti-death penalty norm.

### **2.3.3. Public Resistance to the Anti-Death Penalty Norm Reconsidered**

Whilst a cultural value of *shinde wabiru* may not be appreciated by contemporary Japanese public, other cultural features may also appear to be associated with public support for capital punishment. This section will critically examine the extent to which Japanese legal and human rights consciousness have been contributing to public resistance to the abolitionism. It will contend that it is not necessarily Japanese cultural values that have been hindering the abolitionism movement, but the principles and characteristics of domestic anti-death-penalty



NGOs that have been failing to garner wide public support for abolition.

### ***Japanese Human Rights and Legal Consciousness***

First of all, retention of capital punishment in Japan might at first sight imply that the Japanese public have lower human rights consciousness than those in Western countries. However, in reality, since the Japanese government has been treating the issue of capital punishment from the perspective of criminal justice, the Japanese public do not appear to have been given opportunities to discuss it from a human rights perspective in the first place.

The Public Survey on Defence of Human Rights (*Jinken Yogo ni Kansuru Yoron Chosa*) is conducted by the Prime Minister's Office every five years; and 1,776 out of 3,000 people aged 20 or older responded in 2007. With regard to the question: 'Which of the following human rights issues are you concerned with?', 19 issues are listed as possible choices (see Appendix VIII). What merits some attention is that domestic human rights issues raised by the Prime Minister's Office are mostly different from what international society has been mainly concerned with in Japan, for example: (1) treatment of prisoners; (2) lack of an independent national human rights institution; (3) historical responsibility for the *ianfu* (comfort women) system during the wartime; and (4) the rights of minorities and foreigners (Amnesty International 2008; UN Human Rights Committee 2008).

Of course, it is natural that domestic concerns raised by the national government tend to be daily or local issues whilst those by raised by international society tend to be more internationally critical issues for a global comparison. Having said that, since treatment of prisoners is not listed in the survey, there is little chance that the public would treat related issues such as detention conditions and execution methods for death row inmates as human rights issues in Japan. Excluding these issues from the opinion polls appears, indeed, to be preventing the public from engaging in a domestic debate on capital punishment. Therefore, it is a difficult task to statistically observe the Japanese public's attitude towards human rights of prisoners or death row inmates in particular, or to claim that retention of capital punishment stems from the low human rights consciousness of the Japanese public.

Similarly, the state of Japanese legal consciousness may appear to explain why the general public do not show much sympathy towards domestic anti-death penalty activities. In other words, if the Japanese public has 'low' legal consciousness, they may not necessarily show particular interests to the activists' campaigns which try to challenge the existing legal system. For example, a low litigation rate in Japan by comparison with other industrialised countries (Kawashima 1967; Cole 2007) may make it look as though the Japanese public have 'low' legal consciousness and do not support the anti-death-penalty lobby which tries to challenge the existing legal provisions. According to Meryll Dean (2002:4), the Japanese public tends to 'regard law like an heirloom samurai sword, something to be treasured but not used'; and prefer

to settle disputes informally through mediation.

A legal sociologist, Kawashima Takeyoshi, agrees on this point, and also claims that the Japanese public do not appear to assert their legal rights. Whilst duty or norms are emphasised in Japanese society, terms such as 'rights' (*kenri*) did not exist when Japan imported a Western legal system, which has made translation work challenging (Kawashima 1967:15). Kawashima also claims that once a contract is made in any profession, a master-servant relationship arises: when troubles occur in this power dynamic, mediation is preferred and any hard feeling is expected to be 'washed away' (*mizu ni nagasu*) through apology or small compensation. If someone still tries to bring a lawsuit, this behaviour is seen as morally wrong, subversive, and rebellious; this appears to have been contributing to the low litigation rates in Japan (Kawashima 1963:45). This also relates to Wagatsuma Hiroshi and Arthur Rosett's work on the apology culture in Japan. According to them, the Japanese tend to apologise even when it is not entirely their fault, and this derives from their wish to maintain community harmony and stability (Wagatsuma and Rosett 1986). Such a cultural preference might not appear to motivate the Japanese public to support the anti-death-penalty lobby's vocal campaigns, which try to urge the government to repeal or amend legal provisions.

However, as with human rights consciousness, it is not easy to evaluate Japanese legal consciousness on a scale from low to high in the first place. Regarding the reason why the informal way is preferred for solving problems, it

is worth noting the conciliation methods employed in Japan. For example, companies usually provide employees with a mediating service in the case of traffic accidents, and there is no need for the individual to bring a lawsuit. Legal procedures come in only after exhausting all the available conciliation methods, and by the time this is done, the problem is normally being solved peacefully by mediators' efforts. Therefore, the low litigation rate in Japan does not necessarily stem from 'low' legal consciousness among the Japanese public, but from what is preferred as an alternative conciliation method. More precisely, the legal consciousness of the Japanese public cannot be examined through the lens of culture *or* institutions, but should rather encompass both study areas (Feldman 2007:63).

The next section will examine the characteristics of one of the largest anti-death-penalty NGOs, which appears to be playing a larger role than any cultural factors in failing to gain sympathy from the majority of public for the cause of abolition.

### ***Characteristics of Anti-Death-Penalty NGOs in Japan***

Currently, Forum 90, which was founded in 1990, is the largest anti-death-penalty NGO in Japan. Yasuda Yoshihiro is one of the key founders of Forum 90, and as already discussed, he is a criminal lawyer widely known for his activities in high-profile murder cases. He was one of the defence counsel for Asahara Shoko, who was responsible for the Aum gas attack on the Tokyo

underground railway in 1995, and of the offender, then a minor, in the Hikari case in 1999.

The former case was the biggest security threat in Japan in decade, in which massive numbers of the Self-Defence Forces (SDF) with approximately 60,000 policemen were deployed. Aum Shinrikyo was not only a religious group with approximately 10,000 members led by Asahara Shoko, but also an organisation that sought to protest against the government by committing crimes; 58 SDF members had been identified as Aum members by the autumn of 1995. This sect's commitment to organising crimes from the late 1980s to the early 90s is abundantly clear<sup>74</sup>. Some core members were among the brightest scientists in Japan, and the gas attack was planned using their skills so that the impact would be as big as possible (Katzenstein 1996:71). The media featured this organisation as an atrocious murder group or a brainwashed spooky cult group, and getting rid of it from the society became a high priority for restoring public safety in Japan (Osawa and Mori 2008:157). The public desired that Asahara should be sentenced to death and executed as soon as possible, and the trial for the Aum gas attack was opened even though most psychiatrists diagnosed that Asahara did not have the mental capacity to stand trial (Kaga and Yasuda 2008:133)<sup>75</sup>.

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<sup>74</sup> They include: (1) the Sakamoto family murder on 4 November 1989; (2) the Matsumoto gas attack on 27 June 1994; (3) the shooting of the National Police Agency Chief, Kunimatsu Takaji, on 21 June in 1995; and (4) a case of a letter bomb sent to the Tokyo Governor on 16 May 1995 (Katzenstein 1996:71–2).

<sup>75</sup> The trial started on 24 April 1996, and Asahara was sentenced to death on 27 February 2004 after 257 trial sessions (Nakamura 2006:378).

Whilst the Aum Gas Attack created an extremely negative image of the anti-death-penalty movement (*Sankei*, 22 February 2012), the public resistance to the abolitionism became more evident after Yasuda joined the defence team of the Hikari Case. In defence of a minor offender, the team claimed that he tried to revive both victims using the power of the *Doraemon*, a robotic cat manga character, which could make any dreams come true or would do something to them (*Japan Times*, 6 January 2010). However, as soon as the media featured the defence team's claim, Yasuda received tremendous amount of criticism. For example, the Japan Federation of Bar Associations received more than 8,000 claims from the public demanding the disbarment of Yasuda (*Sankei*, 22 February 2012), and Forum 90 received harassing calls every day.<sup>76</sup>

In my interview, an anonymous NGO member stated that Yasuda's activities as a defence attorney became a setback to their anti-death penalty campaigns indeed.<sup>77</sup> Because of his professional responsibility and of passion to bring abolitionism to Japan, Yasuda tends to argue from the perspectives of the criminals, and not out of line with those of the victim lobby or the general public.<sup>78</sup> Since Yasuda is a key figure of a well-known anti-death-penalty NGO, abolitionist lobby tends to be labeled as those who put an extreme emphasis on the human rights of criminals but undervalue the feelings of victims or their bereaved families.<sup>79</sup> As a result, the public tend to show resistance to the abolitionism activities, which appear to go against the public good.

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<sup>76</sup> Interview with two NGO member, Tokyo, 17 May 2011

<sup>77</sup> Interview with an NGO member, Tokyo, 12 April 2011

<sup>78</sup> *Ibid.*

<sup>79</sup> *Ibid.*

Cultural explanations for the Japanese public's failure to show sympathy towards anti-death-penalty NGO activities – for example, that the Japanese public have a distinctive view of death and life or possess 'low' human rights or legal consciousness – do not necessarily tell the full story. Rather, it is the distinctive characteristics of anti-death-penalty NGOs that appear to have caused their failure to win support amongst the public, with different ideas of social justice, simply because of those campaigners' professional activity and their passion to bring abolitionism to Japan.<sup>80</sup>

The present chapter has thus clarified the limited role that culture plays in the bureaucratic decision making mechanism. Applying the analytical framework presented so far, the following part will move on to evaluate the validity of the existing hypotheses on Japan's retention of capital punishment.

#### **2.3.4. Existing Hypotheses on Governmental Retention of Capital Punishment Reconsidered**

As presented in Chapter 1, Johnson (2011:141–4) discusses that Japan's retention of capital punishment relates to the following historical factors: (1) the US occupation; (2) the characteristics of Japanese political parties; and (3) Japan's geographical position and its stability as a democratic country. Regarding the first hypothesis, it is not impossible to assume that Japan would have abolished the system if that had been included in post-war US policy.

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<sup>80</sup> *Ibid.*

However, no literature has systematically examined the causal relationship between the US occupation and the retention of capital punishment, and Johnson (2011:142–3) himself expresses caution about the validity of this claim and emphasises the necessity for further research.

With regard to the characteristics of Japanese political parties and their resistance to political changes including the abolition of capital punishment, this appears to explain Japan's retention of the system to some extent. Since the pro-death-penalty LDP ruled for approximately 54 years from its foundation in 1955 until 2009 (with 1993 as an exception), the relationship between bureaucrats and LDP politicians became highly interdependent over these years. In the meantime, it is not necessarily right to assume that a change in the ruling party can bring about a shift in capital punishment policy. Of course, after the Democratic Party of Japan took over from the LDP in August 2009, several changes were observed: the issue of capital punishment was 're-discovered' by Ministers of Justice such as Chiba Keiko, Eda Satsuki, Hiraoka Hideo and Ogawa Toshio, and executions were put on hold for approximately 20 months (Chapter 1). Furthermore, it is worth noting that politicians in other parties have different views on capital punishment.<sup>81</sup> For instance, Fukushima Mizuho in the Social Democratic Party is an outspoken anti-death-penalty advocate and has been showing a particular interest in human rights protection. Kamei Shizuka, leader of the People's New Party and a former police officer, is also against

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<sup>81</sup> However, no matter how outspoken Diet members are on the capital punishment system, they tend to be sensitive to public opinion and reluctant to include the abolition of capital punishment in their manifestoes at election time, with Kamei Shizuka as an exception.



capital punishment and has published a book, *Shikei Haishi Ron* (Debate on the Abolition of the Death Penalty), in 2002. Therefore, a change in the ruling political party may appear a significant factor for the future of capital punishment policy in Japan.

Having said that, as Chapter 1 has demonstrated, it is employed-for-life bureaucrats who are in charge of the actual decision making irrespective of any change in the ruling party. Although some Ministers of Justice in the Democratic Party of Japan contributed to the domestic debate on the rights and wrongs of capital punishment, executions have been resumed by pro- and anti-death-penalty Ministers of Justice until today. Therefore, whilst a strong linkage between the perpetual dominance of the LDP and retention of capital punishment can be observed, it is doubtful if a change in the ruling political party could bring a rapid shift towards abolition of capital punishment system.

Regarding the claim that Japan's geographical independence and stability as a democratic state would not make the international society sanction Japan for not complying with international norms (Johnson 2011:144), these are merely arguments that the Japanese government has been using in order to legitimise its policy. Firstly, Japan's resistance to international pressures from organisations such as the UN, the EU, Amnesty International, and the Council of Europe<sup>82</sup> may appear on a simple map as 'Japan v the West' at first sight. Whilst

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<sup>82</sup> Japan obtained observer status in the Council of Europe in 1996, and is entitled to participate in the Committee of Ministers and all intergovernmental committees. However, Japan has not met the requirement declared in the Statutory Resolution (93) that those who acquire observer status should be 'willing to accept principles of democracy, the rule of law

Europe is currently a death penalty free zone, Japanese governmental officials tend to proclaim that those outside its sphere should have the right to choose their own criminal justice system without interference from international society (Moriyama 2001b:8). What is more, one academic points out that the anti-death-penalty norm appears to be considered by the Japanese government as a mere 'European ideology'.<sup>83</sup>

However, being outside Western sphere of influence does not necessarily mean that Japan defies all the pressures from outside. Japanese social and political norms have the capacity to be heavily influenced by external actors, although such 'external actors' are often limited to the US as a result of its unique and intimate relationship since the end of World War II. Rather, what is important to acknowledge is that the Japanese government has been treating capital punishment policy as an issue of law and order, not an issue of human rights. Hence it is not necessarily the case that the Japanese government refuses to comply with the internationally recognised anti-death-penalty norm out of disagreement with the human rights norm. Instead, it appears that the Ministry of Justice simply acts on precedents upon the basis of the law, and tends not to welcome new ideas or opinions for dealing with capital punishment policy from a human rights perspective, or abolishing this historically-held governmental policy by amending legal provisions. Therefore, it is not necessarily critical to focus on

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and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms' (Council of Europe 1993:1). In 2001, the Parliamentary Assembly of the Council of Europe warned both Japan and the US that the possession of observer status would be threatened if any significant progress in the implementation of the resolution could not be made by 1 January 2003 (Council of Europe 2001:3). The Japanese government did not respond to this.

<sup>83</sup> Interview with an academic, Tokyo, 12 April 2011

Japan's geographical situation in explaining the non-compliance with the anti-death-penalty norm.

Secondly, ideas that Japan's external relations with the US, South Korea, and Asia as a whole can affect Japan's capital punishment policy (Johnson 2011:145–8) do not appear valid, given that capital punishment is a criminal justice issue in Japan. As already discussed above, Japan's social and political norms have the capacity to be heavily influenced by its close ally, the US, and it is not impossible to estimate that an initiative by the US could determine the future course of capital punishment in Japan. However, as Johnson himself discusses, the US and Japan have not employed a similar approach in legitimising the use of capital punishment. In the US, communication between death row inmates and their families has been secured to a certain standard, and most states have been employing lethal injections to kill inmates more humanely with less pain (Johnson 2005:259). In Japan, on the other hand, death row inmates' communication has been limited, the execution date is not notified to the families in advance, and hanging is the only execution method regardless of the debate on whether it infringes Article 36 of the Constitution which forbids cruel punishment. Given that Japan has not mirrored its counterpart in detention and execution method, or in the strategy of legitimising state killing, it is doubtful to assume that the US can set a future course for Japan. Similarly, the Japanese government does not appear to be affected by any change in other Asian countries' capital punishment policy, since it proclaims that each country has the right to retain the capital punishment system depending on public sentiment and

the domestic crime situation (Moriyama 2001b:8).

Finally, regarding three internal factors – (1) strong public support for capital punishment; (2) a unique Japanese view on sin and human rights; and (3) a ‘punitive’ way of thinking among Japanese from the perspective of victims’ bereaved families – the present chapter has claimed that they are independent of the actual governmental decision making. Firstly, comparison of opinion polls by the government and non-governmental bodies, and an in-depth survey by an independent research body, provided alternative views. Although opinion polls conducted by non-governmental bodies did not necessarily show a strikingly different result from the governmental one, it highlighted the divergence between the public’s and the state’s official approach on capital punishment. Depending on the questions posed, the public showed some understandings and interests in holding executions in order to discuss the issue of capital punishment fundamentally; or in introducing an alternative penalty such as life imprisonment without parole (see Appendix VI and VII).

Secondly, whilst the social norm regarding atonement through death appears to exist in civil society, influenced by the Japanese public’s possession of self-discipline and their views on criminals and death row inmates, the existence of such a norm does not necessarily lead the state to retain capital punishment. The issue of capital punishment is elite-driven, and it is the governmental narratives, which refer to historical and cultural practice, that have been making the Japanese culture look like a determining factor for justification of the system.

Thirdly, the present chapter posed different perspectives to the governmental claim that all the victim lobby demands *shinde wabiru* for criminals. Whilst the government tends to justify capital punishment as victim satisfaction, and the media feature a pro-death penalty victim lobby sensationally, there exists an anti-death-penalty victim lobby, which poses an ethical question about whether state killing can bring closure to a crime. Finally, the following part will move on to examine how the investigation of the *de facto* moratorium period can tell scholars and activists about the elite-driven nature of capital punishment policy.

#### **2.4. THE *DE FACTO* MORATORIUM PERIOD RECONSIDERED**

As already explained, the Japanese government tends to justify capital punishment policy on domestic and cultural grounds consistently, and endeavours to conduct executions annually. However, at times executions do not take place for years, and this has been making some scholars and anti-death-penalty lobby supporters call such a period *de facto* moratorium period. As mentioned in the Introduction, discussions in the existing literature on this period revolve around the causal relationship between the personal convictions of Ministers of Justice and non-authorisation of executions. However, there has not been any serious attempt to define this phenomenon or investigate its implications for the study of capital punishment policy in Japan from 1989 to 1993. This section will clarify whether there was a moratorium equivalent period during this period in Japan. In order to investigate this, the following factors will be discussed: (1) what the nature of the moratorium period is; (2) who tends to

describe, or refuse to describe, an execution-free period as a *de facto* moratorium period; and (3) what factors tend to make an execution-free period look like a moratorium period. In order to do this, this part will review political and non-academic debate and reconsider the nature of this period. It will then propose what kind of approach is required to investigate this period for a better understanding of Japan's capital punishment policy.

#### **2.4.1. The Political Debate**

Firstly, as already discussed in Introduction, the Japanese government has not treated the *de facto* moratorium period as a political event, and there has been no official statement issued setting out a dominant governmental discourse on the subject. For example, when executions were resumed for the first time in three years and four months in 1993, press conferences were not held to explain why executions had been put on hold or why they were resumed. Ministry bureaucrats did not make official comments in the Diet meetings, either. Whilst it is difficult to trace the governmental and ministerial discourse on this event, three ministers in the MOFA<sup>84</sup> provided me with some unofficial views on the *de facto* moratorium period in my interviews. Their main claim was that: (1) this period was independent from the influence of the then international anti-death-penalty movement; and (2) it is doubtful if there existed an internationally recognised anti-death-penalty norm during this period in the first place.

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<sup>84</sup> Interview with a MOFA minister, Tokyo, 9 May 2011; and with two MOFA ministers, Tokyo, 17 June 2011.

Regarding the then international anti-death penalty movement, the UN's initiative can be cited as an example. Recalling Article 3 of the Universal Declaration of Human Rights and Article 6 of the International Covenant on Civil and Political Rights (ICCPR), the Second Optional Protocol to the ICCPR, aiming at the abolition of the death penalty,<sup>85</sup> was adopted on 15 December 1989 and entered into force on 11 July 1991. In the voting, 59 states voted for, 26 voted against, and 48 abstained in 1989; Japan and the US voted against the protocol. In my interview, an anti-death-penalty MOFA minister stressed that no matter how hard international society tries to urge Japanese governmental agencies to abolish capital punishment, the Ministry of Justice and the Public Prosecutor's Office resist such pressures, and it must have been the same during the *de facto* moratorium period.<sup>86</sup>

With regard to the two other MOFA ministers, they asked me back the following questions: (1) whether or not there was a '*de facto* moratorium period' from 1989 to 1993; (2) whether or not the anti-death-penalty norm was already firmly established worldwide in the late 1980s; and (3) why the Japanese government was and still is required to follow the international trend in the first place.<sup>87</sup> Using the figures for voting on the resolution, in which 26 voted against and 48 abstained whilst 59 states voted for, government officials often claim that the sum of those who voted against and abstained outnumbered those who voted

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<sup>85</sup> It is called the UN Resolution Concerning Abolition of the Death Penalty in a short form.

<sup>86</sup> Interview with a MOFA minister, Tokyo, 9 May 2011

<sup>87</sup> Interview with two MOFA ministers, Tokyo, 17 June 2011.

for.<sup>88</sup> Therefore, their argument is that there still was a divergence in this ethical principle amongst a substantial number of countries; and that there was no such thing as an internationally supported anti-death-penalty norm in the 1980s. Interviewees also denied that the adoption of the UN resolution led Japanese bureaucrats to refrain from conducting annual executions,<sup>89</sup> and two MOFA ministers, in particular, implied that the anti-death-penalty norm was and still is a mere European or Western ideology.<sup>90</sup>

In short, they argued that since not all the states share the exactly same political cultures, it is not appropriate for Western countries to seek by one-sided pressure to impose such values on Japan.<sup>91</sup> Such responses from government ministers sounded like a model answer that they usually use when they are questioned about capital punishment policy in Japan. Throughout the interview, two MOFA ministers also appeared reluctant to be asked questions about Japanese policy being internationally accused from a Western perspective. One of the academics whom I interviewed concluded that this may stem from resistance of Japanese governmental officials to a kind of 'Western arrogance' that tries to impose Western values on other countries, believing the West has a better cause.<sup>92</sup>

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<sup>88</sup> According to the result of the Second Protocol of the ICCPR, aiming at the abolition of the death penalty, 55 voted for, 28 voted against, and 45 abstained on 22 November 1989. In the Legal Affairs Committee on 5 December 1989, Ishigaki Yasuji (1989:3) in the MOFA combined the number of the latter two, and denied that the anti-death penalty norm was not widely supported in the world yet.

<sup>89</sup> Interview with a MOFA minister, Tokyo, 9 May 2011; and with two MOFA ministers, Tokyo, 17 June 2011.

<sup>90</sup> Interview with two MOFA ministers, Tokyo, 17 June 2011.

<sup>91</sup> *Ibid.*

<sup>92</sup> Interview with an academic, Tokyo, 13 April 2011.



#### 2.4.2. The Non-Academic Debate

Whilst the Japanese government does not treat the *de facto* moratorium period as a politically significant period, it is worth presenting the events that have been suggested by a TV agency and anti-death-penalty NGO staff as possible factors contributing to the *de facto* moratorium period: (1) the death of Emperor Showa in 1989; and (2) international anti-death penalty initiative in 1989.

Firstly, the death of Emperor Showa (Hirohito) in 1989 was briefly mentioned in a broadcast in an educational television series by the NHK on 27 February 2011. The main focus of the programme, entitled '*Homu Daijin no Kuno* (Agony of Ministers of Justice)', was to examine what led a former anti-death-penalty Minister of Justice, Chiba Keiko, to decide to authorise executions for three death row inmates in July 2010, before one year of a *de facto* moratorium period had passed. The *de facto* moratorium period from 1989 to 1993 was briefly presented in the programme in comparison, and the NHK made a correlation with the death of Hirohito, or Emperor Showa: 'Since Emperor Showa died in 1989, executions were put on hold for the first time after the war' (NHK 2011). One anti-death penalty MOFA minister supported this hypothesis, though he could not explain exactly how that event affected the running of the capital punishment system in Japan.<sup>93</sup>

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<sup>93</sup> Interview with a MOFA minister, Tokyo, 9 May 2011.

The proponents of this hypothesis appear to argue that the death of Emperor Showa made the then Ministers of Justice refrain from hanging death row inmates. However, it is not empirically proved that this event had an effect on the Japanese capital punishment policy specifically. Of course, the social and political impact that the death of the Emperor had on the Japanese government and civil society should not be underestimated. Japan uses two calendar systems: one is Western, the other is *nengo* system where the name of the era changes with the death of an emperor and his succession of his eldest son. *Showa* (enlightened peace or harmony) was the name of the era that Hirohito served as an emperor, and he was called 'Emperor Showa'. Moreover, Emperor Showa is associated with historical events such as World War II and the pacifism and economic miracle that Japan achieved in the post-war period. Therefore, the psychological impact of his death to Japan should not be underestimated as a mere end of an era under the *nengo* system.

However, the suggestion about the Emperor's death and a halt to executions appears to be based on hearsay rather than on empirical evidence. Firstly, there is no record that reprieve was granted to death row inmates on this occasion. Secondly, one of the former Ministers of Justice during the *de facto* moratorium, Sato Megumu, did not mention that this event affected his decision concerning authorisation of executions, or induced a mood of voluntary restraint on the use of capital punishment within the Ministry of Justice.<sup>94</sup> Similarly, one academic, who is one of the most consistent writers on capital punishment policy in Japan,

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<sup>94</sup> Postal correspondence with a former Minister of Justice, Sato Megumu, 8 February 2011.

also showed a sceptical attitude towards this hypothesis.<sup>95</sup> Given that the media have a potentially enormous role in shaping the public understanding of political events, it was wrong to speak of a correlation between the death of Emperor Showa and the beginning of the *de facto* moratorium as an established fact, without support from empirical research.

Secondly, an anti-death-penalty NGO worker, who has been acting on behalf of innocent death row inmates, spoke of the impact that international pressure must have had on the Japanese government back then.<sup>96</sup> What merits some attention is that the UN's initiative was not a one-off event that grabbed worldwide attention solely on the day it was adopted. Ever since the resolution entered into force on 11 July 1991, those who voted against or abstained have been adopting it in the following years. Given that Japan halted executions from 10 November 1989 for three years and four months, this informant claimed that the UN's initiative to the Japanese policy making had indirect influence, even if it did not impel the government to adopt the resolution.<sup>97</sup>

By contrast, most of the NGO staff denied such international influence on the non-execution period, considering the elite-driven nature of this policy. For example, another NGO worker who was interviewed at the same table as the one just cited disagreed with her, and argued that the *de facto* moratorium took place totally independently of any international movement.<sup>98</sup> That NGO worker

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<sup>95</sup> Interview with an academic, Tokyo, 13 April 2011.

<sup>96</sup> Interview with an NGO staff(a), Tokyo, 27 May 2011.

<sup>97</sup> *Ibid.*

<sup>98</sup> Interview with an NGO staff(b), Tokyo, 27 May 2011.

is one of the editors of *Nenpo Shikei Haishi* (Annual Report: Abolishing Capital Punishment), which has been following the domestic trend of capital punishment in Japan, and he appeared confident in denying any causal relationship. In his opinion, it is doubtful that any international event influenced the Japanese government bureaucrats of the time to start considering where international society was heading or what political price the Japanese government would pay by going against such global initiative.<sup>99</sup> However, the gap between those two interviewees was bridged by other anti-death penalty NGO workers, who said it was not necessarily a single event or person that alone had an impact on pro-death-penalty sentiment, but there was rather a combination of domestic and international events such as the disclosure of four major false accusation cases in the 1980s; the adoption of the UN Resolution Concerning Abolition of the Death Penalty in 1989; and anti-death-penalty campaigns by NGOs at that time.<sup>100</sup>

These hypotheses on the beginning of the *de facto* moratorium period exist amongst some MOFA ministers, TV programme producers, and anti-death-penalty advocates, and appear to have been partly accepted as important in approaching the *de facto* moratorium period. However, more important topics have been overlooked in the discussion hitherto. Firstly, the issue of capital punishment is the province of a narrow elite in the Ministry of Justice and the Public Prosecutor's Office, and it is mistaken to argue that domestic or international factors influenced capital punishment policy making

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<sup>99</sup> *Ibid.*

<sup>100</sup> Interview with two NGO staff members, Tokyo, 17 May 2011.

during this period. Secondly, the hypotheses are based on the presumption that there was a *de facto* moratorium caused by internal or external factors, but without investigation of what the nature of the moratorium period was, or whether or the execution-free period from 1989 to 1993 was a moratorium. Clarifying the conceptual issues regarding this period, the following section will highlight the importance of investigating how consistently the Ministry of Justice promoted the pro-death-penalty norm during the execution-free period.

#### **2.4.3. The *De Facto* Moratorium Period in Japan's Capital Punishment Policy**

The significant fact about moratorium periods is that executions are put on hold temporarily. Even if inmates are still detained on death row, it is guaranteed that they will not be executed for a certain period. On the other hand, the Japanese government has never set a moratorium period officially till today. Therefore, during the period from 1989 to 1993, which is called the *de facto* moratorium period in the existing literature, no significant change was observed in the status of death row inmates, and they were in constant fear of execution.

Despite this fact, some people amongst scholars, anti-death penalty NGOs, and the media tend to treat this period as worthy of close attention as if there was a change in the governmental approach on capital punishment policy. Firstly, discussion in the existing literature (Schmidt 2001; Johnson 2006) stresses the causal relationship between personal convictions of Ministers of Justice and their non-authorisation of executions. It tends to suggest to readers that the

issue of capital punishment is heavily dependent on who serves as Minister of Justice.

Secondly, anti-death penalty NGOs tend to treat the *de facto* moratorium period as a politically significant phenomenon, and try to make this period serve as a smooth transition period towards abolition. Indeed, they consider execution-free periods as a stage when that the Japanese government abolished capital punishment in practice, and seek to make this period as long as possible, expecting that the Ministry of Justice will abolish capital punishment in law.<sup>101</sup> For example, they tend to strengthen their anti-death-penalty campaigns during this period, for example by collecting signatures from supporters and submitting them to Ministers of Justice as an alternative voice to ‘public opinion’ found in the governmental opinion polls.<sup>102</sup>

Furthermore, the media tend to highlight the length of time during which executions have been put on hold, citing Ministers’ personal views on capital punishment. For example, in light of the recent *de facto* moratorium period which lasted for one year and eight months from 28 July 2010 to 29 March 2012, most of the newspapers put the phrase ‘no execution for the first time in 19 years’ in their article titles (*Asahi*, 28 December 2011; *Nikkei*, 28 December 2011; *Yomiuri*, 28 December 2011) in order to stress the ‘abnormality’ of this period.

How these three groups of commentators treat the *de facto* moratorium periods

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<sup>101</sup> *Ibid.*

<sup>102</sup> *Ibid.*

appears to vary. Scholars tend to try to account for the central fact that executions are put on hold; anti-death-penalty NGOs tend to use this period as an opportunity to promote abolition as a final aim; and the media tend to alert the public that this form of legal punishment has not been in use. Despite the difference in their intentions and implications, what has been overemphasised is that this time period is 'different' in nature from the rest of the period, and that personal convictions of Ministers of Justice bring changes to capital punishment policy. In reality, apart from the fact that executions did not take place, no significant change can be observed in capital punishment policy during this period.

As discussed in Chapter 1, important decisions regarding capital punishment are made by elites in the Ministry of Justice and the Public Prosecutor's Office. Therefore, one should not try to overestimate the characteristics of Ministers of Justice, who do not stay in office for more than a year on average and cannot get involved in the crucial part of the decision making process. Similarly, whilst contemporary domestic and international events tend to be instantly linked to explanations of why executions were put on hold, it is wrong to consider that these events led the Japanese government to take a political initiative with the intention of discussing abolition. Rather, what is important to acknowledge is that the moratorium equivalent period was not set by the Japanese government with political intentions, but non-authorisation of executions by Ministers of Justice, who did not serve long enough because of almost yearly cabinet reshuffles, appeared to have created a 'gap' in capital punishment policy. More precisely,

various factors including the personal convictions of Ministers of Justice and contemporary domestic or international events appear to have made this time phase look like a moratorium period. Therefore, trying to investigate what led to a *de facto* moratorium is not a suitable approach to understanding of Japan's capital punishment policy. Rather, what is important to investigate is how consistently the Japanese government justified the policy even during the *de facto* moratorium period.

## **2.5. CONCLUSION**

Through examining domestic and cultural factors comprehensively, this chapter investigated the governmental claim that capital punishment is culturally determined. Firstly, public opinion has been cited by the government as a primary source for justification for capital punishment. However, comparison of the opinion polls conducted by the government and non-governmental bodies indicated that 'wide public support' for the capital punishment system mainly stems from the strategically phrased questions in the governmental opinion polls. Indeed, analysis of the results of opinion polls conducted by non-governmental bodies and an in-depth survey by a research team suggested that: (1) the majority of the Japanese public is not fully informed about the human rights issues of death row inmates; and (2) the public have shown some understanding of and interest in introducing life imprisonment without parole as an alternative punishment. Besides the fact that 'public opinion' can fluctuate depending on their level of knowledge on the capital punishment system, and how questions



are phrased in the questionnaire; it is also important to acknowledge that important decisions regarding this policy are made by elites, irrespective of public opinion in reality.

Secondly, it investigated what kind of cultural features have been claimed by the government to be associated with and to support capital punishment. Firstly, it challenged the theoretical approach to governmental and public non-compliance with the anti-death-penalty norm on cultural grounds. It has been discussed in the existing literature that culture has an influence on shaping legal punishment and that national attachment to a contrasting domestic norm can hinder the importing of international norms. However, this chapter argued that it is policy elites' recurring use of narratives making reference to culture that has been influencing the public and scholars to believe that capital punishment policy is domestically and culturally determined.

For example, although a concept of *shinde wabiru* appears to have been accepted as a social norm in Japanese society, a problem emerges when the government seeks to use it as a source to legitimise state killing. Secondly, not all the victim lobby believes that capital punishment functions as social justice; and secondly, it has been overlooked that *shinde wabiru* requires spontaneous acceptance by convicts. Moreover, the existence of a proverb, contrasting to *shinde wabiru*, has been completely ignored in the governmental narratives. The act of *shinde wabiru* can be appreciated as a virtue since it symbolises that convicts sincerely have a feeling of remorse towards the victims and their

bereaved families. However, given that capital punishment is conducted at the convenience of the Ministry of Justice and the Public Prosecutor's Office, under the ill-defined criteria governing the way some inmates are chosen out of dozens, it is hazardous to consider that capital punishment policy has been designed to reflect death row inmates' will to atone for crimes through death.

Thirdly, this chapter posed methodological problems of measuring Japanese human rights and legal consciousness relating to support for capital punishment. Firstly, capital punishment has been conceived by the public as an issue of criminal justice because of the governmental approach, and it is wrong to conclude that the Japanese public have a weaker human rights consciousness by global standards and therefore support capital punishment. Secondly, it argued that the state of Japanese legal consciousness may partially account for the public 'indifferent' attitude towards campaigns, which demand the government to repeal or amend the existing legal provisions. However, it appears that public reluctance to comply with the anti-death penalty norm largely stems from a lack of sympathy towards the activities of domestic anti-death penalty NGOs. Since a key figure in a well-known anti-death-penalty NGO puts extreme emphasis on the human rights of criminals or death row inmates, the public appears to tend to perceive their activities as undervaluing the feelings of victims or their bereaved families.

Finally, this chapter has suggested that further investigation of the *de facto* moratorium periods from appropriate perspectives can provide scholars and

activists with a better understanding of Japan's capital punishment policy. Scholars and activists have been paying tremendous attention to a wide range of domestic or international factors as influential factors affecting the *de facto* moratorium period; and the media also highlight the length of the execution-free period. However, it is important for them to acknowledge the fact that the *de facto* moratorium period was never implemented by the Japanese government with any political intentions. Rather, non-authorisation of executions by Ministers of Justice caused by the frequent cabinet reshuffles created a 'gap' in capital punishment policy, which made it look as though there was a change in government policy. This part discussed that the execution-free period should not be treated as a politically significant phenomenon out of line with government policy, and there should be no attempt to specify what led decisively to the *de facto* moratorium periods. Rather, this part proposed that it is more beneficial to focus on how consistently the Ministry of Justice tried to justify capital punishment policy even when executions were put on hold.

The following chapters will move on to empirically examine the *de facto* moratorium period from 1989 to 1993, applying the analytical framework presented in Chapter 1. Although various domestic and international factors have been considered as influential factors contributing to the *de facto* moratorium, the following case study will illuminate the fact that capital punishment policy is primarily elite-driven, and the Japanese government consistently justified the system even during the execution-free period.

## CHAPTER 3

### Governmental Justification for Capital Punishment from 1980 to 1989

#### 3.1. INTRODUCTION

The previous chapters analysed the capital punishment system in Japan highlighting the tightly-knit institutional mechanism within which selected elites in the Ministry of Justice and the Public Prosecutor's Office operate. This chapter and the following two will focus on how consistently the Ministry of Justice has been seeking to construct a dominant discourse on this system. As already discussed, the government frequently cites public opinion as a primary reason for retaining capital punishment. Therefore, the first part of each chapter will briefly examine the prevailing social climate on capital punishment at certain times, which was often a result of media coverage of, and the governmental response to, the contemporary crime situations. The second part will investigate the official comments on capital punishment by Ministers of Justice in press conferences and Diet meetings. It will clarify how consistently the Ministry of Justice tried to justify the capital punishment system using domestic factors as 'legitimate' reasons.

The present chapter examines the period from 1980 to 1989, that is, the ten years before the *de facto* moratorium period. Firstly, it will introduce several key events that aroused domestic discussions on the Japanese criminal justice system during this period: disclosure of false charge cases and successive

serious murder cases. Through examining the media coverage of and governmental response to these incidents, and the absence of effective anti-death-penalty NGO activities at the time, it will clarify why these events did not necessarily cause a setback to retentionism in the civil society. The second part will explore the governmental discourse on capital punishment by pro-death penalty norm entrepreneurs, or Ministers of Justice and bureaucrats in the Ministry of Justice. It will investigate exactly how the Japanese government dealt with the issue of false charge cases, in order to legitimate the retaining of capital punishment even at the risk of detaining and executing innocent people.

### **3.2. PERSISTENT PRO-DEATH PENALTY MOOD IN THE PUBLIC?**

According to the governmental poll results, 62.3 per cent of the Japanese public supported capital punishment in 1980, and 66.5 per cent in 1989 (Appendix IV). Although there exists a methodological problem regarding the governmental opinion polls (Chapter 2), Japanese civil society in the 1980s did not appear a fertile ground to discuss abolitionism fundamentally. The following section will examine key events during this period and investigate why they did not become major impediments to the prevailing argument that capital punishment functions as social justice.

#### **3.2.1. Public Reaction to the Disclosure of the Four Main False Charge Cases in the 1980s**

Firstly, the 1980s was when four major retrials revealed miscarriages of justice,

which resulted from forced confessions by police and prosecutors: the Menda case, the Saitagawa case; the Shimada case and the Matsuyama case. As Petra Schmidt (2001:148) argues:

[a]ll [the four cases] occurred during the postwar turmoils, when the violent investigation methods of prewar times were still applied. Police, prosecutors and judges had been trained under the old system, and a confession was still regarded as the most important and absolute evidence. Moreover, the techniques of forensic science had not yet been very highly developed.

In the Menda case, Menda Sakae, a 23-year-old black market rice dealer, was detained for 34 years and seven months until 15 July 1983, on a false charge of murdering a priest and his wife with a knife and an axe on 29 December 1948. Although Menda had an alibi that he stayed at a guesthouse with a prostitute on the day of the crime, a policeman made her testify that it was on 30 December 1948 that Menda stayed with her, and forced him to confess with torture which lasted over nights (Foote 1992b:20; Schmidt 2001:143).<sup>103</sup> Menda's death sentence was upheld on 5 January 1952 on the sole basis of two pieces of 'evidence': (1) a confession extracted by torture and (2) Menda's axe with some type O blood on (Shiotani 1994:21).<sup>104</sup> Although the three other murder cases

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<sup>103</sup> Menda happened to know that a policeman, Masuda, was tolerating a minor prostitution business, and Masuda felt a strong urge to make Menda a suspect for this crime (Menda 2004; Shiotani 1994:48).

<sup>104</sup> Given that Menda's grandmother, who had often used the same axe, also had type O blood, what was found was not necessarily the blood of the victims. However, further investigation was not conducted since the confession was used as prime evidence.

are different in nature,<sup>105</sup> some similarities can be observed in how suspects were chosen and forced to confess: the defendants either were not engaged in professional work of high social status or had previous crime records. In order to pursue greater efficiency in 'solving' murder cases, the police appeared to have charged socially and economically vulnerable people with insufficient investigation.

Disclosures of miscarriages of justice were widely featured in the media in the 1980s, and this could have become a setback to the 'persistent' pro-death-penalty sentiment amongst the Japanese public. However, there was not a full debate amongst the public on whether or not capital punishment functions as social justice when there is a risk of detaining and killing innocent people. Most of the interviewees including governmental ministers, NGO staff, and attorneys who specialise in capital cases, argued that it was closely linked to the fact that the Japanese government and the media dealt with a series of false charge cases as a separate issue from capital punishment, and did not encourage domestic debate on the immediate abolition of capital punishment.<sup>106</sup>

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<sup>105</sup> (1) In the Saitagawa case, the police forced Taniguchi Shigeyoshi, a 19-year-old unemployed man with a few previous criminal convictions, to make a confession under torture. Taniguchi was detained for 33 years and 11 months until 12 March 1984 on a charge of stabbing a 62-year-old black market rice dealer (Foote 1992b:30). (2) In the Shimada case, 24-year-old Akabori Masao, who had mental disability and two previous criminal convictions for theft, was forced to confess to kidnapping a six-year-old girl, and was detained for 34 years and eight months until 11 February 1989 (Schmidt 2001:146). (3) In the Matsuyama case, 24-year-old Saito Sachio, who had been arrested for causing bodily harm a few weeks before, was forced to confess to murdering four members of the Ohara family and setting fire to their house, and was detained for 28 years and seven months until 11 July 1984 (Schmidt 2001:145).

<sup>106</sup> Interview with: (1) a MOFA official, Tokyo, 9 May 2011; (2) an NGO worker, Tokyo, 12 April 2011; and (3) two NGO workers, Tokyo, 17 May 2011.

For example, as will be discussed in the following section in detail, the then Minister of Justice stuck to the claim that erroneous judgments should not happen in Japanese criminal justice system since it is equipped with a fair three-tiered judicial system (Okuno 1980c:3, 19), so that even if human errors are made in the first or second trial, it will be clarified in the Supreme Court with careful investigation of the case. Moreover, the media coverage of the four main false charge cases put much emphasis on the violent interrogation methods in *daiyo kangoku* (police detention) and a poor blood test or lack of adequate DNA test technology in the late 1940s and early 1950s, not necessarily on the existence of the capital punishment system itself (Yasuda et al. 1996:112).

Besides the lack of fundamental efforts by the government or the media to tackle false charge cases, it should be noted that anti-death-penalty NGOs were still in the making, and lacked social impact to advance the domestic discussion of the issue during this period. The 1980s in Japan were the period when individual activities gradually started to take the form of collective action. For example, it was a chaplain, Shiotani Soichiro, who acted on behalf of Menda for approximately 30 years at his request, - not yet a group of activists.<sup>107</sup> Various anti-death-penalty NGOs started to be founded in the 1980s,<sup>108</sup> and it was after the disclosure of false charge cases that they began to act systematically on

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<sup>107</sup> Postal correspondence with a former death row inmate, Menda Sakae, 8 March 2011; and interviews with two NGO workers, Tokyo, 17 May 2011

<sup>108</sup> They include: (1) *On-na no Kai* (Women's Anti-Death Penalty Group); (2) *Shikei Shikko Teishi Renraku Kaigi* (Liaison Conference for Suspending Death Penalty); (3) *Mugi no Kai* (Group of Straw, or an anti-death-penalty group with death row inmates as full members); (4) *Shikei Jiken Tanto Bengoshi no Kai* (Attorney Group that Specialises in Capital Cases); and (5) *Kyuen Renraku Centre* (Rescue Liaison Centre).



behalf of other falsely charged death row inmates. However, anti-death-penalty NGOs constantly received complaints from the public telling them not to mix the issues of acting on behalf of particular innocent convicts and advancing anti-death penalty campaigns in Japan (Yasuda et al. 1996:116).

Considering the methodological issues regarding the governmental opinion polls (Chapter 2), the results of those polls cannot properly be taken as showing that the Japanese public during this period was pro-death-penalty.<sup>109</sup> However, it still merits some attention that the public showed aversion to the emergence of collective anti-death penalty actions. A similar view also appeared to have been shared by the attorneys then specialising in false charge cases. Whilst they strongly denounced the efficiency-centred public prosecutors' work, where the priority is given to obtaining confessions from suspects, not many of them supported the idea of abolishing capital punishment immediately (Yasuda et al. 1996:112–3). As Yasuda points out, their professional mission was to save innocent convicts through retrials, and most of them believed that convinced criminals must be punished legally and deserved death to make atonement when appropriate (Yasuda et al. 1996:112–3).

### **3.2.2. Public Reaction to Serious Murder Cases and Two Capital Cases in the 1980s**

Another reason why disclosure of false charge cases did not particularly

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<sup>109</sup> According to the government opinion polls, 62.3 per cent of the Japanese public supported capital punishment in 1980, and 66.5 per cent in 1989 (Appendix IV).

advance abolitionism in Japanese society in the 1980s appears to relate to sensational media broadcasting of serious murder cases and inappropriate governmental responses to them during this period: (1) the Shinjuku bus arson attack case; (2) the Miyazaki Tsutomu case; (3) the Nagoya murder case; and (4) the Ayase murder case. Regarding the Shinjuku bus arson attack case,<sup>110</sup> it was first mis-reported that the offender was mentally disabled. Expressing concern that mentally disabled people tend to be exempted from death sentences and become repeat offenders, the then Minister of Justice, Okuno Seisuke, vocally called for harsher punishment towards mentally disabled people (Okuno 1980a:5); this will be discussed more in the following section. In the second incident Miyazaki Tsutomu, 26 or 27 at the time of the crimes, molested and strangled four primary school girls in Tokyo and Saitama prefectures from 1988 to 1989. Because of the abnormality of the crimes that he committed,<sup>111</sup> a national sensation quickly arose (*Japan Times*, 18 June 2008).

The third and fourth incidents were both committed by juvenile offenders and the media sensationally featured their brutality. The Nagoya murder case arose from a murder-robbery and gang-rape incident in Nagoya in Aichi prefecture from 23 to 25 February 1988. What particularly merits some attention is that five out of the six criminals were teenagers; one of them was first sentenced to death on 28

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<sup>110</sup> Maruyama Hirofumi, 38 at the time of the crime, threw some burning newspaper and a bucket of petrol into a bus in Shinjuku, Tokyo on 19 August 1980; six people died and 14 were seriously injured.

<sup>111</sup> He burned a four-year-old girl's body and sent her bones and teeth to her parents, and he is also reported to have eaten her flesh and drunk her blood (*Japan Times*, 18 June 2008).

June 1989.<sup>112</sup> Similarly, the Ayase murder was committed by seven juvenile offenders: they kidnapped and tortured a 17-year-old high school girl for 41 days from 25 November 1988 in Ayase, a suburb of Tokyo. What aroused public attention regarding this case was not only the cruel nature of the crime, but also the media's response to it. The identities of juvenile offenders are usually hidden in court, and the media do not disclose them, respecting Article 61 of the Juvenile Law, which 'prohibits the publication of information that reveals the identity of suspects or convicted criminals below the age of 20'. However, a weekly magazine, *Shukan Bunshu*, revealed their real names in its issue of 20 April 1989, claiming that 'beasts do not deserve human rights' (Hanada cited in Tanihara et al. 2005:334).

According to an interview conducted by *Asahi* with Hanada Kazuyoshi, the then editor of *Shukan Bunshu*, this decision was made in order to: (1) impose a 'social sanction' on the offenders, who are protected by the Juvenile Law; (2) denounce the responsibility of the educational institution and parents of the offenders, and call for amendment of the Juvenile Law; and (3) pose a question to Japanese journalism, which makes it a custom not to disclose the names of juvenile victims or offenders (Tanihara et al. 2005:334). Article 61 of the Juvenile law does not provide for punishment or fine for violation of the right of juveniles to have their names concealed, and decisions are at the discretion of the media agencies in practice (Brislin and Inoue 2005:3). According to Hanada, the editorial team realised how brutal this case was as they proceeded their investigation, and they

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<sup>112</sup> His death sentence was reduced to life imprisonment on 16 December 1996.

decided to treat this case exceptionally (Hanada cited in Tanihara et al. 2005:334).

In the meantime, whilst juvenile crimes were featured sensationally in the media, one death row inmate at the time, Nagayama, who had also been a minor at the time of the crime, grabbed public attention as a novelist from the 1980s to 90s. He published a book *Kihashi* (Wooden Bridge) in 1984 and was granted the New Japanese Literature Award; and his *Muchi no Namida* (Tears of Ignorance) in 1990 became a best-selling book with over 270,000 copies in print at that time. Claiming that his poverty and ignorance had led him commit a series of serious murders, 'From prison, he pleaded for tolerance and sought to win sympathy with his novels and poetry' (Métraux 2009:286). Nonetheless, virtual interaction with a death row inmate through his literature did not necessarily help promote the idea of abolishing capital punishment amongst the public. The *New York Times* (26 April 1990) suggested that Japanese media were not necessarily sympathetic to Nagayama, but supported the Supreme Court decision:

Several newspapers warned last week that capital punishment should be imposed carefully but that it was appropriate in this case because of what one called "the coldbloodedness of the slayings, the motives for the crimes and the great pain suffered by the families of the victims."

Indeed, the Hidaka Murder Case<sup>113</sup> highlighted the lack of public interest in the

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<sup>113</sup> Hidaka Yasumasa and Nobuko, committed an murder for insurance-related reasons in

legal rights of death row inmates. Although a married couple, Hidaka Yasumasa and Nobuko, had been appealing against the rulings since they were sentenced to death on 4 March 1987, they withdrew the appeal on 11 October 1988 after hearing about the opportunity that a reprieve would possibly be granted. Emperor Hirohito was very ill at that time, and there was a rumour in the prison that a reprieve from execution would be handed down at his death only if the final verdict has been delivered (Yasuda 1998:98). Article 6 (4) of the ICCPR stipulates the right to plead for reprieve,<sup>114</sup> as do Articles 3 and 4 of the Pardon Act<sup>115</sup> and Article 337 (3) of the Code of Criminal Procedure.<sup>116</sup> However, reprieves for death row inmates in Japan have been very rare, except for some special events such as when the San Francisco Peace Treaty came into effect in 1952. Although anti-death-penalty NGOs tried repeatedly to convince the Hidakas not to give up their right to appeal, they did abandon the appeal (Yasuda 1998:98). Emperor Showa died on 7 January 1989, but those prisoners were not reprieved in the end.<sup>117</sup>

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Yubari, Hokkaido, on 5 May 1984. It was first dealt with as a fire accident, but after a conspirator turned himself in, the Hidakas were arrested on 19 August 1984.

<sup>114</sup> It provides that '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 UN Human Rights Committee 1966).

<sup>115</sup> According to Article 3, 'Except as otherwise specially provided for by the Cabinet Order of the preceding Article, general pardon shall have the following effect with respect to crimes for which general pardon has been granted: (i) In the case of a person against whom a judgment of conviction has been rendered, the rendition thereof shall cease to have effect; (ii) In the case of a person against whom a judgment of conviction has not yet been rendered, the power to prosecute shall be extinguished'. Moreover, Article 4 stipulates that 'A special pardon shall be granted with respect to a specific person against whom a judgment of conviction has been rendered'.

<sup>116</sup> According to Article 337, 'The court shall, by a judgment, render a dismissal for judicial bar when: (i) The case has gone through a final and binding judgment; (ii) The punishment is repealed by laws and regulations established after the crime; (iii) There is a general pardon; (iv) There is a lapse of the statute of limitations'.

<sup>117</sup> The Hidakas were both executed on 1 August 1997.

Although anti-death-penalty activists protested against this, claiming that decisions on amnesty or reprieve are ill-defined and can mislead convicts to give up their rights to appeal or seek retrials, this case did not necessarily make the general public look at the Hidakas sympathetically (Yasuda 1998:98). For example, no public movement to reconsider the legal rights of the death row inmates emerged (Yasuda 1998:98). Just as anti-death-penalty NGOs faced protests from the public calling on them not to mix the two issues of acting on behalf of falsely charged people and abolishing a legal system thought to uphold social justice, Nagayama's contribution to the literary world did not necessarily make the public reconsider in what other ways criminals convicted in serious murder cases could atone for their crimes.

### **3.2.3. Public Retentionism in the 1980s**

To summarise, even though the four false charge cases were disclosed successively, it did not necessarily help lead the public to call for abolition of capital punishment immediately in the 1980s. This appears to be because: (1) the media and the Japanese government handled these events as a negative legacy of the immediate post-war era, which would less likely to happen in the future; and (2) the media featured serious murder crimes sensationally. In addition, the 1980s was a period when individual abolitionist activities only gradually started to turn into collective actions, and lacked social impact across

the nation.<sup>118</sup> In addition, NGOs which began to act on behalf of the victims of false charge cases had been seen by the public as mixing the two ideas of fighting for innocent convicts and abolishing the capital punishment system (Yasuda et al. 1996:116). Furthermore, Nagayama's success as a novelist did not necessarily contribute to helping the public to discuss whether depriving a man of life is merely judicial killing, or to examine alternative punishment. As the Hidaka case illustrates, whilst anti-death-penalty activists criticised the Ministry of Justice for the ill-defined criteria regarding reprieve for death row inmates, it did not become a central concern amongst the general public (Yasuda 1998:98).

The next section will focus on the governmental discourse on capital punishment, and examine how strategically the government had been using the climate of public opinion in order to add legitimacy to the retention of the system.

### **3.3. GOVERNMENTAL JUSTIFICATION FOR CAPITAL PUNISHMENT**

The successive disclosure of false charge cases could have caused a setback to Japan's justification of capital punishment policy. Even if capital punishment may appear to function as social justice for victims' bereaved families, executing innocent people is nothing but injustice (Dando 1996). However, in order to keep gaining public support for the system and using it as a primary source of justification, the Ministry of Justice endeavoured to stress that a serious of miscarriages of justice stemmed from a pre-war criminal justice system, and only

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<sup>118</sup> Postal correspondence with a former death row inmate, Menda Sakae, 8 March 2011; and interviews with two NGO staff, Tokyo, 17 May 2011.

amended the compensation system instead of halting executions in order to avoid further false charge cases. For examination of the exact measures that the government took, this part will divide this time period into the three phases: (1) 1980 to 1984, when the first three false charge cases were disclosed; (2) 1984 to 1987, when the issue of a decades-long-serving death row inmate was raised; and (3) 1987 to 1989, when the Criminal Compensation Act was amended and the fourth false charge case was disclosed.

### **3.3.1. Governmental Response to False Charge Cases (1980 to 1984)**

First of all, the Minister of Justice Okuno Seisuke's (17 July 1980 to 30 November 1981) pro-death-penalty approach was first observed in the Legal Affairs Committee on 27 August 1980, when he proposed amendment of the Penal Code following the Shinjuku bus arson attack case. According to Okuno, harsher punishment must be imposed on mentally disabled people since it was not fair to the public that they tended to be exempted from death sentences and be left free to become repeat offenders (Okuno 1980a:5). He then proclaimed the deterrent effect of capital punishment when he was questioned on the retention of the death penalty in the Legal Affairs Committee on 16 October and 18 December 1980. He stressed that the Japanese public believed that criminals of serious murder cases should atone for the crimes with death, and that the capital punishment system had been working as a deterrent in Japan (Okuno 1980c:8).



With regard to the miscarriages of justice, he emphasised the existence of a fair trial system in Japan. When the Menda Sakae case started to be examined as a possible miscarriage of justice by attorneys and anti-death-penalty advocates, Okuno was asked his opinion in the Legal Affairs Committee on 18 December 1980. However, he only commented that false charge cases can usually be avoided since Japan is equipped with a fair three-tier judicial system (Okuno 1980c:3, 19). Thus, Okuno: (1) proposed an amendment to the legal provisions so that death sentences would also be imposed on mentally disabled people; (2) proclaimed the retention of capital punishment referring to a cultural value, *shinde wabiru*, and the deterrent effect; and (3) denied the possibility that convicts could be falsely condemned in the Japanese criminal justice system.

On the other hand, it is worth noting that Okuno (1980b:24) commented in the Legal Affairs Committee on 16 October 1980 that he was unwilling to be given such a difficult decision – authorising execution orders – during his term. That is, he showed some reluctance to get involved in state killing with his authorisation. However, given that Okuno authorised an execution during his term, he appears to have chosen to separate his personal feelings from his official duty as a Minister of Justice. A similar attitude was observed in the subsequent Minister of Justice, Sakata Michita (30 November 1981 to 27 November 1982). Sakata (1982a:29) indicated that his official responsibility as the Minister of Justice overrode his personal convictions, and also tried to justify capital punishment on cultural grounds. In the Legal Affairs Committee on 23 March 1982, he claimed that the Japanese had nurtured their own culture living in the islands for

approximately 2,000 years: abolishing capital punishment could go against it (Sakata 1982b:20).

It was then during the term of Hatano Akira (27 November 1982 to 27 December 1983) that Menda Sakae was found not guilty on 15 July 1983 after being detained on death row for 34 years and seven months. Therefore, it was expected by anti-death-penalty Diet members that the Ministry of Justice would engage in a constructive discussion and take appropriate measures to prevent miscarriages of justice. However, Hatano tried to legitimise the retention of capital punishment, denying the necessity of reforming the Japanese criminal justice system. Firstly, in the Legal Affairs Committee on 10 August 1983, the international anti-death-penalty trend was discussed through the example of the UK.<sup>119</sup> However, Hatano argued that the issue of whether or not states should abolish capital punishment depended on the quality of the national criminal justice system, the climate of public opinion, and cultural practices (Hatano 1983:23). Regarding the first factor in particular, Hatano (1983:23) argued that Japanese criminal justice was 'superior' to those of the US or the UK, referring to the findings by B.J. George, Jr..

According to George (1984:72), Japan is both 'number one and unique' since 'public prosecutors in Japan are committed to a standard of objectively fair administration of justice to a far greater extent than all but a handful of federal

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<sup>119</sup> In the UK, a motion to reintroduce capital punishment was rejected in the House of Commons on 13 July 1983 in the face of a strong public support corresponding to an increase in serious crimes.

and state prosecutors in the United States'. Given that George is an expert in comparative criminal law, Hatano may have cited his work in order to back up his claim. However, it cannot be ignored that the majority of the scholars agree that public prosecutors pursue 'exceptional efficiency' in solving the cases,<sup>120</sup> and their activities are not directed by the principle of *in dubio pro reo* ('when in doubt, favour the accused') (Van Wolferen 1989:222). As Johnson (2002:39) argues, forced confessions lie at the heart of Japanese criminal justice. In fact, in the Menda case, it was the Japanese criminal justice system that 'delayed' and 'denied' justice for more than three decades (Van Wolferen 1989:190). Nevertheless, citing a single source that admires the 'fair' work of Japanese public prosecutors, Hatano (1983:23) claimed that disclosure of a single false charge case cannot necessarily be a significant factor in advancing abolitionism in Japan.

To sum up, Hatano insisted that false charge cases rarely occur in Japan and it is not necessary to abolish capital punishment since: (1) prosecutors do an outstanding job compared with those in other countries; (2) defendants can prove innocence through the legal process from first to third trials; and (3) death row inmates can submit pleas for retrials if they are falsely convicted. However, in reality, human errors are inevitable in trials even with the improved DNA test technology compared with a poor blood test in the late 1940s and early 1950s, and it is not easy for death row inmates to prove their innocence. Prosecutors tend to make defendants confess in order to keep their investigative efficiency

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<sup>120</sup> Consistent writers on this issue include C. Johnson 1972; Clifford 1976; Aoyagi 1986; Foote 1992a; 1992b; Haley 1992; Mukherjee 1994; and D. Johnson 2002.

high; they get involved in the rulings from the first to third trials; and they possess the right to submit immediate appeals against retrials.

In fact, contrary to Hatano's confidence in the Japanese criminal justice system, two more false charge cases were disclosed successively during the term of the subsequent Minister of Justice, Sumi Eisaku (27 December 1983 to 1 November 1984): Taniguchi Shigeyoshi was found not guilty on 12 March 1984 after 33 years and 11 months, and Saito Yukio on 11 July 1984 after 28 years and seven months. The issues of false charges and capital punishment were frequently discussed in the Diet meetings, and several proposals were made by anti-death-penalty Diet members.

Firstly, Hayashi Hyakuro (1984:38) proclaimed the rights of death row inmates to retrial in the Legal Affairs Committee on 2 March 1984. He proposed that once retrials are permitted, death row inmates must be treated as 'defendants' who may be proved innocent, and should be released from death row temporarily. In response, the Director-General of the Criminal Affairs Bureau, Kakei Ei-ichi (1984:38) dismissed the proposal, referring to Article 11 (2) of the Penal Code, which provides that 'A person who has been sentenced to the death penalty shall be detained in a jail until its execution'. However, Hayashi's proposal aroused a great amount of sympathy amongst some Diet members, and on 17 May 1984 Terada Kumao (1984:1) proposed a bill to amend a part of the Code of Criminal Procedure with other abolitionist Diet members. According to the proposed bill:

- (1) criteria for opening of retrials must be softened;
- (2) executions must be halted once death row inmates have started to appeal for retrials;
- (3) attorneys' rights must be secured in the process of opening retrials (secret communication between death row inmates and attorneys, and attorneys' rights to access to necessary information must be secured);
- (4) public prosecutors' immediate appeals against retrials must be forbidden; and
- (5) the costs of appeals for and opening of retrials must be covered by the government (Terada 1984:1).

Since the three false charge cases had already been disclosed by then, this proposal was a constructive action towards ensuring more fair trials in Japanese criminal justice. However, the bill did not pass in the Diet and no measures of that sort have been taken by the Ministry of Justice until today. Given that approximately 80 per cent of all legislation passed is drafted by bureaucrats (Van Wolferen 1989:33, 145), it was unlikely from the start that measures drafted by Diet members who are not in favour of government policy would pass.

Although Sumi did not try to engage with the issue of false charges, he made further conservative remarks justifying capital punishment in the Legal Affairs Committee on 27 March 1984: (1) views on capital punishment depend on individuals; (2) the government must respect the feelings of the Japanese nation,

which can be observed in public opinion polls; and (3) it is a legal duty of Ministers of Justice to authorise executions (Sumi 1984:8). Even though two more false charge cases were disclosed during his term after the Menda case, and initiatives to improve the rights of death row inmates and ensure a better chance for them to open retrials were taken by Diet members, Sumi authorised an execution of a death row inmate during his term. Like Okuno, Sumi (1984:32) showed some reluctance to authorise executions, but chose to carry out his official duty on the basis of law and public opinion.

### **3.3.2. Governmental Response on a Long-Serving Death Row Inmate (1984 to 1987)**

Following the disclosure of false charge cases, the main discussion topic during the term of Shimasaki Hitoshi (1 November 1984 to 28 December 1985) was shifted to an inmate at the time, Hirasawa Sadamichi. Hirasawa had been on death row for 30 years since 1950, on a charge of poisoning 12 people and committing a bank robbery on 26 January 1948. Hirasawa had submitted 17 pleas for retrials and five pleas for clemency by that time, none of which had been accepted. What deserves a particular attention is that he was the last defendant sentenced to death under the old Code of Criminal Procedure used in the pre-war period, whereby only a confession was required to charge defendants with a capital offence. Therefore, Diet members such as Miura Takashi, Akiyama Chozo, and Inokuma Shigeji raised two main concerns on this case during this time period: (1) Hirasawa might have been forced to make a confession by torture; and (2) years of detention in constant fear of execution is

an inhuman punishment, which cannot be justified by the Penal Code.

In the Legal Affairs Committee on 11 December 1985, Miura (1985:6) questioned whether Hirasawa would be granted a reprieve considering his age, 94. However, the Director-General of the Criminal Affairs Bureau, Kakei Ei-ichi (1985:6), explained that no exception can be allowed to the elderly unless they suffer from a serious mental disorder as specified in Article 479 (1) and (2) of the Code of Criminal Procedure. With regard to Shimasaki, he did not show particular initiatives on this issue, either. He merely mentioned that this case was not an easy one given that approximately 30 years had passed since the incident occurred, and few public prosecutors knew the details of this case (Shimasaki 1985:7). Given that Shimasaki believed in *Jodo Shinshu* Buddhism, which teaches that every single person's life is precious, one may conjecture that he was personally sensitive to the issue of depriving death row inmates of life. Indeed, it has been disclosed that a later Minister of Justice, Sato Megumu (29 December 1990 to 5 November 1991), refused to authorise executions out of respect for the teaching of the *Jodo Shinshu* Buddhism, which will be discussed more in Chapter 4. However, rather than sticking to his religious belief, Shimasaki appears to have chosen to fulfill his official responsibility as the Minister of Justice. He authorised executions of two death row inmates during his term.

Regarding the term of Suzuki Seigo (28 December 1985 to 22 July 1986), what merits some attention is not necessarily his own remarks. Rather, it is a drastic

change in the opinion of the former Minister of Justice, Hatano, on the Japanese criminal justice system. During his term as Minister of Justice (27 November 1982 to 27 December 1983), Hatano (1983:23) used to stick to his argument that the Japanese criminal justice system is superior to those in Western countries, and that there are only handful false charge cases in Japan. However, Hatano (1986:11) argued in the Legal Affairs Committee on 25 March 1986 that public prosecutors' role must be altered to achieve more fair trials in Japan. According to him, whilst public prosecutors were considered as judicial officers in the pre-war period, they became administrative officers after the war (Hatano 1986:11). The Public Prosecutor's Office became the administrative authority accordingly, and the judges became the only judicial officers. Despite this change, prosecutors continued to exert tremendous power in the Japanese criminal justice system and get involved in the crucial part of capital punishment policy. Furthermore, Hatano (1986:11) claimed that the criminal justice system in Japan was originally an import from Germany, and now that it had taken root in Japan, it was time to adjust it to the Japanese way so that it could function better.

Whilst Hatano sought to legitimise Japanese criminal justice when he was in the post of the Minister of Justice, he thus criticised deficiencies in exactly the same system. Given that it was only about three years after Hatano left his post of Minister of Justice one may doubt that such concerns occurred to him suddenly within such a short time. This can indicate that Ministers of Justice tend to try to act on precedents and legitimise the existing legal system as the top authority of the Ministry of Justice, even against their personal convictions. In response to



Hatano's suggestion on the role of public prosecutors, Suzuki (1986:12) merely stated that he would respect Hatano's opinion and continue to make an effort for the future of the Japanese criminal justice system. Invoking the feelings of Japanese citizens on capital punishment in the Legal Affairs Committee on 27 March 1986, Suzuki authorised executions of two inmates during his term.

In the meantime, the natural death of Hirasawa Sadamichi at the age of 95 was confirmed on 10 May 1987, and a subsequent Minister of Justice, Endo Kaname (22 July 1986 to 6 November 1987), and bureaucrats were heavily accused of ill treatment by the Ministry of Justice in this case. However, they endeavoured to: (1) legitimate the non-execution allowing some room to the interpretation of Article 475 of the Code of Criminal Procedure, which specifies the responsibility of the Minister of Justice regarding the timing of authorising and conducting executions; and (2) stress that there was no possibility that Hirasawa was innocent (Okuno 1980c:3, 19; Endo 1987a:8; Okamura 1987: 8). Firstly, in the Legal Affairs Committee on 14 May 1987, a Diet member, Inokuma Shigeji, voiced concerns regarding the non-execution of Hirasawa against the legal provisions. According to him, Hirasawa's 32 years of life in detention until his death could imply that Japan used a system of life imprisonment without parole with no legal backing, and this could be more inhuman than hanging (Inokuma 1987:14).

In response, Okamura Yasutaka, the Director-General of the Criminal Affairs Bureau, raised three main reasons to explain why the Ministry of Justice failed to

take appropriate measures dealing with this case: (1) shortage of competent public prosecutors; (2) low efficiency caused by outstanding numbers of pleas from Hirasawa; and (3) the advisory nature of Article 475 of the Code of Criminal Procedure. According to Okamura, whilst the number of applicants for public prosecutor posts had been decreasing,<sup>121</sup> Hirasawa submitted pleas for retrials 18 times and for reprieves five times in total, which heavily hindered the efficiency in dealing with this case (Okamura 1987:5,6,14). What is more, Okamura tried to justify Hirasawa's 32-year detention claiming that it was reasonable for Ministers of Justice to have dealt with the case very carefully and postponed the execution orders (Okamura 1987:14). More precisely, Okamura argued that it was not strictly necessary for Ministers of Justice to be bound by Article 475 (2): whilst it requires the Minister to order the execution of the death penalty 'within six months from the date when the judgment becomes final and binding', this excludes the period that applications or requests for a retrial or pardon are being made (Okamura 1987:14).

This is strikingly different from what Ministry bureaucrats often claim in justifying the capital punishment system. It is usually the Ministry of Justice that contends that executions must be authorised on the basis of Article 475 in order to keep Japan *hochi kokka*, whilst constitutional scholars tend to interpret this provision in wider terms and claim that it is rather mandatory for Ministers of Justice to be extraordinarily careful with decisions that relate to matters of life and death.<sup>122</sup> In

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<sup>121</sup> Okamura explained that whilst there were more than 50 applicants for prosecutor posts in the previous year, less than 40 applied in 1987.

<sup>122</sup> Interview with two constitutional scholars, Tokyo, 13 May 2011.

order to justify the fact that Hirasawa was not executed despite the legal provisions, Okamura thus implied legal ambivalence in Article 475, which was not consistent with the Ministry's usual claim to legitimate capital punishment on the basis of law.

Endo (1987a:15) also supported Okamura's explanation regarding this case and claimed that it was not necessarily unusual that more than 30 years should pass by without parole or execution while the Ministry of Justice and the Public Prosecutor's Office were handling each plea one by one. Furthermore, what merits some attention is that both Okamura and Endo stressed that there was no possibility whatever that Hirasawa was innocent (Okamura 1987: 8; Endo 1987a:8); and Endo provided detailed information on how he tried to deal with this case. According to Endo, doubting whether the non-execution of Hirasawa was a neglect of the duty of the Ministry of Justice, he set up several meetings with senior bureaucrats in the Ministry (Endo 1987a: 15). He then claimed that the Ministry appeared to have been extraordinarily careful in case the Japanese public might wonder whether the government had killed an innocent person before Hirasawa's retrials were permitted (Endo 1987a:8).

Given that Ministers of Justice rarely talk about internal communication within the Ministry of Justice, Endo appeared at first sight enthusiastic about engaging himself in this issue. However, stressing that there was no possibility whatever that Hirasawa was innocent and that the Ministry of Justice cared about the public view of the legitimacy of capital punishment policy, Endo appeared to

have evaded a fundamental question of whether it is appropriate to retain capital punishment at the risk of detaining or executing innocent people.

The Ministry of Justice thus endeavoured to defend the non-execution of Hirasawa on grounds of (1) the shortage of competent prosecutors; (2) the tremendous amount of pleas from Hirasawa; (3) the 'rights' of Ministers of Justice to postpone executions when appropriate; and (4) careful investigation on this case in order not to raise public doubt as a false charge case. However, Endo's further remark raised controversy in the Diet. In light of the Hirasawa case, Endo suggested in the Legal Affairs Committee on 14 May 1987 that it would be better to limit the number of retrials for each inmate, since it could give the public a wrong understanding that there was a loophole that death row inmates could use to postpone executions (Endo 1987a:8). What is more, Toyoshima Eijiro, superintendent public prosecutor in the High Public Prosecutors' Office in Nagoya, made a similar comment at his inauguration speech on 18 May 1987, only four days after Endo's comment. Since Toyoshima stated that 'it appears that submitting pleas for opening retrials are currently "in fashion"', Negoro Yasuchika (1987:3), the Chief Cabinet Secretary, had to comment in the Legal Affairs Committee on 27 August 1987 that Toyoshima's remark referred to those who submit pleas without valid reasons repeatedly, and it did not necessarily refer to Hirasawa.

The Hirasawa case thus revealed the 'institutional ambivalence' of the capital punishment system. The Ministry of Justice treats capital punishment as an

issue of law consistently, and justifies executions on the basis of Article 475 of the Code of Criminal Procedure. However, it tried to legitimate non-execution of a death row inmate who had been sentenced to death decades ago, using the same legal provision as a valid reason. Stressing in the Legal Affairs Committee on 15 May 1987 that the validity of the system's deterrent effect depends on national characteristics (Endo 1987b:6), Endo authorised executions of two inmates during his term.

### **3.3.3. Governmental Response to the Criminal Compensation Act and Disclosure of Another False Charge Case (1987 to 1989)**

Finally, it was during the term of Hayashida Yukio (6 November 1987 to 27 December 1988) that an amendment was made to the Criminal Compensation Act relating to those detained on death row on false charges. Given that Menda, Taniguchi and Saito were found not guilty from 1983 to 1984, and Hirasawa died in 1987 leaving the possibility that he was innocent, significant attention was paid to the improvement of criminal compensation in the Diet meetings. Originally, criminal compensation for those detained on death row on false charges was from 1,000 yen (£7.69) up to 7,200 yen (£55.38) per day, while for those who were executed on false charges it was up to 20 million yen (£153,846) since 1980 (Hayashida 1988a:1). Hayashida (1988b:1) proposed a new bill in the Legal Affairs Committee on 25 March 1988 which would increase the amounts to 9,400 yen (£72.31) and 25 million yen (£192,308),<sup>123</sup> respectively.

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<sup>123</sup> The amount was originally up to one million yen (£7,692) in 1964; three million (£23,077) yen in 1968; five million yen (£38,462) in 1973; 15 million yen (£115,385) in 1975; and 20 million yen (£153,846) in 1980. It is currently up to 30 million yen

In the following Legal Affairs Committee on 29 March 1988, scholars and attorneys were called to the Diet to give unsworn testimony. Discussions ranged from raising the amount of the compensation money more than the Ministry of Justice proposed to a fundamental question of whether or not it was appropriate to set a limit to the amount in the first place. For example, Yokoyama Koichiro, professor of law at Kyushu University, used the example of the Compensation Act in West Germany in 1971. There was no upper limit in West Germany, and those who were detained on false charges could claim any amount as long as they could prove the loss it may have incurred (Yokoyama 1988:2). Considering the psychological damage that inmates had to go through from the first trial to the third, and financial loss during their life in detention, Yasuoka Okiharu (1988:5), a Diet member and a later Minister of Justice, also disagreed with an upper limit to compensation. Despite these criticisms in the Diet discussions, the proposed bill, which presumably had already been agreed amongst governmental officials, passed in the Legal Affairs Committee on 28 April 1988.

The Diet discussion agenda then moved back to whether or not Japan should retain capital punishment. Chiba Keiko (1988:6), later Minister of Justice, argued in the Legal Affairs Committee on 26 April 1988 that abolishing capital punishment was as important as securing criminal compensation for those detained on death row or executed on false charges. This was because amendment of the Act appeared to have been made as an alternative to

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(£230,769) since the bill was passed in 1992 (Shigitani 2007:72).

discussing a temporary halt to executions or the abolition of the capital punishment system. In response, Hayashida merely commented that the death sentence had only been given to those convicted of significantly serious crimes, with very careful consideration (Hayashida 1988b:6). This sounded like a claim that capital punishment policy only involves a small fraction of criminals, and does not deserve to be discussed fundamentally.

A similar attitude was observed throughout this period. For example, the Ministry of Justice tried to deny the possibility of more false charge cases and to justify capital punishment, on three grounds: (1) the three-tier judicial system; (2) death row inmates' rights to retrials, and (3) the improved financial compensation system (Okuno 1980c:3, 19; Okamura 1987: 8; Endo 1987a:8; Hayashida 1988b:6). However, the Ministry of Justice did not try to explain why capital punishment needed to be retained even at the risk of detaining and executing innocent people. It left aside the ethical concerns about depriving a person of life, and dealt with the issue of false charge cases by increasing the amount of financial compensation. The Ministry of Justice thus tried to retain a historically held policy acting on precedents, and Hayashida authorised executions of two inmates as an annual practice.

With regard to the subsequent three Ministers of Justice, each resigned within a short period, and active discussions did not take place on the issue of capital punishment or false charge cases. For example, Hasegawa Takashi (27 to 30 December 1988) resigned within four days over an insider trading scandal called

the Recruit Scandal. A former Supreme Court judge, Takatsuji Masami (30 December 1988 to 3 June 1989), took over from him, and it was during his term that Akahori Masao was found not guilty on 11 February 1989 after 34 years and eight months. However, Legal Affairs Committees met only five times during his term, and death row inmates' rights to retrials and the rights and wrongs of capital punishment were not discussed. Thirdly, the subsequent Minister of Justice, Tanikawa Kazuo (3 June 1989 to 10 August 1989), resigned within approximately two months because of the Prime Minister Uno Sosuke's resignation due to his womanizing. Successive replacements of Ministers of Justice did not allow active discussions on human rights issues in the Diet, and executions did not take place during these periods, either.

Finally, during the term of Goto Masao (10 August 1989 to 28 February 1990), he did not show any particular initiatives on the issue of capital punishment. In the Legal Affairs Committee on 5 December 1989, Chiba Keiko (1989:3) questioned Japan's position towards the international anti-death-penalty initiatives such as the Second Protocol of the ICCPR, aiming at the abolition of the death penalty. However, Ishigaki Yasuji (1989:3) of the MOFA stressed that: (1) such an initiative is a mere recommendation and legally non-binding; and (2) an internationally recognised norm on the death penalty does not exist yet.<sup>124</sup> Although Goto was also questioned on his policy on capital punishment, he only replied that the decision on whether or not Japan should comply with such

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<sup>124</sup> In voting on the Second Protocol of the ICCPR, aiming at the abolition of the death penalty, 55 voted for, 28 voted against, and 45 abstained on 22 November 1989. Ishigaki (1989:3) combined the number of the latter two and denied that the anti-death penalty norm was not widely supported in the world yet.



initiatives must be made considering various domestic factors such as public opinion that those committing serious crimes deserve death (Goto 1989:3). Goto authorised an execution of one death row inmate during his term.

#### **3.3.4. Governmental Justification for Capital Punishment (1980 to 1989)**

To sum up, Ministers of Justice during this term separated their personal views or emotions from the performance of their official duties, and execution orders were authorised upon the basis of law, public opinion, and the *shinde wabiru* social norm. Given that there were a maximum of two executions per year during this period, which was exceptionally low by comparison with other retentionist countries,<sup>125</sup> the Ministry's dutiful way of carrying out its duty on an annual basis was observed. Furthermore, what merits particular attention regarding this period is that: (1) executions were not hindered even after several controversial events such as a disclosure of false charge cases; and (2) the Ministry of Justice invoked the 'advisory' nature of legal provisions on executions once it was accused of the imprisonment of a death row inmate until death. Firstly, the Ministry of Justice treated false charge cases as exceptional incidents which occurred during the post-war turmoil, and it did not make them look like crucial incidents worth reconsidering the possible abolition of capital punishment. A politicians-led bill to provide death row inmates with better treatment in the process of opening trials did not pass the bureaucratic decision making mechanism, and instead, the Compensation Act was amended as a temporary

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<sup>125</sup> More than 95 per cent of all executions are believed to take place in China; the estimates range from 2,000 to 15,000 per year (Johnson and Zimring 2009:21).

alternative to such proposal. The amendment of the Act did not mean that the Ministry of Justice started to take a firm step on the issue of capital punishment. Rather, it appears to have been based on the idea that abolition of capital punishment was unnecessary since Japan was equipped with a three-tier judicial system and a retrial system.

Secondly, although the death row inmate Hirasawa was not permitted to open retrials and was detained for approximately three decades until his death, a ministry bureaucrat, Okamura (1987:14), claimed that it was mandatory for Ministers of Justice to be extraordinarily careful with decisions. Whilst Ministry bureaucrats usually criticise refusals by anti-death-penalty Ministers of Justice to authorise executions as a neglect of official duty, Okamura justified the same action when the Ministry was accused of practically giving someone life imprisonment without parole without legal backing. Consequently, instead of clarifying why Japan should retain capital punishment even at the risk of detaining and executing innocent people, the Ministry of Justice chose to justify the existing criminal justice system by: (1) using legal provisions, public opinion, and cultural factors as prime sources; (2) stressing the available measures to avoid miscarriages of justice, and increasing the amount of financial compensation for those falsely charged or executed; and (3) implying the ambiguity of legal provisions regarding executions.

### 3.4. CONCLUSION

This chapter investigated how consistently the Ministry of Justice justified capital punishment and conducted executions on an annual basis from 1980 to 1989. With regard to the social dynamic in the 1980s, there did not appear to exist a mood to discuss the issue of capital punishment fundamentally. It was a time when individuals gradually started to take collective action, and anti-death-penalty NGOs were still in the making.<sup>126</sup> Following the successive disclosure of false charge cases, newly formed anti-death-penalty NGOs began to act on behalf of falsely charged inmates. However, their campaigns invited criticisms from the public for mixing two different issues: (1) resolving judicial injustice by trying to prove the innocence of particular inmates, and (2) denying social justice by calling for the abolition of capital punishment (Yasuda et al. 1996:116). Such protests appear to have arisen from the public mainly because the Japanese government and the media had been hindering the public from acknowledging the correlation between the two issues of false charges and capital punishment.

Secondly, the media sensationally featured several serious murder cases during this period. Although Japan had an exceptionally low crime rate as it still has today, the media coverage of these cases may have led the public to believe that heavy punishment through death was still required in Japan. Exceptionally, Nagayama's activities as a novelist on death row grabbed public attention to

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<sup>126</sup> Postal correspondence with a former death row inmate, Menda Sakae, 8 March 2011; and interviews with two NGO staff members, Tokyo, 17 May 2011.

some extent; but this did not necessarily introduce the idea of abolitionism across the society. For example, whilst the Hidaka case made anti-death-penalty activists criticise the Ministry of Justice over the ill-defined criteria for reprieves for death row inmates, this did not become a central concern amongst the general public. Although false charge cases aroused sympathy amongst the public towards falsely charged people to some extent, and Nagayama raised public awareness about death row inmates, this did not necessarily lead the public to reconsider how death row inmates should and could atone for their crimes.

On the government side, the Ministry of Justice consistently endeavoured to justify capital punishment on the basis of law and domestic factors such as the climate of public opinion. For example, although false charge cases were disclosed successively, the Ministry of Justice treated them as exceptional incidents which occurred during the post-war turmoil, not as 'systematic injustice' (Van Wolferen 1989:188) inflicted by police and public prosecutors. It endeavoured to proclaim that Japan was equipped with a three-tiered judicial system and retrial system (Okuno 1980c:3, 19), and dealt with the criticisms by amending the financial compensation policy. In other words, the Ministry did not take any particular measures to prevent false charges or to discuss the existence of capital punishment fundamentally, but proclaimed the measures already in place for the falsely charged.

Moreover, with regard to the Hirasawa case, the Ministry of Justice showed an

ambiguous attitude towards the legal provisions. Whilst the Ministry of Justice usually claims that Article 475 of the Code of Criminal Procedure, which specifies the responsibility of Ministers of Justice regarding executions, must be respected in order to keep Japan *hochi kokka*, a Ministry bureaucrat suggested that it was not necessarily required for Ministers of Justice to strictly comply with the relevant legal provision (Okamura 1987:14). The Ministry of Justice also tried to justify the capital punishment system consistently with reference to domestic factors such as the presumed deterrent effect, public opinion, and cultural values. However, it failed to account or avoided accounting fully for why Japan is required to retain this system even at the risk of detaining or executing innocent people. The following chapter will move on to examine the *de facto* moratorium period from 1989 to 1993, and investigate how the Ministry of Justice justified the capital punishment system even while executions were put on hold for three years and four months.

## CHAPTER 4

### **Governmental Justification for Capital Punishment during the *de facto* Moratorium Period (1989 to 1993)**

#### **4.1. INTRODUCTION**

Through examining the period from 1980 to 1989, Chapter 3 clarified that the Ministry of Justice consistently justifies capital punishment on legal, domestic, and cultural grounds, and conducts executions annually. However, no executions took place for three years and four months from 1989 to 1993, and it may appear at first sight that domestic or international events during this period made the bureaucrats at that time refrain from applying capital punishment. Nonetheless, as earlier chapters discussed, capital punishment policy is primarily elite-driven, and it is not appropriate to consider that executions were put on hold on political initiative. Instead, this chapter examines how the Japanese government continued to present the dominant governmental discourse on capital punishment during the *de facto* moratorium period from 1989 to 1993.

The first part of this chapter will critically investigate public opinion on capital punishment, which the Japanese government frequently cites in order to justify the policy. Whilst the governmental opinion polls tend to suggest that the majority of the Japanese public supports capital punishment, no significant protest from the public was observed during the *de facto* moratorium period. This

part will investigate whether or not some domestic factors softened the public attitude, or there was not particularly persistent public support for capital punishment in the first place.

The second part will explore how the Japanese government justified the capital punishment system while ‘institutional ambivalence’ was observed and executions did not take place for three years and four months. Since it has been revealed that the then Minister of Justice, Sato Megumu, refused to authorise executions owing to his religious belief, the role that he played to bring about the execution-free period tends to be over-represented in the existing literature. However, it is wrong to attach much weight to the individual behaviour of a single Minister of Justice in examination of this period. Although this chapter will investigate the social climate of the time and the personal convictions of Ministers of Justice, it does not aim to investigate the extent to which these factors contributed to the *de facto* moratorium period. Rather, it will illuminate the fact that: (1) the period of 40 months without executions simply stemmed from a frequent change in Ministers of Justice, and not from a changed view amongst the bureaucrats on this policy; and (2) the capital punishment system is consistently justified by the Ministry of Justice since the current law allows it to exist.

#### **4.2. A SOFTENED PRO-DEATH PENALTY MOOD AMONG THE PUBLIC?**

Firstly, it should be particularly noted that the general public were not particularly

concerned about the fact that executions were put on hold during this time period. As Johnson (2006:113) argues, no significant protests by pro-death-penalty bodies were observed, whilst the government tends to consistently claim that capital punishment has been retained on the basis of strong public support. This part will investigate whether the increase and decrease in certain media coverage raised the public's awareness of capital punishment and helped soften the pro-death penalty sentiment amongst them or, on the other hand, public opinion on capital punishment was always more neutral in the first place, in contrast to the findings of governmental poll results.

#### **4.2.1. Media Influence on the Public View of Capital Punishment**

In contrast to the previous period (1980 to 1989), there appears to have been a change in the media coverage of issues related to capital punishment: (1) an increase in media coverage of the issue of capital punishment; (2) a decrease in media coverage of serious murder cases; and (3) well-known novelists' action for the basic rights of death row inmates. Firstly, the media appear to have helped spur a domestic debate on the retention of capital punishment following the disclosure of false charge cases in the 1980s. Japan's major newspapers such as *Asahi* (which is committed to opposing the death penalty), -*Yomiuri*, *Mainichi*, and *Nikkei* became very active in calling for a national debate (FIDH 2008:16).<sup>127</sup> *Asahi* TV also broadcast a debate on the issue of capital punishment on 30 March 1989 and 18 June 1992; and *Mainichi* TV broadcast a

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<sup>127</sup> Another leading newspaper company, publishers of *Sankei*, is not included in the data by FIDH. *Sankei* conducted opinion polls on capital punishment in 1972 and 1977, but not in the 1980s or 90s.



documentary on this system in Osaka on 28 July 1989. Furthermore, the *Chunichi* newspaper, a local newspaper in the Tokai area, and *Shukan Josei*, a weekly magazine, displayed an anti-death-penalty mood.<sup>128</sup>

Secondly, a lack of sensational media coverage of serious murder cases may not have particularly encouraged the public to demand that the government resume executions. Of course, it is not that serious incidents did not occur during this period. For example, there was the Sakamoto family murder case. On 4 November 1989 Aum Shinrikyo members murdered Sakamoto Tsutsumi, 33; his wife Satoko, 29; and their son Tatsuhiko, one year old at their home in Yokohama in Kanagawa prefecture, and this prompted tremendous media coverage in Japan. However, as the victims initially just disappeared and were not found dead for many years, the case was treated as a missing persons case until 1995, when three dead bodies were found buried in mountain areas of Toyama in Niigata and Nagano prefectures and when one of the main culprits, Okazaki Kazuaki, turned himself in to the police in September 1995 (*Asahi*, 18 November 2011). For this reason, this incident did not necessarily arouse the pro-death-penalty sentiment during this period.

Thirdly, some famous writers called for equal opportunities for death row inmates in 1990. Recommended by novelists such as Akiyama Shun and Kaga Otohiko, the then death row inmate, Nagayama, applied to be a member of the Japan Writers' Association (*Nihon Bungeika Kyokai*). However, his application was

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<sup>128</sup> Interview with two NGO workers, Tokyo, 17 May 2011.

rejected on 5 March 1989 'given his status as a convicted killer' (Métraux 2009:285). To protest against that decision, some novelists such as Nakagami Kenji, Tsutsui Yasutaka, Karatani Kojin, and Iguchi Tokio withdrew from the association (Mori 2008:88). They greatly esteemed Nagayama's talent as a writer and proclaimed the need to 'accommodate' death row inmates as a part of civil society as normal citizens like everyone else.

Thus, the absence of a particularly strong pro-capital-punishment protest from the public during this period may appear to have stemmed from the aforementioned three factors: media coverage on the rights and wrongs of capital punishment, lack of sensational media reports on murder cases; and some novelists' action to call for the basic rights to death row inmates. However, this does not automatically mean that an anti-death-penalty mood surged amongst the public during this period. Whilst media agencies, regardless of size or popularity, may have helped raise public awareness of the issue of capital punishment and false charge cases, lack of media coverage of serious murder cases did not appear to have motivated the public to doubt the deterrent effect of capital punishment or call for abolition.

Similarly, it merits some attention that novelists who supported Nagayama's membership in the association were not anti-death-penalty advocates. What they called for was an equal opportunity for talented novelists regardless of criminal record, since they believed it inappropriate to draw lines between those on death row and outside it (Mori 2008:88); they did not necessarily intend to

discuss the rights and wrongs of the capital punishment system fundamentally, and their protest action did not appear to have generated a drastic conscious change in thinking about how those now sentenced to death should atone for their crimes. Just as acting on behalf of falsely charged death row inmates and advancing abolitionism were treated separately in the 1980s, so the call for Nagayama's rights as a writer appears to have been conceived by the public as a distinct issue.

Moreover, it is not impossible to conjecture that public opinion was more neutral in the first place than what was suggested in the governmental opinion polls. Given that there was no particular public protest against the absence of executions which lasted for more than three years, a mixture of the aforementioned factors may appear at first sight to have 'softened' strong public support for capital punishment. However, it is unsafe to argue that there was originally a 'strong' or 'persistent' public support for capital punishment, which some domestic factors calmed down. As the other opinion poll conducted by NHK indicated 40.5 per cent of public support for the introduction of alternative punishment in 1994 (Appendix VI), it is important to acknowledge that answers can vary depending on how the questions are phrased in the questionnaire. The subsequent section will move on to examine the prominence of an anti-death-penalty NGO in Japan and its social impact.

#### 4.2.2. Emergence of Collective Anti-Death Penalty Activities

Whereas abolitionism was still in the making in civil society in the 1980s, anti-death-penalty activities started to be recognised from 1990 with the foundation of Forum 90, one of the largest anti-death-penalty NGOs in Japan. According to Yasuda Yoshihiro, criminal attorney and key founder of Forum 90, it was the adoption of the UN Resolution Concerning Abolition of the Death Penalty in 1989 that motivated the existing anti-death-penalty groups to become a stronger force in Japan (Yasuda et al. 1996:123, 125). They believed that abolition could be achieved in Japan if they succeeded in mobilising the international voice to convey it to the Japanese government through their grass-roots campaigns more effectively.<sup>129</sup> Forum 90 was thus established in 1990 but with a unique vision. The founders did not try to make it a formal organisation with official members, but an informal gathering for those who shared the same vision.<sup>130</sup> This is because they wanted to make this group open to supporters of any social, political, and academic background, and to make their activities long-lasting, avoiding any friction amongst members on the direction of anti-death-penalty activities.<sup>131</sup> Besides the existing supporters from the 1980s, several associations and individuals joined this new wave of the abolition movement: (1) the Japan Federation of Bar Associations; (2) Setouchi Jakucho, a nun; (3) Kikuta Koichi, professor of law; and (4) Danto Shigemitsu, professor of law and former Supreme Court Judge.

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<sup>129</sup> Interview with two NGO members, Tokyo, 17 May 2011.

<sup>130</sup> *Ibid.*

<sup>131</sup> *Ibid.*

Firstly, they started to hold meetings periodically in Hibiya in Tokyo in order to raise public awareness, and a meeting on 1 December 1990 attracted 1,400 people. The numbers of those who showed sympathy for their activities also rose to 5,500 shortly after the foundation, and they included particularly Diet members, attorneys, academics, and local assembly members.<sup>132</sup> Regional branches also started to be established in Nagoya, Osaka, Hiroshima, Shikoku, and Sendai in the following years. Secondly, besides holding meetings, members approached Ministers of Justice in person and tried to convince them not to authorise executions. They attended the inauguration party of each Minister of Justice with bouquets, visited the home towns of Ministers to hold meetings and protests, and even placed opinion advertisements in the local newspapers there in order to raise public awareness.<sup>133</sup>

Whilst anti-death-penalty NGO activities appeared active at the beginning of the 1990s, which covers the *de facto* moratorium from 1989 to 1993, most of the NGO members whom I interviewed were reluctant to claim that they had an impact on the *de facto* moratorium period. This is because they are fully aware that human rights NGOs have not been integrated in the governmental decision-making process in Japan, and it is inappropriate to claim that they had any impact on governmental policy. Indeed, when I asked interviewees how they assessed the 'influence' that the then existing anti-death-penalty NGOs had possibly exerted during the *de facto* moratorium, some of them replied by asking

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<sup>132</sup> *Ibid.*

<sup>133</sup> *Ibid.*; Forum 90 placed an opinion advertisement in the *Oita Godo* newspaper in the home town of the former Minister of Justice Tahara, for example.

me how I defined the term in the first place.<sup>134</sup> This is because they felt that it was an inappropriate term to describe the effect they could have on the Japanese government. Other interviewees such as attorneys and academics also agreed with a majority of NGO workers on the limited contribution to the *de facto* moratorium. In particular, denials by governmental officials were strikingly strong. They tend not to admit that any policy changes are due to NGO pressures in the first place, and such a tendency was also observed in the postal correspondence with a former Minister of Justice, Sato Megumu. Regarding the question of whether or not there was any interaction with anti-death-penalty NGOs during his term, Sato responded that: (1) there was no such thing, except that he received letters petitioning him not to authorise executions;<sup>135</sup> and (2) ‘anti-death penalty NGOs were not so active during his term’.<sup>136</sup>

Thus, this part has clarified that no significant public protest was observed over the absence of executions for three year and four months. The following factors may appear at first sight to have contributed to ‘softening’ of the public pro-death-penalty sentiment: (1) increased media coverage of the issue of capital punishment; (2) decreased media coverage of serious murder cases; and (3) novelists’ protest against the literary world regarding the discrimination against death row inmates. However, it is also possible that public opinion on capital punishment was more neutral than appeared from the results of the

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<sup>134</sup> Postal correspondence with an NGO worker, 28 February 2011, and interview with an NGO worker, Tokyo, 12 April 2011.

<sup>135</sup> The anti-death-penalty *Jodo Shinshu* Sect and Forum 90 sent him a letter on 17 April 1991 urging him not to authorise executions.

<sup>136</sup> Postal correspondence with a former Minister of Justice, Sato Megumu, 8 February 2011.

governmental opinion polls. Having briefly examined the social climate during the *de facto* moratorium period, the subsequent part will investigate how the Japanese government sought to justify capital punishment.

#### **4.3. GOVERNMENTAL JUSTIFICATION FOR CAPITAL PUNISHMENT (1989 TO 1993)**

The central reason for executions being put on hold during this period is that Ministers of Justice did not authorise executions. Having said that, it is not necessarily right to attach much weight to the individual behaviour of a single Minister of Justice, for two main reasons: (1) this issue has been handled within the tightly-knit institutional dynamics where selected elites in the Ministry of Justice and the Public Prosecutor's Office have a near monopoly; and (2) not all the Ministers of Justice refused to authorise executions because of their personal convictions. For example, Hasegawa Shin (28 February to 13 September 1990), the first Minister of Justice during this term, stayed in office for less than one year because of his health condition, and did not have opportunities to authorise executions. Similarly, the next Minister of Justice, Kajiyama Seiroku (13 September to 29 December 1990), served for an even shorter period and was not given opportunities to authorise executions, either. By contrast, Sato Megumu (29 December 1990 to 5 November 1991), who took over Kajiyama, is currently known as the Minister of Justice who did not authorise executions because of his religious belief. However, it should be noted that Sato did not clearly express his personal opinion on the issue of capital punishment during his term: it was after he resigned that he disclosed the fact he

had refused to authorise executions.

In fact, Sato's remarks on various human rights issues in the Diet meetings indicate that he did not seek to actively engage in the discussion. Rather, he stressed that it was important to prioritise law and order over human rights. For example, the continuation of the *daiyo kangoku* (police detention) system was questioned in the Legal Affairs Committee on 20 February and 25 April 1991. Since confession is often extracted by torture in *daiyo kangoku*, which can lead to false charge cases, the abolition of this system had been frequently discussed in the Diet meetings. However, Sato rejected the possibility that *daiyo kangoku* would be abolished immediately. Firstly, he showed reluctance to have this issue dealt with in the Ministry of Justice. He stressed on 20 February 1991 that it was the police and the Public Prosecutor's Office that were in charge of maintaining legal order in Japan (Sato 1991a:16), and avoided accusations that the Ministry of Justice was taking no initiatives on abolishing the *daiyo kangoku* system. Secondly, he commented on 25 April 1991 that: 'Although I am aware of the reports by Amnesty International on this system and international movements to uplift human rights of prisoners, it is currently challenging to abolish the *daiyo kangoku* system with a limited budget (within the Ministry of Justice)' (Sato 1991b:2)<sup>137</sup>. Sato's response implied that the *daiyo kangoku* issue could be dealt with in the Public Prosecutor's Office, and that the Ministry's own concerns overrode the issue of preventing false charges.

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<sup>137</sup> Sato did not clarify how abolition of the *daiyo kangoku* system could cause a financial problem.



Moreover, what merits some attention is his remark in the Legal Affairs Committee on 20 February 1991 on human rights, when he discussed the issue of foreigners' human rights in Japan.<sup>138</sup> Sato stressed the superiority of law and order to human rights: 'individual's human rights must be protected under legal order (and not the other way around)' (Sato 1991a:11). Significantly, Sato appears to have applied 'double standards' to the human rights policy in Japan. He stated that the law is situated above human rights regarding the treatment of defendants in *daiyo kangoku* and of foreigners in Japan. On the other hand, he appears to have placed individual human rights above the law on the issue of capital punishment. In other words, believing that every single person has the right to live, he appears to have chosen not to comply with Article 475 of the Code of Criminal Procedures that specify the duty of Ministers of Justice: Sato did not authorise executions in a dutiful manner during his term.

Of course, he tried to achieve a balance between his personal conviction and his responsibility as the Minister of Justice on the issue of capital punishment. Sato asked the Director-General of the Criminal Affairs Bureau to bring him documents that he was supposed to sign and authorise executions.<sup>139</sup> However, after reading the documents for two death row inmates, taking two weeks to read them, he refused to authorise the executions in the end.<sup>140</sup> His official claim on

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<sup>138</sup> According to Article 62 (1) of Immigration Control and Refugee Recognition Act, 'Any person may, if he/she has knowledge of a foreign national whom he/she believes to fall under any of the items of Article 24, report such information', and the person who reports the illegal immigrant can receive a reward up to 50,000 yen if that report is correct. Regarding this provision, a Diet member, Okazaki Hiromi, claimed that this can bias Japanese citizens against foreign residents in Japan in general.

<sup>139</sup> Postal correspondence with Sato Megumu, 8 February 2011.

<sup>140</sup> *Ibid.*

the legal provisions and human rights issues thus strikingly differed from what he disclosed after he resigned as Minister of Justice. This may reflect the policy of the Ministry of Justice, which endeavours to act on precedents on the basis of law.

Currently, anti-death-penalty advocates treat Sato as a heroic figure who directly contributed to maintaining the *de facto* moratorium. However, it is not well known to them that Sato did not show any assertive attitude towards human rights concerns, which can either directly or indirectly relate to the capital punishment system. The reason why he did not take initiatives in the improvement of domestic human rights issues during his term appears to be that he chose to act on precedents as a government member. Of course, he may not have been aware that neglecting these issues – abolishing the *daiyo kangoku* system and tackling foreigners' human rights issues – could be linked to an increase in death sentences contrary to his personal conviction. For example, confession can be extracted in *daiyo kangoku* through torture, and foreign residents in Japan subjected to poor treatment can also be victims of the capital punishment system. Given that the issue of capital punishment has been treated by the Japanese government as a criminal justice matter, and a distinct one that does not deserve attention from the perspective of human rights, Sato may not have been aware of that dynamic. However, Sato may have tried to stress the superiority of the law and order over human rights as a Minister of Justice only in the official setting. In reality, he appears to have chosen not to authorise executions dutifully in line with the relevant legal provisions.

Finally, after Tawara Takashi (5 November 1991 to 12 December 1992) succeeded Sato, he did not have opportunities to authorise executions. Since Sato stated after resignation that he did not authorise executions owing to his personal conviction during his term,<sup>141</sup> Tawara was constantly questioned in the Diet meetings about his position on capital punishment and whether or not he would authorise executions during his term. However, he confined himself to giving general comments. For example, when he was questioned in the Legal Affairs Committee on 12 March 1992 on the French experience of the abolition of capital punishment and Sato's non-authorisation of executions, Tawara (1992:11) responded in only one sentence that the Ministry of Justice respected the current law and it had not been taking any particular measures towards change in the current criminal justice system in Japan.

Furthermore, the submissive attitude of the Ministry of Justice to the Public Prosecutor's Office on the issue of Japanese criminal justice – the issue of false charge cases specifically – was highlighted in the Legal Affairs Committee on 4 and 17 December 1991. Article 14 of the Public Prosecutor's Office Act specifies the relationship between the Ministry of Justice and the Public Prosecutor's Office as follows: 'The Minister of Justice may control and supervise public prosecutors generally in regard to their functions. However, in regard to the investigation and disposition of individual cases, he/she may control only the Prosecutor-General'. Although this indicates that Ministers of Justice are not

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<sup>141</sup> Sato also developed his personal opinion on the issue of capital punishment on an Asahi TV programme on 28 January 1992.

responsible for supervising an individual public prosecutor, a Diet member, Seya Hideyuki (1991:9) claimed that Ministers of Justice should not simply await for the outcome of prosecutors' work, since false charge cases can be avoided if Ministers of Justice keep an eye on their investigation activities. However, Tawara proclaimed that the Public Prosecutor's Office was in charge of maintaining legal order in Japan, and it was highly important for Ministers of Justice to trust them for their rigorous and fair activities (Tawara 1991:8–9).

Tawara thus endeavoured to act on precedents, and did not take any initiatives on the issue of capital punishment or false charges. Equally important, the anti-death-penalty politicians of the time were not competent in mobilising the emerging international and domestic anti-death-penalty trend to the governmental level effectively. To judge from the parliamentary proceedings, all they did with Tawara was question whether or not he would authorise executions during his term. They did not succeed in discussing the issue fundamentally from the perspective of: (1) why the state neglects to protect the basic rights of the Japanese citizens once they are on death row; (2) by what measures false charge cases could be prevented; or (3) what the government could offer for victim satisfaction without the use of capital punishment. Simplistic 'abolition or retention' discussion did not help ministry bureaucrats face the fact that Japanese society at that time had been keeping order without the use of capital punishment. As a result, Ministry officials appeared to have continued to show reserved attitudes towards the existing Japanese criminal justice system.

To sum up, four Ministers of Justice stayed in office for a year or less each during the *de facto* moratorium period, and it is difficult to analyse the governmental discourse on capital punishment. In particular, the first two of those Ministers of Justice, Hasegawa and Kajiyama, did not have opportunities to discuss the issue of capital punishment or to authorise executions. Regarding Sato, he chose not to authorise executions on account of his religious belief. However, since the issue of capital punishment was not brought up during his term, Sato neither disclosed his anti-death penalty sentiment nor proclaimed retention of the system separating his personal view from his official duty. Instead, he appears to have chosen to act on precedents as the Minister of Justice, and proclaimed the superiority of law and order to human rights during his term (Sato 1991a:11). It was only Tawara during this period who was asked his opinion on the capital punishment system, after it was revealed that Sato did not authorise executions on the grounds of personal belief. Although it is risky to analyse the governmental discourse on the capital punishment system during this period simply from several statements by a single Minister of Justice, Tawara's comments suggested that this system existed since the law allowed it to function as a criminal justice method.

#### **4.4. CONCLUSION**

This chapter has examined social climate during the *de facto* moratorium period from 1989 to 1993 and how the Japanese government continued to maintain the dominant governmental discourse on capital punishment. Firstly, it merits some attention that overt protests against the execution-free period were not observed,

contrary to the general understanding that the majority of the Japanese public supports the system. The central reason may appear to relate to media coverage of the issue of capital punishment, limited media coverage of serious murder cases, and some novelists' support for Nagayama regarding his status in the literary world. 'Public opinion' appears to vary depending on when the opinion polls are conducted and how questions are phrased, and 'strong' or 'persistent' public support for capital punishment may not have existed in the first place. Indeed, the foundation of Forum 90 in 1990 attracted public attention to this issue, as shown in the number of participants in one of their meetings.<sup>142</sup>

However, whilst these events appear to have contributed to increased public awareness on the issue of capital punishment to some extent, it does not necessarily mean that abolitionism surged rapidly amongst the general public. For example, as the case of Nagayama shows, those who called for death row inmates' rights as writers appeared to have been considered as a distinct issue from the right and wrong of capital punishment. Moreover, abolitionists' voice was not counted as a crucial factor in the governmental decision making, they were rather seen as a small fraction of public opinion. As Sato Megumu recalls, their activities were not treated as a collective voice of Japanese society on the governmental side.<sup>143</sup>

Secondly, whilst the existing literature overestimates the personal convictions of the then Ministers of Justice in examination of the *de facto* moratorium period,

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<sup>142</sup> Interview with two NGO members, Tokyo, 17 May 2011

<sup>143</sup> Postal correspondence with a former Minister of Justice, 8 February 2011

an in-depth analysis of the parliamentary proceedings revealed that not all the Ministers during this period endeavoured either to halt executions or to advance abolitionism. Rather, most of them stayed in their office for a short period and did not have opportunities to authorise executions. Exceptionally, Sato Megumu disclosed that he had refused to authorise orders because of his personal belief. However, his governmental discourse in the Legal Committee meetings indicate that he had not clearly expressed his view on capital punishment or tackled relevant human rights issues during his term. Instead, he stuck to presenting of official views, such as that the law is situated above human rights. The only Minister of Justice who had an opportunity to discuss the issue of capital punishment was Tawara, and his statement illuminates the dutiful approach that the Ministry of Justice takes. In other words, the Ministry of Justice justifies and uses the capital punishment system since the law provides for it. Given that abolishing this system requires repealing or amending all of the relevant legal provisions, it is less likely for the Ministry of Justice to take an initiative.

Consequently, whilst some people amongst scholars, anti-death penalty NGOs, and the media tend to treat this period as worthy of close attention (Chapter 2), it appears that what caused the *de facto* moratorium period was simply a high-turnover of Ministers of Justice. Frequent changes of Ministers of Justice did not provide them with opportunities to authorise executions, and created a 'gap' in capital punishment policy, which looked like a *de facto* moratorium period. Although Sato's decision not to authorise executions is not unimportant to study this period, as Chapter 1 clarified, important decisions are made within the

tightly-knit institutional framework and the role that Ministers of Justice can play is limited. Therefore, it is not helpful to try to specify what domestic or international factors led decisively to the *de facto* moratorium periods. Rather, it is important to focus on how the Ministry of Justice tries to justify capital punishment policy even when executions do not take place. The following chapter will move on to examine the governmental narratives on capital punishment after the *de facto* moratorium period.



## CHAPTER 5

### Governmental Justification for Capital Punishment from 1993 to 2002

#### 5.1. INTRODUCTION

Finally, this chapter investigates how the Ministry of Justice defended the capital punishment system from 1993 to 2002, the ten years following the *de facto* moratorium period. The first part will explore the then prevailing social climate on capital punishment. According to the governmental opinion polls, 73.8 per cent of the Japanese public supported capital punishment in 1994, and 79.3 per cent in 1999 (Appendix IV). These results may at first sight indicate increased public support for capital punishment. However, this section will clarify that such a public mood was very much related to how the media and the government dealt with the prevailing crime situations. The second part will investigate how the Ministry of Justice put the capital punishment system back in use for the first time in three years and four months. Whilst the numbers of annual executions were no more than two from 1980 to 1989, and none from 1989 to 1993, they ranged from two to seven per calendar year during this period. This part will investigate how the government tried to maintain the dominant discourse on crime and punishment for the justification of capital punishment during this period.

## **5.2. A REAWAKENED PRO-DEATH-PENALTY MOOD AMONG THE PUBLIC?**

The governmental opinion polls indicate that 73.8 per cent of the Japanese public supported capital punishment in 1994, 79.3 per cent in 1999. However, leaving aside the methodological issues regarding the governmental surveys, the prime reason why the public may have looked punitive or pro-death-penalty during this period appears to relate to: (1) the sensational media coverage of indiscriminate murder cases; (2) governmental response to these crimes; and (3) media reporting of the results of the governmental opinion polls on the public image of Japanese society. The following section will examine how public pro-death-penalty sentiment was created by the media agencies, and how strategically it was used by the Japanese government as justification for the capital punishment system.

### **5.2.1. Media Coverage of Serious Murder Cases**

Whilst media agencies appeared very active in calling for a national debate on the issue of capital punishment in the early 1990s (FIDH 2008:16), this significantly lost momentum following successive serious crimes. The first case was the Aum gas attack, which was committed by the Aum sect in the Tokyo underground on 23 March 1995. As already discussed in Chapter 2, it was featured by the media as the biggest security threat in Japan in decades.

Secondly, four successive juvenile crimes were also featured by the media

sensationally. For example, in the Sakakibara case a 14-year-old high school boy committed murders between March and May 1997, finally strangling an 11-year-old primary school boy in Kobe and cutting off his head, which he left at the school gate with a taunting note stuck in the victim's mouth, found on 27 May 1997 (Asahi Newspaper Agency 2000:56–7). Names of juvenile offenders are usually withheld in media reports for the purpose of protecting their privacy. However, as had happened in the Ayase murder case in 1988-9, a weekly magazine, *Focus*, declared that this case should not be handled like other, less serious juvenile crimes, and it disclosed the criminal's full name and picture in the issue of 9 July 1997 (Asahi Newspaper Agency 2000:167–9).

Moreover, besides the Hikari case, of a murder committed on 14 April 1999 by an 18-year-old boy (Chapter 2), there were the Saga bus hijack case and the Aichi murder case, both involving murder committed in 2000 by 17-year-old boys. In the former case, on 3 May 2000 a high school boy hijacked a bus in Saga prefecture with a knife, and a 68-year-old woman died and three others were seriously injured. After investigation, this case was found to have been influenced by the latter case, committed by another 17-year-old high school boy, who murdered a 64-year-old housewife by stabbing her 40 times and also injured her 67-year-old husband seriously (Machizawa 2000:122).

Indiscriminate murders were also committed by adults during this period, and they were widely featured by the media. Firstly, there was the Wakayama curry poisoning case; four people were killed and 63 others badly affected at a

community summer festival in Wakayama prefecture on 25 July 1998. Hayashi Masumi, a 42-year-old insurance salesperson, was arrested and sentenced to death for both murders and attempted murders in the Wakayama District Court on 18 May 2009.<sup>144</sup> Secondly, there was the Osaka school massacre case, in which a 37-year-old man, Takuma Mamoru, stabbed primary school children at Osaka Kyoiku University Ikeda Elementary School on 8 June 2001, killing eight children and injuring 13 children and two teachers. The motive was found to be retaliation against Japanese society from which Takuma felt left out, and a desire to be executed through capital punishment since he could not commit suicide by himself (Shinoda 2008:9). Therefore, anti-death-penalty activists proclaimed that Takuma would not have committed this indiscriminate crime if the capital punishment system did not exist in Japan (Mori 2008:121).

What also merits particular attention in this case is that although Takuma was executed within a year after the final sentence was given,<sup>145</sup> no major public concern was aroused about him being singled out from other death row inmates, who had been imprisoned for decades. It may have been a strategic bureaucratic decision to execute Takuma within this short period in order to justify capital punishment, exploiting public fear aroused by serious murder cases. However, since Takuma did not apologise to the bereaved families even once, some in the victim lobby doubted whether swift punishment put a closure

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<sup>144</sup> Regarding this case, there remained a possibility that the crime was set up by someone else (*Japan Times*, 19 June 2004). However, since she had a previous criminal record of conspiring with her husband in an insurance-related murder attempt, she was convicted without any definite evidence against her or confession from her.

<sup>145</sup> The death sentence on Takuma was finalised on 26 September 2003, and he was executed on 14 September 2004.

to this incident and eased their feelings (*Japan Times*, 15 September 2004).

### **5.2.2. Governmental Response to Serious Murder Cases**

In reaction to the successive indiscriminate murder cases, the Japanese government handled several cases differently, and tried to maintain its pro-death-penalty stance. More precisely, the Ministry of Justice (1) claimed the necessity of harsher punishment towards juvenile offenders, (2) amended several legal provisions on the initiatives of the Public Prosecutor's Office, and (3) demonstrated through opinion polls that public fear has increased over years. Firstly, on 1 July 1997, three days after the offender in the Sakakibara case was arrested, Kajiyama Seiroku, then Chief Cabinet Secretary and former Minister of Justice, stressed that it was doubtful that social justice could be maintained when offenders did not get appropriate punishment because of their ages (*Asahi Newspaper Agency* 2000:205–8).

The Ministry of Justice also made a partial amendment to the prison system for juveniles on 9 September 1997. Whilst the maximum imprisonment for juvenile offenders used to be set for two years, this change made it possible to extend the period for a further two years many times. Secondly, following the Osaka school massacre, the Japanese government showed a punitive attitude towards criminals who are mentally disturbed. The then Prime Minister, Koizumi Jun-ichiro, stated on 9 June 2001 that those people tended to commit crimes repetitively and that it was necessary to revise Article 39 of the Penal Code

which provides that 'an act of insanity is not punishable'.<sup>146</sup>

Thirdly, the results of the opinion poll conducted by the Prime Minister's Office were used for justification of several amendments of the legal procedures and retention of capital punishment. As already discussed in Chapter 1, a change was made in the police policy on counting of crimes after the Okegawa case (Hamai and Ellis 2008b:26), and this generated a sudden and drastic increase in overall recorded crime and decreased clearance rates in recent statistics (Kawai 2004:39). However, the media only highlighted the statistics, and the public anxiety about the current state of society appeared to have surged and may have influenced the opinion poll results.

Indeed, the reason for the increased fearfulness amongst the Japanese public can be found from the other governmental poll, the Opinion Poll on Public Order and Safety (*Chian ni Kansuru Yoron Chosa*). Although the questions were slightly different from 2004 to 2006, both results show that the Japanese public tend to take in what the media report uncritically. The question was 'What made you become concerned about the current public order and safety?' in 2004 and 'Where do you acquire information about the current public order and safety?' in 2006. 83.9 per cent of respondents answered in 2004 that it was newspapers and television programmes that made them concerned about the current state of public order and safety; and 95.5 per cent answered in 2006 that these were what the public receive the latest news on the criminal situation from (Prime

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<sup>146</sup> 'The Act on Medical Care and Treatment for Persons Who Have Caused Serious Cases Under the Condition of Insanity' was then adopted in 2003 and came into force in 2005.

Minister's Office 2004b;2006). Whilst the emerging public fearfulness had been heavily influenced by the wide coverage of high-profile murder cases, these results were cited by the media and governmental officials to 'prove' that Japanese society was becoming dangerous and that harsher punishment and retention of capital punishment were inevitable in Japan.

The following section will investigate exactly how governmental officials justified the capital punishment system during this period.

### **5.3. GOVERNMENTAL JUSTIFICATION FOR CAPITAL PUNISHMENT**

Much as happened in the other case study periods, as a result of political corruption scandals or cabinet reshuffles 16 Ministers of Justice served within ten years from 1993 to 2003. Although not all of the Ministers of Justice, for this reason, had opportunities to clearly demonstrate the governmental approach on capital punishment the present section will highlight the key discussions in the Legal Affairs Committees dividing this period into four phases: (1) 1993 to 1996 when executions were resumed and justified by Ministers of Justice on the basis of law; (2) 1996 to 2000 when the Ministry of Justice justified capital punishment with the climate of public opinion as a prime source; and (3) 2000 to 2002 when the Ministry of Justice justified executions disregarding the anti-death-penalty victim lobby's protest.

### 5.3.1. Governmental Justification on the Basis of Law (1993 to 1996)

Executions were resumed by the authorisation by the then Minister of Justice, Gotoda Masaharu (12 December 1992 to 9 August 1993). Given that Gotoda was consistent with his pro-death penalty attitude throughout his term, his personal characteristics and leadership may appear as a crucial factor to this event. However, a majority of the anti-death penalty advocates whom I interviewed mentioned that more attention must be paid to the intentions of Ministry bureaucrats who (they claimed) were really behind the nomination of Gotoda for this post, expecting him to resume executions and put capital punishment policy back in use.<sup>147</sup> Through examining Gotoda's narratives on the issue of capital punishment in depth, the following part will examine: (1) how the Ministry of Justice tried to maintain the dominant discourse on crime and punishment; and (2) how subsequent Ministers of Justice continued to justify capital punishment in order to keep Japan *hochi kokka*.

First of all, what Gotoda stressed in the Legal Affairs Committee on 23 February 1993 was the responsibility of Ministers of Justice regarding the capital punishment system in Japan. He argued that 'as long as capital punishment exists as a legal system and is sentenced to criminals under fair trials, I believe that it is *homu daijin no shokuseki* (a duty of Ministers of Justice) to authorise it. Otherwise, it will ruin *ho chitsujo* (legal order)' (Gotoda 1993a:17). However,

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<sup>147</sup> Interview with an NGO worker, Tokyo, 12 April 2011; with a MOFA official, Tokyo, 9 May 2011; and with two NGO workers, Tokyo, 17 May 2011. Although interviewees hypothesised that it was a decision made amongst the bureaucrats in the Ministry of Justice strategically, it is the Prime Minister who nominates the Ministers (Chapter 1).



Gotoda also showed an open mind towards discussing the issue of capital punishment in the same meeting:

Whilst opinion polls show that the vast majority of the Japanese citizens support retaining capital punishment, most of the Western countries have abolished the system. Although the US is exceptional in this case, I am aware that there exists an international anti-death-penalty trend. Also, I have heard that a public survey was conducted on the street in Shikoku<sup>148</sup> area a year ago or so, and anti-death penalty sentiment appeared to be increasing amongst young generation in particular. Whilst opinion polls conducted by the Prime Minister's Office have revealed that there are more retentionists in Japan, we need to handle this issue very carefully keeping young generation's trend in mind (Gotoda 1993a:17).

Members of Shikoku Forum, a regional NGO of Forum 90, conducted an opinion poll on the issue of capital punishment in the Shikoku area in October and November 1992. Out of 1,955 people surveyed, 35 per cent (687 people) answered that the capital punishment system was necessary in Japan; 39 per cent (759 people) answered that it was not necessary; and 26 per cent (509 people) answered that they did not know (Shimaya 2005:1). It deserves some attention that Gotoda had been informed about the NGO-led survey and that he referred to the results when answering questions in the Legal Affairs

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<sup>148</sup> The Shikoku area comprises four prefectures: Tokushima, Kagawa, Ehime, and Kochi.

Committee.<sup>149</sup>

Whilst Gotoda thus appeared to have shown some understanding towards a different opinion poll result from the governmental one, he authorised three executions on 26 March 1993 in order to stick to his principles and to keep Japan *hochi kokka*. Although it was the first time in more than three years that executions took place in Japan, the Ministry of Justice did not make any official statement regarding this decision. For example, in the Legal Affairs Committee on 29 March 1993 Hama Kunihisa, head of the Criminal Affairs Bureau, refused to discuss the issue. According to him, the Ministry of Justice cannot disclose information about the executions since it can hurt the feelings of the bereaved families of those executed, and can disturb other inmates from maintaining stable feelings (Hama 1993:3). Gotoda also showed a similar attitude and tried to legitimise his political decision, criticising the previous Ministers of Justice who had been putting executions on hold:

When serious crimes occur, judges sentence capital punishment to criminals: executions then require authorisation of Ministers of Justice.

Despite this, some Ministers do not authorise executions based on *kojinteki na shiso shinjo* (personal convictions) or *shukyo kan* (religious

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<sup>149</sup> However, Shikoku Forum members were upset, five years after this Committee meeting, because Gotoda misused the information in his memoir, stating that the Shikoku Forum survey showed the same result as the one conducted by the Prime Minister's Office. Although 74 members of Shikoku Forum who were involved in conducting this survey sued Gotoda and a publisher of his book in Matsuyama prefecture on 20 May 1999, they lost in all the trials in Matsuyama, Takamatsu, and Tokyo District Court and the Supreme Court (Sakuma 2004: 5).

views). In my opinion, they should not be appointed in this post if they do not agree with such responsibility in the first place. If they were not aware of such issue, it is reasonable that they resign the job as soon as they realise it. [...] Otherwise, I doubt if one nation's *ho chitsujo* can be maintained (Gotoda 1993b:2).

In response to an accusation against his dutiful attitude by an anti-death-penalty Diet member, Takemura Yasuko, Gotoda tried to make his point clear as follows:

What I am trying to say is that once you are assigned to a job, you are required to carry it out. Of course, it is possible to leave certain jobs to successors if you do not want to complete the duty, since one Minister's job can only last for approximately one year. However, how can you maintain *chitsujo* (order) like that? I believe that you should resign and contribute all of your efforts to anti-death penalty activities if you are not happy with your responsibility (Gotoda 1993b:3).

In the Legal Affairs Committee on 2 April 1993, another abolitionist Diet member, Suzuki Kikuko, criticised Gotoda's execution orders upon the basis of law: 'Although the *de facto* moratorium period was a kind of "sustainable legal order" that former Ministers of Justice and anti-death penalty lobby had built up, Gotoda overturned it under the name of maintaining legal order' (Suzuki 1993:12). In response, Gotoda explained that he did not think there had been a certain legal order during the *de facto* moratorium period: those who had been sentenced to

death must be executed and this was how legal order was maintained (Gotoda 1993c:12). Admitting that there were various opinions on this issue, Gotoda said there existed a sort of retributive sentiment amongst the Japanese public: the vast majority supported the idea of retaining capital punishment, putting themselves in the victims' and their families' shoes (Gotoda 1993c:13). Consequently, Gotoda tried to demonstrate the government's responsibility regarding executions to the following Ministers of Justice, and the Japanese state's approach on crime and punishment to the public.

### ***Strategies behind the Appointment of Gotoda?***

Since Gotoda thus showed a consistent pro-death penalty attitude, large numbers of the anti-death-penalty advocates whom I interviewed argued that the bureaucrats of the time in the Ministry of Justice must have chosen him strategically in order to resume executions.<sup>150</sup> In the meantime, Gotoda states in his memoir *Jo to Ri* (Mercy and Rationality) that it was he himself who chose the post for his own reasons. According to him, the then Prime Minister, Miyazawa Kiichi, asked Gotoda to join his administration in any post. Gotoda then chose the Ministry of Justice since he considered that he could start his job without much expertise required (Gotoda 1998:266). The anti-death-penalty lobby's theory appears to stem from Gotoda's career background. Since Gotoda had first-hand experience of dealing with serious murderers in the National Police Agency, according to this theory the Ministry of Justice must have known that he

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<sup>150</sup> Interview with an NGO worker, Tokyo, 12 April 2011; with a MOFA official, Tokyo, 9 May 2011; and with two NGO workers, Tokyo, 17 May 2011.

would not fail to show a severe attitude towards criminals and would authorise executions in a business-like manner.<sup>151</sup>

Of course, it is not necessarily true that those in the National Police Agency always show a severe attitude towards criminals. For example, from the experience when he was the Director-General of the National Police Agency and played a leading role in the *Asama Sanso* (Asama Lodge) incident on 19 February 1972, Gotoda recalls in his memoir a concern for the importance of human life:

The primary purpose of the Japanese police is nothing but to secure the safety of citizens. In this incident, the first priority was given to save a hostage, Muta Yasuko. [...Moreover,] no matter who they are – even if they are rioters or criminals – they are still Japanese citizens. In order not to deprive them of life or human rights, the police owed responsibility to assure criminals' lives as well (Gotoda 1994:26).

However, an alternative view is that priority was not necessarily given to respecting the life of criminals but to arresting the criminals 'alive' in order to punish them with the appropriate penalty. As Johnson (2002:243–4) argues, the Japanese police and prosecutors are evaluated for their high efficiency in 'solving' crimes: shooting criminals as self-defence is usually avoided and it is important for them to have criminals convicted and sentenced to appropriate

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<sup>151</sup> *Ibid.*

punishment. Whilst anti-death-penalty activists criticised the political decision to nominate Gotoda and his authorisation of executions, it merits some attention that two of those whom I interviewed showed some understanding of Gotoda's political actions. According to them, 'as it is clear from the fact that he consistently claimed the importance of maintaining legal order, Gotoda must have been the only Minister of Justice who sincerely cared about what the best for the Japanese citizens is: "capital punishment should be used for social justice"'.<sup>152</sup>

Secondly, Gotoda's successor, Mikazuki Akira (9 August 1993 to 28 April 1994), an attorney and law professor, showed a great deal of sympathy towards Gotoda, and acted on precedents. Regarding the authorisation of executions, Mikazuki had already made up his mind before he took his office as the Minister of Justice. Firstly, Mikazuki clearly states in his book *Hogaku Nyumon* (Introduction to Studies of Law) (1982) that capital punishment can be used once illegal acts are observed and the judge sentences a convicted person to death. Moreover, it has been revealed that Mikazuki had told an abolitionist Diet member, Futami Nobuaki, about his decision to authorise executions in advance. Futami visited Mikazuki on 9 August 1993, when Mikazuki took office, and Mikazuki told Futami the following: after debating with himself in a hotel room for a few days, he finally decided to accept the job offer, which includes the 'responsibility' of authorising executions when required (cited in Sakuma 2004:5). Mikazuki did not try to engage in the debate on the propriety of Article 475 of the Code of Criminal

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<sup>152</sup> Interview with two NGO workers, Tokyo, 17 May 2011.

Procedure, which specifies the duty of the Minister of Justice on authorisation of executions, and he authorised executions in a bureaucratic manner.

In the meantime, Mikazuki's successors did not make official statements on the justification. This was partly because most of them stayed in office as Ministers of Justice for short periods (see Appendix IX) but partly because anti-death-penalty Diet members stopped bringing the issue to the Legal Affairs Committees shortly after the Aum gas attack on 20 March 1995. Special Committees on Religious Groups took place repetitively, even several days in a row during the term of Miyazawa Hiroshi (9 Oct 1995 to 11 January 1996). Attention had been paid to investigating the possibility that similar type of crimes would be committed by similar religious groups, and how to prevent them. Unlike Ministry bureaucrats who do not pay an electoral price for being non-responsive, Diet members are sensitive to public opinion. Therefore, a lack of discussion on the abolition of capital punishment in the Committee meetings may imply that anti-death-penalty Diet members found it risky to bring the issue against the background of growing public outcry over the Aum attack. This case shows that there exists a boundary dividing anti- and pro-death-penalty lobbies in Japan. The results of the opinion polls by non-governmental bodies indicate that the public show some understandings and interests in holding executions in order to discuss the issue of capital punishment fundamentally, or in introducing an alternative penalty such as life imprisonment without parole (see Appendix VI and VII). However, most anti- and pro-death-penalty groups tend to consider that they are at different ends of the spectrum and that it is a challenging task to

overturn a trend when either is in fashion in society.

### **5.3.2. Governmental Justification Using Social Climate (1996 to 2000)**

#### ***Executions of High-Profile Death Row Inmates***

Secondly, regarding the four executions authorised by Matsuura Isao (7 November 1996 to 11 September 1997) on 1 August 1997, it appears that the Ministry of Justice used the growing public fear aroused by serious murder cases for justification of capital punishment. As mentioned earlier, in light of the Sakakibara murder case in March-May 1997, Kajiyama Seiroku, then Chief Cabinet Secretary and former Minister of Justice, stressed on 1 July 1997 that it was doubtful that social justice could be maintained when offenders did not get appropriate punishment because of their ages (Asahi Newspaper Agency 2000:205–8). It was on 1 August 1997 that the four death row inmates were executed: (1) Nagayama Norio; (2) Hidaka Yasumasa and Hidaka Nobuko, who had given up their rights of submitting pleas for retrials, expecting reprieves; and (3) Kanda Hideki, who murdered his father, father's partner, and partner's granddaughter on 8 March 1985.

Since Nagayama and the Hidakas were particularly very well-known to the public, questions arose amongst the anti-death-penalty lobby on how these inmates were chosen out of dozens of other inmates at this specific time (Yasuda 1998:103). What the abolitionist lobby presumed was that singling out



Nagayama, who was 19 years old at the time of the crime, in particular must have been a temporary measure to relieve the public fear aroused by the serious juvenile murder cases (Yasuda 1998:103). In other words, Ministry bureaucrats presumably sought to demonstrate to the public that the Japanese government would not hesitate to punish offenders through capital punishment regardless of an offender's age (Yasuda 1998:103).

As the executions strategically took place in the middle of the summer holiday, the Legal Affairs Committee did not take place before Matsuura resigned. Therefore, his successor, Shimoinaba Kokichi (11 September 1997 to 30 July 1998), and ministry bureaucrats were urged to comment on behalf of Matsuura in the Legal Affairs Committee on 13 November 1997. However, Harada Akio, head of the Criminal Affairs Bureau, confined himself to mentioning that he could not comment on an individual execution since the Ministry of Justice had not been disclosing such information officially. He only stressed that Ministry bureaucrats selected death row inmates to be executed after careful investigations such as whether or not a reprieve could be granted for them (Harada 1997:7). Shimoinaba also discussed the retention of capital punishment in general terms:

Given that it is less than one per cent of all the criminals that are sentenced to death, it is certain that the Supreme Court judges have been extremely careful with the decision of sentencing such penalty to offenders. Capital punishment has an aspect of bringing justice to the

society, and I believe that retention of the current system is inevitable (Shimoinaba 1997:9).

Thus, Hamai's and Shimoinaba's defence of the use of capital punishment made it look like a trivial matter for the public to wonder why particular inmates are executed regardless of long periods spent on death row. Their argument also sounded like justification of the Ministers' responsibility to sign the document for execution in a dutiful manner: since criminals are sentenced to death in the trustworthy judicial system and singled out for executions after careful investigations, it was, they suggested, natural that Ministers of Justice sign execution orders when their underlings bring them. Having said that, what merits some attention about Shimoinaba's remarks is that he fulfilled his official duty on the basis of his personal conviction regarding social justice. As with a former Minister of Justice, Gotoda, Shimoinaba had experience as a chief in the homicide division in Osaka, and in the National Police Agency. He claimed that his professional career led him to realise that the use of capital punishment can bring social justice to the public (Shimoinaba 1998:15). Whereas anti-death-penalty Ministers are often accused of mixing private and public matters, proponents of capital punishment appear to be allowed to follow their personal convictions in conducting official duty as long as they are in line with their official responsibilities provided in the law.

### ***Amendment of the Ministry's Secretive Policy***

Finally, what was significant during the term of Nakamura Shozaburo (30 July 1998 to 8 March 1999) was that the number and date of executions started to be announced officially from 19 November 1998. This may at first sight have appeared as a firm step towards making capital punishment policy more open and encouraging public debate regarding abolition or retention. However, the real intention of the Ministry of Justice appears to have been the opposite. In response to questions regarding this sudden change in the policy in the Legal Affairs Committee on 3 December 1998, Matsuo Kunihiro, head of the Criminal Affairs Bureau, stated that the Ministry of Justice aimed to receive public support and understanding through demonstrating that fair punishment was taking place under fair judgment (Matsuo 1998:6). Therefore, as a response to the growing public fear aroused by the excessive media coverage of serious crimes, the policy change appears to have aimed to show the public that capital punishment had been in use in order to bring social justice and that the Ministry did not intend to alter the system.

### **5.3.3. Governmental Justification in Disregarding the Feelings of Victims' Bereaved Family (2000 to 2002)**

Thirdly, although executions did not take place during the period when Komura Masahiko was Minister (5 December 2000 to 26 April 2001), it was not because he did not have opportunity to authorise executions. As discussed in Chapter 2,

since Komura received pleas from the victim's bereaved family, Harada Masaharu, on 18 April 2001, he promised not to authorise the execution of Hasegawa Toshihiko, who killed Harada's brother in an insurance-related murder committed in 1983 (Harada 2004:108–9). However, despite the pleas of Harada, Hasegawa was executed on 27 December 2001 under the authorisation of the subsequent Minister of Justice, Moriyama Mayumi (26 April 2001 to 22 September 2003). When criticised for her political decision in the Legal Affairs Committee on 3 April 2002, Moriyama defended herself stating that it was not appropriate for the final decision made by the Supreme Court judge to be overturned by the victims' bereaved families (Moriyama 2002a:8). Although the Ministry of Justice often cites the feelings of the victims' bereaved families as justification of capital punishment, her remarks appeared to have implied the Ministry's actual approach to the system: executions are merely conducted as a part of judicial procedures stipulated by the law.

In fact, Moriyama had already showed an assertive attitude regarding the issue of capital punishment when she took office as the Minister of Justice. Regarding the option of ordering an official moratorium period in order to discuss the system fundamentally, Moriyama disagreed with the idea in the Legal Affairs Committee on 28 June 2001, stating that this could upset the feelings of death row inmates if executions were first put on hold and later resumed (Moriyama 2001a:17). Although introduction of life imprisonment without parole was also proposed as an alternative to the death penalty in the Legal Affairs Committee on 11 April 2002, Moriyama voiced her concern that imprisoning offenders until

their natural death could destroy their personality (Moriyama 2002b:9). Moreover, in the Legal Affairs Committee on 19 October 2001, she stressed that the issue of retaining or abolishing capital punishment should be solely left to domestic decision making based on domestic factors such as criminal situations, public opinion, and the criminal justice system (Moriyama 2001b:8).

Finally, what seems to have prompted Moriyama to treat the issue of capital punishment merely as an issue of law and order, not as an issue of human rights, was her lack of knowledge about false charge cases in the 1980s. For example, when the issue of a pension for Menda Sakae, a former death row inmate, was briefly discussed in the Legal Affairs Committee on 2 July 2003,<sup>153</sup> Moriyama (2003:11) commented that 'his name rings the bell but I do not know much about his details'. It is possible to suspect that she tried not to engage herself in the discussion, pretending that she was not aware of that case. However, Menda is not a kind of figure that only the anti-death-penalty lobby knows about; he is widely known for having been detained on death row for 34 years for a false charge. Since this event happened under the responsibility of the Ministry of Justice and the Public Prosecutors' Office, such a remark by Moriyama was particularly inappropriate as she was an outspoken pro-death-penalty Minister of Justice.

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<sup>153</sup> Menda could not have a pension right after he was exonerated and freed. This was because the Ministry of Justice had not supposed that death row inmates would be freed after proof of innocence, and had not informed them about joining the pension system when it was introduced in 1961. Therefore, Menda had not paid his insurance premiums while he was on death row (*Japan Times*, 4 June 2009).

#### **5.3.4. Governmental Justification for Capital Punishment (1993 to 2002)**

This part has investigated how executions were resumed on political initiative from 1993 to 2002. Although 16 Ministers of Justice served within ten years, the Ministry of Justice made sure that one or more executions took place each calendar year flawlessly. Firstly, Gotoda and Mikazuki not only resumed executions but also tried to maintain a principle that it was a responsibility of Ministers of Justice to authorise executions in order to maintain legal order. Although the provisions of Article 475 and 476 of the Code of Criminal Procedure, which specifies the duty of the Minister of Justice on authorisation of executions, have been interpreted in various ways by different scholars, Gotoda, in particular, denounced non-authorisation as a neglect of duty (Gotoda 1993a:17; 1993b:2-3). Following Ministers uncritically authorised executions simply to act on precedent and did not seek to encourage domestic debate on the ethical concerns of capital punishment.

Secondly, through analysis of the timing of executions, it was evident that the Ministry of Justice had been conducting executions to give a political signal in order to legitimate state killing (Yasuda 1998:103). For example, annual executions took place in order to show that the system continued, or shortly after a surge of public outcry against serious murder cases. Moreover, the Ministry started to disclose the fact of executions officially in 1998 for the purpose of getting more public support for the use of the capital punishment system. Furthermore, execution of one inmate was authorised on legal grounds

regardless of the protest of the victim's bereaved family. Although victims' feelings are often primarily cited by the government as the justification of capital punishment, this appears to only refer to the pro-death-penalty victim lobby, which is in favour of the government's policy.

#### **5.4. CONCLUSION**

This chapter investigated how executions were resumed, and how the Ministry of Justice as a pro-death penalty norm entrepreneur tried to maintain the dominant discourse on crime and punishment for the justification of capital punishment. The first part studied the social climate on capital punishment through examining the excessive media coverage on domestic terrorism, juvenile crimes, and increase in reported crime rate. It argued that these factors appeared to have divided the public into two extremes, for and against the death penalty, without allowing alternative debates.

The second part examined how the Ministry of Justice tried to justify the capital punishment system on the basis of law and by strategic use of the prevailing social climate. Firstly, multiple executions started to take place constantly from March 1993, and some key Ministers of Justice such as Gotoda and Mikazuki may have at first sight appeared to have re-established a principle for the succeeding Ministers to follow, referring in the process to Article 475 of the Code of Criminal Procedure: it is required for Ministers of Justice to authorise executions in order to fulfil their duty and to maintain legal order for the public.

Similarly, Moriyama proclaimed that Japan retained capital punishment since it was deeply embedded in Japanese culture. However, the real key drivers of this policy were still bureaucrats in the Ministry of Justice. They appear to have managed to use Gotoda and Mikazuki's legal approach, and Moriyama's cultural approach, as useful political signals to legitimise state killing in Japan.

Similarly, a change in the Ministry's policy may at first be subject to the initiative of then Minister of Justice. For example, an amendment was made to the Ministry's secretive policy, and executions started to be announced by the Ministry of Justice during Nakamura's term. Some anti-death-penalty advocates perceived that this would be a definite step towards spurring public debate on the rights and wrongs of capital punishment. However, the Ministry's aim was apparently to gain further public support by demonstrating that the capital punishment system had been in use for social justice.

Moreover, in addition to the 'institutional ambivalence' represented by the *de facto* moratorium period from 1989 to 1993, another ambiguity was observed during this period. Whilst the Ministry of Justice usually cites public opinion and the feelings of the bereaved families as justification for capital punishment, Moriyama authorised an execution, primarily on the basis of the law, ignoring the plea of the bereaved family. It illuminated the fact that the Ministry of Justice tends to change its priority or source for justification of capital punishment depending on the situation.



## CHAPTER 6

### Conclusions:

### Governmental Justification for Capital Punishment in Japan Reconsidered

#### 6.1. INTRODUCTION

This thesis has examined how the Ministry of Justice justified capital punishment during the *de facto* moratorium period, through the case study of the years 1989 to 1993. Its primary goal has been: (1) to fill the gap in the existing literature, which tends to overrepresent domestic and international factors during the execution-free period; and (2) to investigate the closed institutional dynamic where capital punishment is justified on legal and cultural grounds. The aim of Chapter 1 was to present an analytical framework to understand capital punishment policy in Japan. The first part illuminated the elite-driven nature of the policy, and challenged the existing approach that the Japanese government retains capital punishment considering historical, external, and internal factors. Examining the highly interdependent relationships within the government, it explained that public opinion or anti-death-penalty NGOs do not play significant roles in this policy. The second part then threw light on the fact that this policy has been dealt with by the government as an issue of criminal justice upon the basis of law, and not as an issue of human rights.

Chapter 2 critically examined the validity of the governmental justification for capital punishment on domestic and cultural grounds. Firstly, comparison of the

opinion polls conducted by the government and non-governmental bodies indicated that 'wide public support' for the capital punishment system stems from strategically phrased questions in the governmental opinion polls. Secondly, reviewing the Japanese culture or concepts represented by the act of *shinde wabiru*, and human rights and legal consciousness, it stressed that Japanese culture appears to have been strategically cited by the government in order to legitimise state killing. Thirdly, it clarified that: (1) the Japanese view on the capital punishment system appears to have been heavily influenced by the media coverage of serious murder cases, and strategically phrased governmental opinion polls; and (2) the Japanese public's resistance to the abolition of capital punishment appears to stem from the lack of sympathy for the domestic anti-death-penalty campaigns. Finally, it presented the approach that is required to examine the *de facto* moratorium for a better understanding of the elite-driven nature of capital punishment policy in Japan.

Chapter 3, 4, and 5 empirically examined how the Ministry of Justice justified the capital punishment system from 1980 to 2002. Chapter 3 focused on the period from 1980 to 1989, when the government legitimised the system despite the emergence of criminal justice issues including the disclosure of successive miscarriages of justice. Chapter 4 examined the *de facto* moratorium period from 1989 to 1993. It investigated how consistently the Ministry of Justice justified the system even during the execution-free period. Chapter 5 focused on the period from 1993 to 2002. It investigated how executions were resumed on political initiative, and how the government tried to maintain the dominant discourse on

crime and punishment for the justification of capital punishment.

Finally, this concluding chapter summarises the main findings of the thesis, and reflects on other issues that should be tackled in future research.

## **6.2. INSTITUTIONAL DYNAMIC: PRO-DEATH-PENALTY NORM ENTREPRENEURS IN JAPAN**

Firstly, one of the main claims of this thesis is that the issue of capital punishment has been the province of a narrow elite in two government agencies, irrespective of public opinion or the views of party politicians. The Ministry of Justice justifies capital punishment on the basis of the law, and personal convictions of Ministers of Justice do not necessarily challenge the retention of the system. Whilst non-authorisation of executions by anti-death-penalty Ministers of Justice may appear to create a 'gap' in capital punishment policy, it is wrong to consider that they play crucial roles in this policy. Rather, it is employed-for-life bureaucrats in the Ministry of Justice and the Public Prosecutor's Office who exert tremendous power in justifying and retaining this system in the long run. Indeed, the Public Prosecutor's Office gets involved in the crucial parts of capital punishment policy. Public prosecutors generate confessions from offenders to produce sentences of capital punishment, and possess the right to immediately appeal against a retrial.

Furthermore, it deserves particular attention that the Ministry of Justice tends to be submissive to the Public Prosecutor's Office on the issue of Japanese

criminal justice. Article 14 of the Public Prosecutor's Office Act indicates that Ministers of Justice are not responsible for supervising an individual public prosecutor, and it does not actively take measures to avoid miscarriages of justice (Chapter 5).

Secondly, Chapter 1 also clarified that: (1) capital punishment has been dealt with as an issue of law and order, not as an issue of human rights in Japan; and (2) the Ministry of Justice tries to ensure the annual executions in business-like manner. As Kakusho (1991:17) argues, death row inmates have been considered by the government as those who are merely waiting for execution. Moreover, the recent lawsuit regarding the Hikari murder case demonstrated that the fundamental rights of death row inmates tend to be neglected once a death sentence is finalised. These facts appear to explain why several rules regarding detention and execution either infringe Article 11 of the Constitution of Japan, which guarantees the fundamental human rights, and Article 36, which forbids cruel punishments by public officers, or else are not specified in the Act on Penal Detention Facilities and Treatment of Inmates and Detainees. Although Johnson (2011) presents the nine main hypotheses which encompass historical, external, and internal factors comprehensively, Chapter 1 discussed that the actual reason why the government retains capital punishment stems from the institutional framework where this policy is handled as an issue of law and order, not an issue of human rights.

Furthermore, Chapter 1 clarified that since the issue of capital punishment is

elite-driven, there is no room for anti-death-penalty NGOs or public opinion to play a crucial role. For example, human rights NGOs in Japan do not have official consultative status in drafting official reports on human rights record in Japan, and the Japanese government does not usually make official comments on their recommendations. Therefore, anti-death-penalty NGOs cannot get involved in the governmental decision making regarding capital punishment policy.

Moreover, although public opinion appears at first sight to be the determining factor in Japan's retention of capital punishment, examination of the opinion polls conducted by the Prime Minister's Office and other non-governmental bodies, and an in-depth survey by a research group, provide alternative views (Chapter 2). Firstly, public opinion on this issue can vary depending on: (1) the media coverage of crime; (2) the discussion on introducing life imprisonment without parole as an alternative penalty; and (3) the public level of understanding of the capital punishment system. More important, the issue of capital punishment primarily revolves around institutional decision making, and public opinion plays a relatively passive role in Japan. It is bureaucrats in selected governmental agencies who produce the pro-death-penalty norm, and the Japanese public's pro-death penalty sentiment appears to have been strategically built up in the media and governmental opinion polls.

### 6.3. CULTURAL DYNAMIC: STRATEGIC USE OF CULTURE IN THE GOVERNMENTAL DISCOURSE

The second main claim in this thesis is that Japanese culture has been over-represented by governmental officials and the existing literature as a determining factor for the retention of capital punishment (Chapter 2). In fact, a strategic use of culture in the language used by the government appears to be making pro-death-penalty advocates, in particular, believe that Japan's retention of capital punishment has been culturally determined. Firstly, a former Minister of Justice, Moriyama, put tremendous emphasis on the concept of *shinde wabiru*, and claimed that capital punishment in Japan was deeply embedded in Japanese culture (Moriyama quoted in *Japan Times*, 4 October 2002). However, in-depth investigation of this concept revealed that: (1) it is not necessarily a sentiment that contemporary Japanese appreciate; (2) this act is not essentially meaningful when spontaneity is lacking; and (3) a contrasting proverb has been ignored.

Despite the methodological issues regarding the governmental opinion polls, those conducted by non-governmental bodies also indicate public support for capital punishment to some extent (Chapter 2). This may appear at first sight to relate to the Japanese view on criminals. Self-discipline is admired amongst the Japanese public, and those who do not comply with this principle tend to be excluded from society. As Komiya (1999:387) contends, the reintegrative function is limited in Japan, and once people become criminals, it is less likely for them and their families to be accommodated in society again. Even so, it is

hazardous to conclude that the Japanese public are 'punitive' towards offenders for cultural reasons. For example, with the emergence of a vocal victim lobby such as that surrounding Motomura on the Hikari case in 1999, the idea of capital punishment as social justice started to be reconsidered. What is more, an amendment was made to the Juvenile Law in 2000 in order to impose harsher punishment on youth offenders. In the meantime, the media showed a reserved attitude when the death sentence was finally upheld on the Hikari case offender in 2012. An *Asahi* newspaper editorial on 21 February 2012 generated a discussion of the right and wrong of punishing a young man who had committed the crime at the age of 18, without giving him a chance of correction or rehabilitation. Thus, whether or not the public show a 'punitive' attitude towards offenders or pro-death-penalty sentiment appears to depend on the climate of media coverage and legal measures taken by the government.

Secondly, Japan's retention of capital punishment appears at first sight to stem from a lack of human rights consciousness among the Japanese public. However, this too relates to the way the Japanese government treats the legal status and rights of death row inmates. For example, Opinion Polls on Defense of Human Rights, conducted by the Prime Minister's Office, do not include human rights of death row inmates in the list (see Appendix VIII). Therefore, there is little chance for the public to perceive the capital punishment system as a domestic human rights concern. The general public's 'indifferent' attitude appears to stem from a low level of understanding on the capital punishment system and on the treatment of death row inmates (Sato 2009:1-2), and this

closely relates to the secretive policy of the Ministry of Justice and biased opinion polls.

Thirdly, Japanese legal consciousness can at first glance seem another important factor to evaluate the public awareness regarding the capital punishment system. Kawashima (1967) discusses that the Japanese public tend to prefer legal incidents being dealt with by legal professionals, since they appear to 'regard law like an heirloom samurai sword, something to be treasured but not used' (Dean 2002:4). Therefore, they tend not to show much sympathy or give legitimacy to vocal anti-death-penalty campaigns, which aim to challenge the existing Japanese legal system. However, besides that, attention must be paid not only to public resistance to the NGO activities that go against the governmental policy, but also to the characteristics of the domestic anti-death-penalty NGOs. For example, activities of a core member of the largest anti-death penalty NGO in Japan, or Forum 90, have been playing a crucial key in mobilising public opinion. Yasuda Yoshihiro, founding member of Forum 90, is a defence attorney for the defendants in high-profile cases. Since he proclaims the rights of criminals or death row inmates from his professional responsibility, it appears difficult for him, Forum 90, and other domestic anti-death-penalty NGOs to enjoy sympathy from the public, whose discussion tends to revolve around victim satisfaction.

Consequently, there are problems in considering that the issue of capital punishment is culturally determined in Japan. Rather, a strategic use of



language by governmental officials appears to be making the public and pro-death-penalty advocates believe that capital punishment is deeply embedded in Japanese culture. As long as the Japanese government creates the pro-death penalty norm and exports it to civil society using Japanese culture as its justification, the public are less likely to recognise that the existing capital punishment system sacrifices human rights of death row inmates.

#### **6.4. GOVERNMENTAL JUSTIFICATION FOR CAPITAL PUNISHMENT DURING THE DE FACTO MORATORIUM PERIOD (1989 TO 1993)**

The final argument in my thesis was highlighted from the case study of the *de facto* moratorium period: it is not necessarily critical to investigate how executions were put on hold in Japan; rather, it is more important to investigate how consistently the Japanese government has been trying to justify capital punishment on the basis of the law. For example, although personal convictions of Ministers of Justice appeared at first sight to have contributed to the execution-free period from 1989 to 1993, in-depth investigation of this factor revealed alternative views.

Although the Minister Sato refrained from authorising executions on account of his personal beliefs, not all the Ministers were opposed to the death penalty: rather, they did not stay in office long enough to authorise executions. Moreover, Sato was not necessarily keen on taking initiatives on the issue of human rights during his term. Instead, he proclaimed that the law is above human rights (Sato 1991a:11), and sought to act in line with the law-based policy of the Ministry of

Justice. It was only Tawara who represented the Ministry's official approach on capital punishment during this period, and his statement helped illuminate the dutiful approach of the Ministry of Justice to this system. According to him: (1) the Ministry of Justice retains capital punishment since the current law provides for it; and (2) it continues to refer to the rigorous and fair activities of the Public Prosecutor's Office (Tawara 1991:8–9; 1992:11). In fact, the capital punishment system has been justified as a legal penalty on the basis of various legal provisions.<sup>154</sup> Whether the Ministry of Justice holds executions officially, abolishes the capital punishment system, or introduces an alternative penalty such as life imprisonment without parole, any of these courses would require repealing or amending of the existing legal provisions. It is unlikely for the Ministry of Justice, which tries to act on precedents on the basis of law, to agree to this. In fact, Tawara's statement illuminated the Ministry's view that the capital punishment system has been retained because the current law provides for it.

Besides the 'institutional ambivalence' represented by non-executions from 1989 to 1993, the Ministry of Justice also showed some contradictory or inconsistent attitudes in order to justify capital punishment policy throughout 1980 to 2002: (1) altering the criminal justice policy; (2) interpreting legal provisions in the

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<sup>154</sup> They include: (1) Article 31 of the Constitution of Japan, which allows a legal punishment to deprive a person of life or liberty exceptionally; (2) the Penal Code and the Nagayama Criteria, which specify crimes that are applicable to capital punishment under nine main criteria; (3) Articles 475 and 476 of the Code of Criminal Procedure, which stipulate the responsibility of Ministers of Justice regarding the timing of authorising and conducting executions; (4) Article 11 of the Penal Code, which specifies the execution method as hanging; (5) Article 472 of the Code of Criminal Procedure, which provides that execution is carried out on the initiative of the head of the Public Prosecutor's Office; and (6) Article 98 (1) of the National Civil Service Law, which specifies that civil servants have to carry out duties set by senior staff.

favour of governmental decisions; and (3) changing the prime source of justification of the policy. Firstly, the Ministry of Justice 'dealt with' the false charge cases in the 1980s by increasing the amount of financial compensation in cases where innocent people are detained or executed. Recalling the available measures such as the three-tier judicial system and retrial system, it did not try to review the criminal justice system, where the Public Prosecutor's Office exerts tremendous power. Secondly, when the Ministry of Justice was accused of detaining a death row inmate, Hirasawa, until his natural death, it claimed that it was not necessarily required for Ministers of Justice to strictly comply with Article 475 of the Code of Criminal Procedure. Thirdly, although the Ministry of Justice often claims that capital punishment functions as social justice for the victims' bereaved families, Moriyama authorised executions against the will of an anti-death penalty lobby, on the pretext of maintaining legal order. Thus, in order to justify capital punishment consistently, the Ministry of Justice tends to alter its claim or policy depending on the situation.

#### **6.5. IMPLICATIONS FOR INTERNATIONAL AND DOMESTIC ANTI-DEATH-PENALTY ADVOCATES**

Having examined both institutional and cultural dynamics of the capital punishment system, this thesis will suggest implications for international and domestic anti-death penalty advocates. As my thesis has claimed, capital punishment policy is primarily elite-driven in Japan, and anti-death penalty activists have no room to get involved in the decision making process. However, it is still important for them to recognise why the Japanese government resists

their campaigns; and what strategy would raise public awareness of this issue under a secretive governmental policy.

Firstly, the primary task for the international anti-death-penalty advocates is to acknowledge the tightly-knit institutional framework that surrounds capital punishment policy. Those who face these foreign pressures in Japan tend to be Prime Ministers or MOFA officials. However, they are not in a position to express any independent opinion on capital punishment, and simply reproduce the policy of the Ministry of Justice. Moreover, international anti-death-penalty bodies are required to recognise that capital punishment has been dealt with as a criminal justice issue in Japan, not as an issue of human rights. Indeed, it is not necessarily the case that the Japanese government fails to comply with the internationally recognised anti-death-penalty norm out of disagreement with the human rights norm. Rather, it appears that the Ministry of Justice simply acts on precedents on the basis of the law, and tends not to welcome new ideas or opinions to deal with capital punishment policy from a human rights perspective or to abolish this historically-held governmental policy. For this reason, a blanket approach of imposing the international or European anti-death-penalty norm from a human rights perspective is inappropriate and likely to be ineffective.

Furthermore, with regard to the cultural restraints in Japan, it is also important for them to understand that it is often political culture that has been hindering abolitionism from gaining ground. For example, the Ministry of Justice's idea of treating death row inmates as those who can be released only through death

does not necessarily stem from the general public's view on life and death. Rather, it appears to result from the lack of legal status and rights of death row inmates in Japan. Therefore, it is important to recognise what language the Japanese government has been using in order to make the issue look culturally dependent.

Secondly, it is crucial for domestic anti-death-penalty NGOs to recognise why their campaigns have been ineffective in advancing abolitionism at the civil society level. Although the media coverage of serious murder cases can be the major factor in making retentionism surge amongst the public, the way in which the core NGO members' activities have been construed by the public also needs to be reviewed. Since core members of anti-death-penalty NGOs tend to be defence attorneys, they are likely to send the public a message that they overemphasise the human rights of criminals and disregard those of victims and their bereaved families.

Moreover, what is required for them is not necessarily just spreading the idea of abolitionism but also providing accurate information regarding the capital punishment system in Japan. Since *saiban-in seido* was introduced and members of the general public without knowledge of the law are in charge of determining both guilt (or innocence) and the sentence to be imposed, it is crucial for the public to gain sufficient information on the capital punishment system. Given that the Ministry of Justice has followed a secretive policy, domestic anti-death-penalty NGOs can be a great source of information for the

public. Besides providing accurate information about the capital punishment system, it is also required for domestic anti-death-penalty NGOs to try to mobilise the public to discuss in what alternative way justice can be brought to the victims, their bereaved families, and the general public in Japanese civil society. In order to do this, conveying messages of anti-death-penalty victim lobbyists would counterbalance the widespread viewpoint of the pro-death-penalty victim lobby.

## **6.6. FUTURE RESEARCH**

Finally, the present chapter will conclude by presenting ideas for future research using the main findings in my thesis. This thesis has focused on the period from 1980 to 2002 including the *de facto* moratorium period from 1989 to 1993; and investigated how consistently the Ministry of Justice tried to justify the capital punishment system. Therefore, my future research would focus on the period after 2002 until today, which includes two other *de facto* moratorium periods: (1) from 28 July 2009 to 28 July 2010; and (2) from 28 July 2010 to 29 March 2012. The key events surrounding these execution-free periods include: (1) the introduction of *saiban-in seido* since 21 May 2009; (2) the period in power of the Democratic Party of Japan and re-emergence of outspoken anti-death-penalty Ministers of Justice from 30 August 2009; and (3) 're-discovery' of the issue of capital punishment in the Ministry of Justice and subsequent political initiatives since August 2010. I believe that the framework this thesis used for the analysis of the period from 1989 to 1993 will help investigate these two contemporary

execution-free periods.

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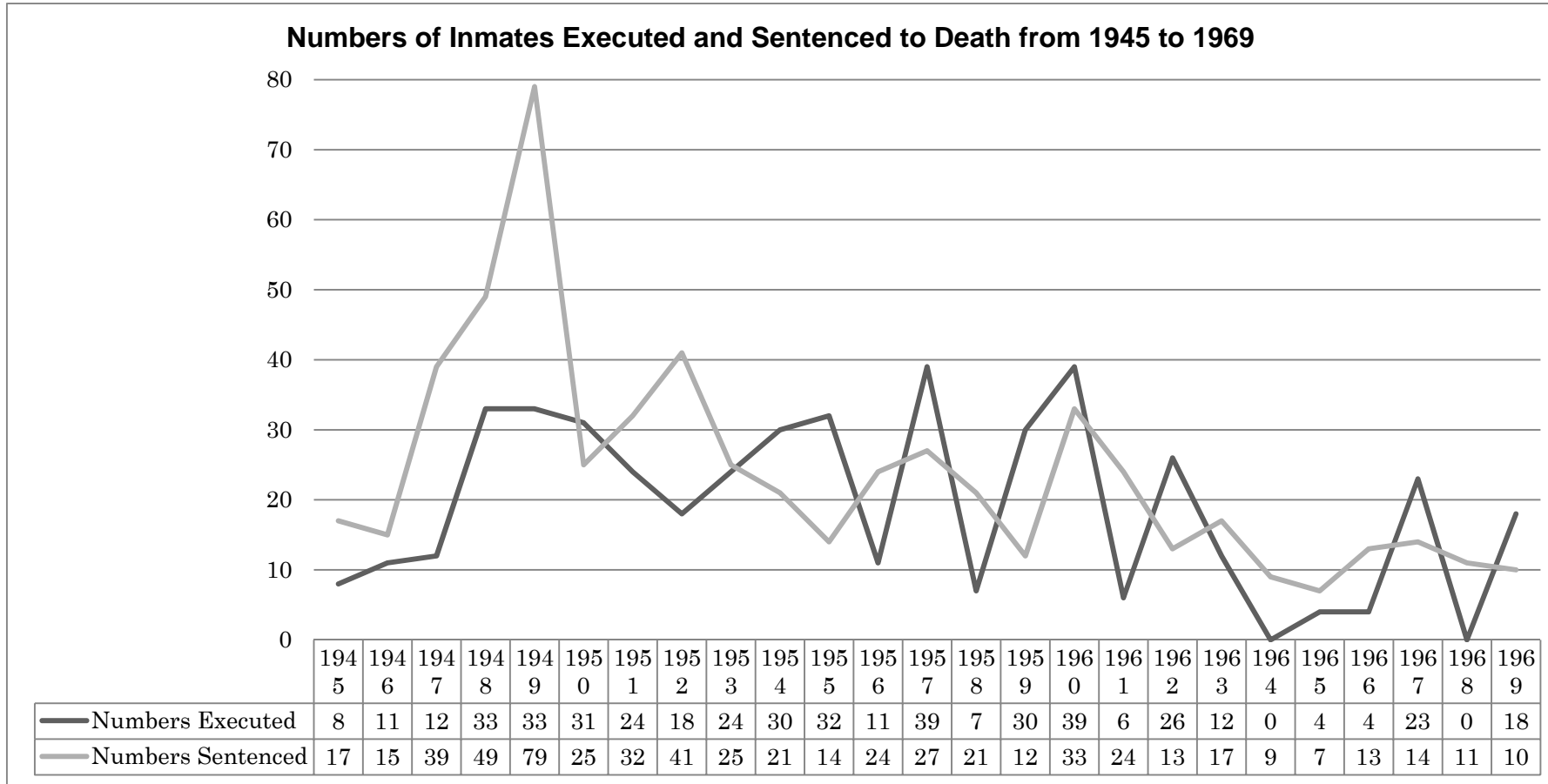
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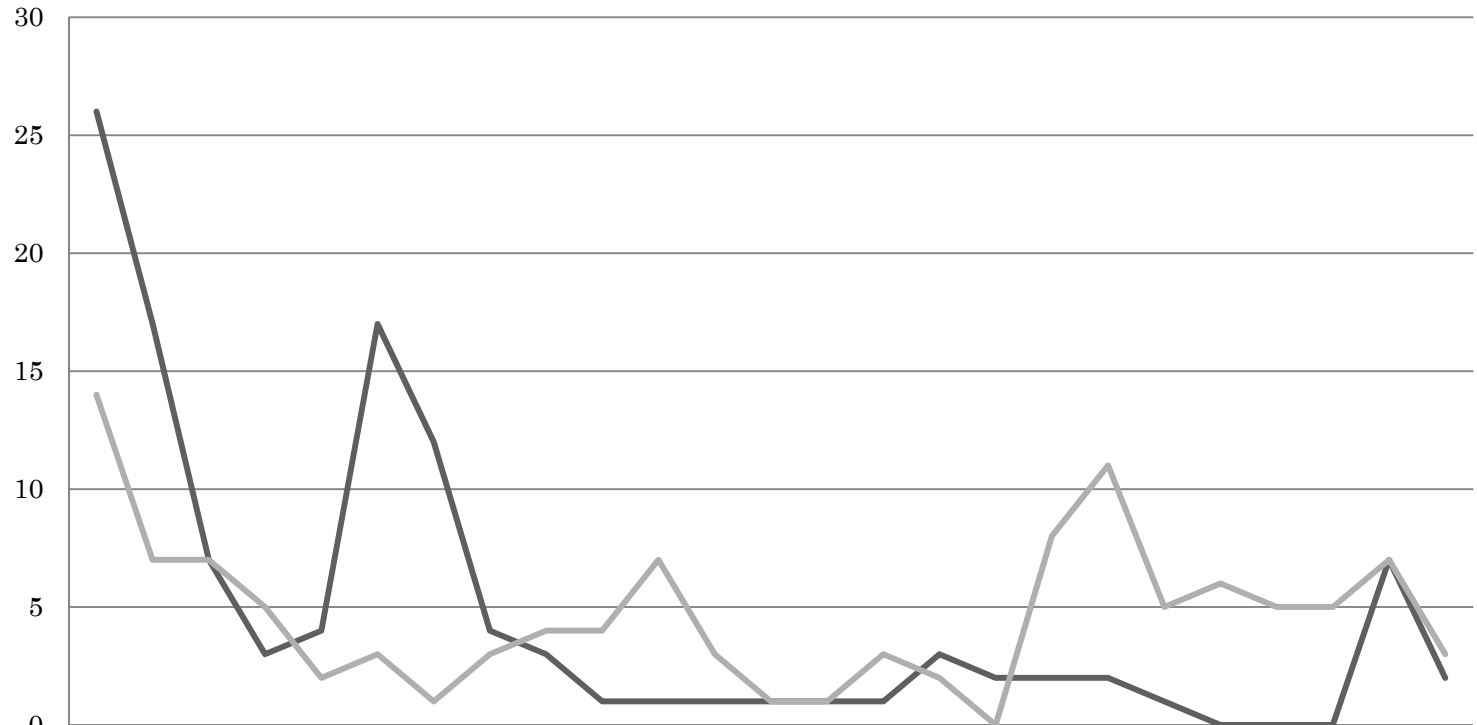
## 8. APPENDICES

### Appendix I: Numbers of Inmates Executed and Sentenced to Death from 1945 to 2012



\*There was no execution conducted in 1964 and 1968.

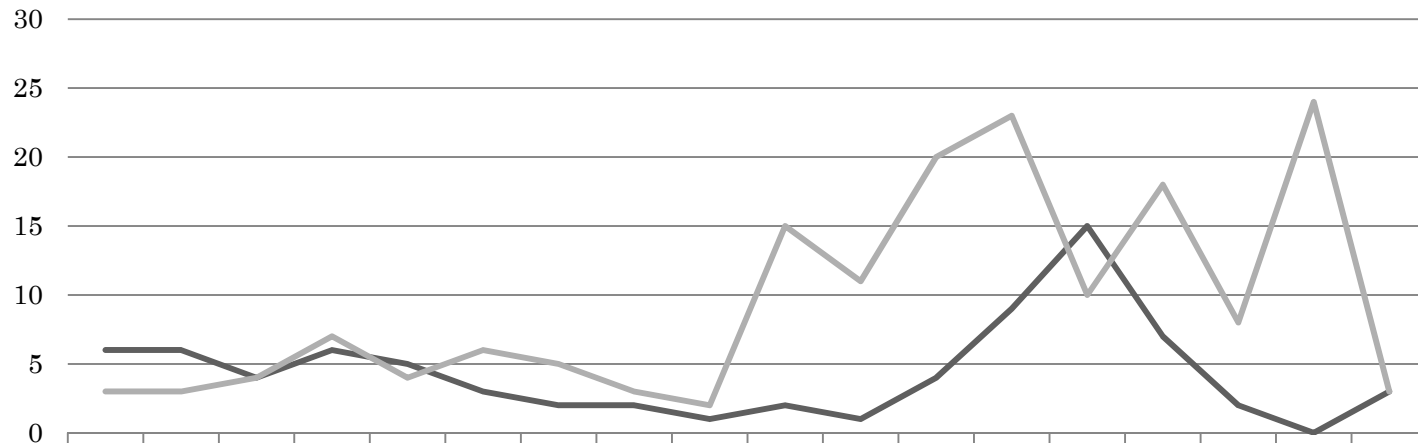
**Numbers of Inmates Executed and Sentenced to Death from 1970 to 1994**



	1970	1971	1972	1973	1974	1975	1976	1977	1978	1979	1980	1981	1982	1983	1984	1985	1986	1987	1988	1989	1990	1991	1992	1993	1994
— Numbers Executed	26	17	7	3	4	17	12	4	3	1	1	1	1	1	3	2	2	2	1	0	0	0	7	2	
— Numbers Sentenced	14	7	7	5	2	3	1	3	4	4	7	3	1	1	3	2	0	8	11	5	6	5	5	7	3

\*There was no execution conducted from 1990 to 1992.

**Numbers of Inmates Executed and Sentenced to Death from 1995 to 2012**



Numbers Executed	6	6	4	6	5	3	2	2	1	2	1	4	9	15	7	2	0	3
Numbers Sentenced	3	3	4	7	4	6	5	3	2	15	11	20	23	10	18	8	24	3

\*There was no execution conducted in 2011.

## Appendix II: List of Interviewees<sup>155</sup>

### Japanese Governmental Officials

#### **Ministry of Justice**

Postal Correspondence, former Minister of Justice, Sato Megumu, 8 February 2011

#### **Ministry of Foreign Affairs**

Interview, Tokyo, 9 May 2011

Interview, Human Rights and Humanitarian Affairs Division, Tokyo, 17 June 2011

Interview, Human Rights and Humanitarian Affairs Division, Tokyo, 17 June 2011

### NGOs/NPOs

Postal correspondence, 28 February 2011

Interview, Tokyo, 12 April 2011

Postal correspondence, Tokyo, 31 January and 16 April 2011

Interview, Tokyo, 18 April 2011

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<sup>155</sup> Unless otherwise indicated, interviewees agreed to be interviewed anonymously.

Interview, Tokyo, 17 May 2011

Interview, Tokyo, 17 May 2011

Interview, Tokyo, 27 May 2011

Interview, Tokyo, 27 May 2011

## **Individuals**

### **Former death row inmate**

Postal Correspondence, Menda Sakae via Shimaya Naoko (Forum 90), 8 March 2011

### **Attorneys**

Interview, Saitama, 13 April 2011

Interview, Tokyo, 13 April 2011

Interview, Tokyo, 19 April 2011

### **Senior Writers at Newspaper Agencies**

Interview, Tokyo, 12 May 2011

Postal correspondence, 21 May 2011

### **Delegation of the European Union to Japan**

Interview, Political Adviser, Tokyo, 27 May 2011

## **Academics**

Interview, Tokyo, 12 April 2011

Interview, Tokyo, 27 April 2011

Telephone Interview, 7 May 2011

Interview, Tokyo, 13 May 2011

Interview, Tokyo, 13 May 2011

Interview, Tokyo, 13 May 2011



## **Appendix III: Sample Interview Questions**

### **Interview Questions for a Former Death Row Inmate, Menda Sakae**

1. Could you tell me who was in your support group or wrote on your behalf before you were freed from death row in 1983?
2. Was it allowed by the detention centre to meet support group staff in person back then?
3. To what extent do you think support groups' activities contributed to being freed from death row?
4. To what extent do you think activities by human rights NGOs such as distribution of fliers and calling in to Ministers of Justice contributed to the *de facto* moratorium from 1989 to 1993?
5. From your experience of calling for the abolition of capital punishment in and outside Japan, what do you think about the current anti-death-penalty trend in Japan?
6. Did you see any changes in the response of the Ministry of Justice to both domestic and international pressures? How about the period before and after the *de facto* moratorium?
7. Could you tell me about how the Japanese government should perform towards the international anti-death-penalty trend in the future?

### **Interview Questions for Government Officials and Pro-Death-Penalty Advocates**

1. What do you think about the role of human rights NGOs in the Japanese decision making process, regarding capital punishment policy in particular?
2. To what extent do you think protest activities by human rights NGOs can help shape Diet members' and the Japanese public's views on capital punishment?
3. What do you think about the fact that executions did not take place from 1989 to 1993?
4. What do you think about the current anti-death-penalty trend in Japan?
5. As a pro-death-penalty advocate, do you see any problems or room for improvement in the current anti-death-penalty campaigns?
6. What do you think about the phrase '*shinde wabiru*' or '*shi wo motte tsugunau*' (atonement for crimes through death)?
7. What do you think about the Japanese government's response to recommendations by the UN Human Rights Committee or the Council of Europe regarding abandonment of capital punishment?
8. Could you tell me about how the Japanese government should perform towards the international anti-death-penalty trend in the future?

### **Interview Questions for Anti-Death-Penalty Advocates**

1. From your experience as an anti-death-penalty activist, do you get any protests from pro-death-penalty Diet members or NGOs?

2. What do you think about a balance between carrying out duties as a civil servant and respecting personal convictions, through the example of the Justice Minister's duty to authorise executions?
3. Capital punishment appears to be construed as (1) a domestic issue that needs to be handled on the basis of public opinion and the seriousness of the crimes; or (2) a global issue in which there is a need to correspond with the international trend towards abolition. What do you think about these views?
4. What do you think about the Japanese government's response to recommendations by the UN Human Rights Committee or the Council of Europe regarding abandonment of capital punishment?
5. To what extent do you think protest activities by human rights NGOs can help shape Diet members' and the Japanese public's views on capital punishment?
6. To what extent do you think protest activities by human rights NGOs and anti-death-penalty Diet members helped bring about the *de facto* moratorium?
7. What do you think about the current anti-death-penalty trend in Japan?
8. From your experience, do you see any problems or room for improvement in the current anti-death-penalty campaigns?
9. Could you tell me about how the Japanese government should perform towards the international anti-death-penalty trend in the future?

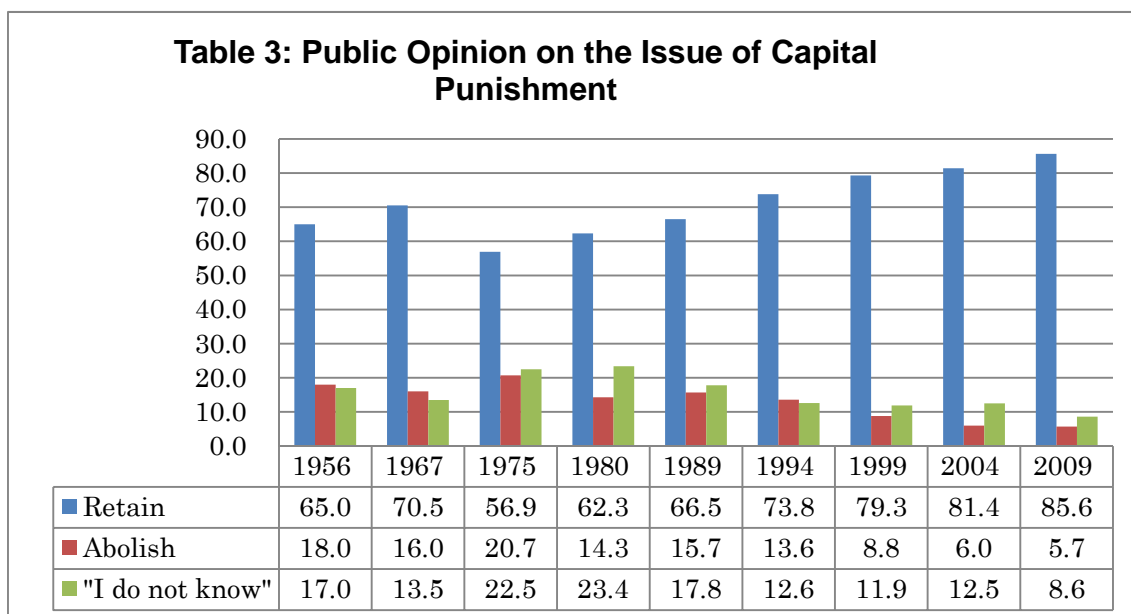
### **Interview Questions for Victims' Group**

1. To what extent do you think activities by victims' groups can help shape Diet members' and the Japanese public's views on punishment and rehabilitation issues?
2. Regarding your experience of making speeches in the Legal Affairs Committee meetings, how did you get such opportunities? Were you asked by anti-death-penalty Diet members to voice concerns on capital punishment from the perspective of victims' bereaved families?
3. What do you think about the current anti-death-penalty trend in Japan?  
Could you tell me about how the Japanese government should perform to establish the legal rights of victims and their families?

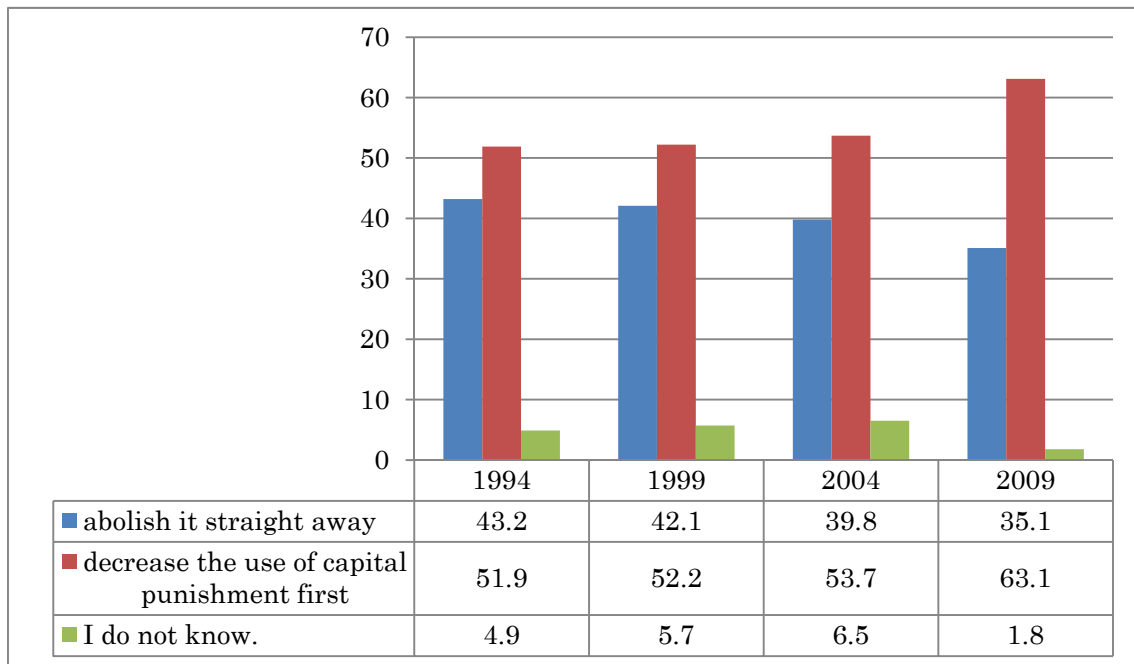
**Appendix IV: Opinion Poll on Basic Legal System by the Prime Minister's Office**

**Q.1 Out of these opinions on the issue of capital punishment, which one do you agree with?:**

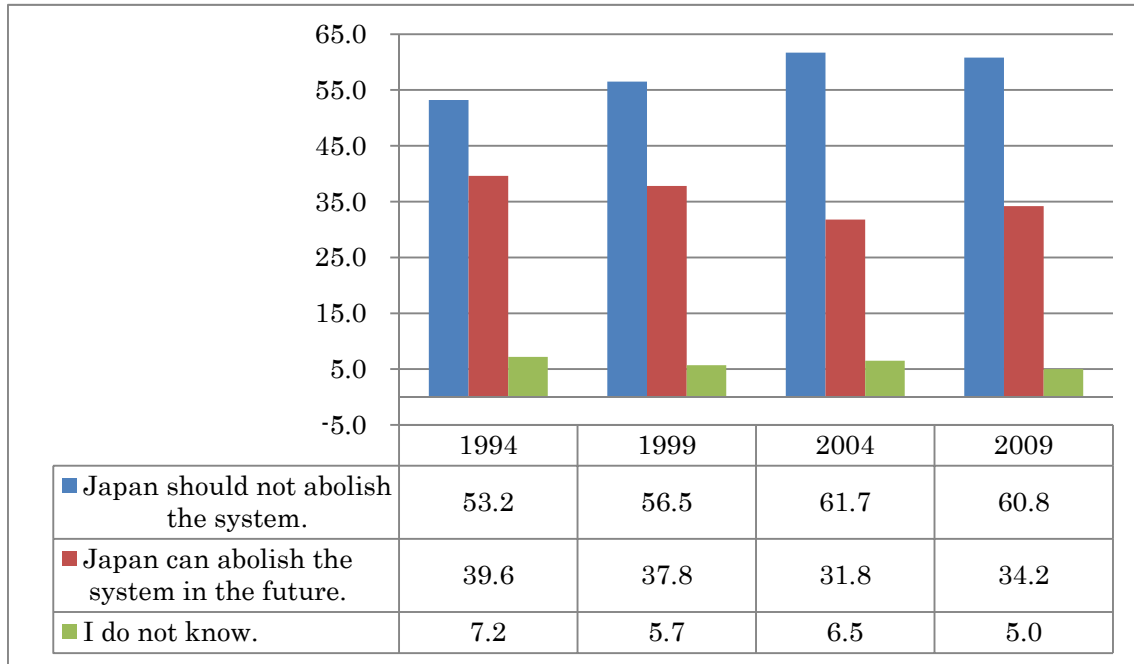
- 1) It is unavoidable *in certain circumstances*;**
- 2) It should be abolished *in all circumstances*;**
- and 3) I do not know.**



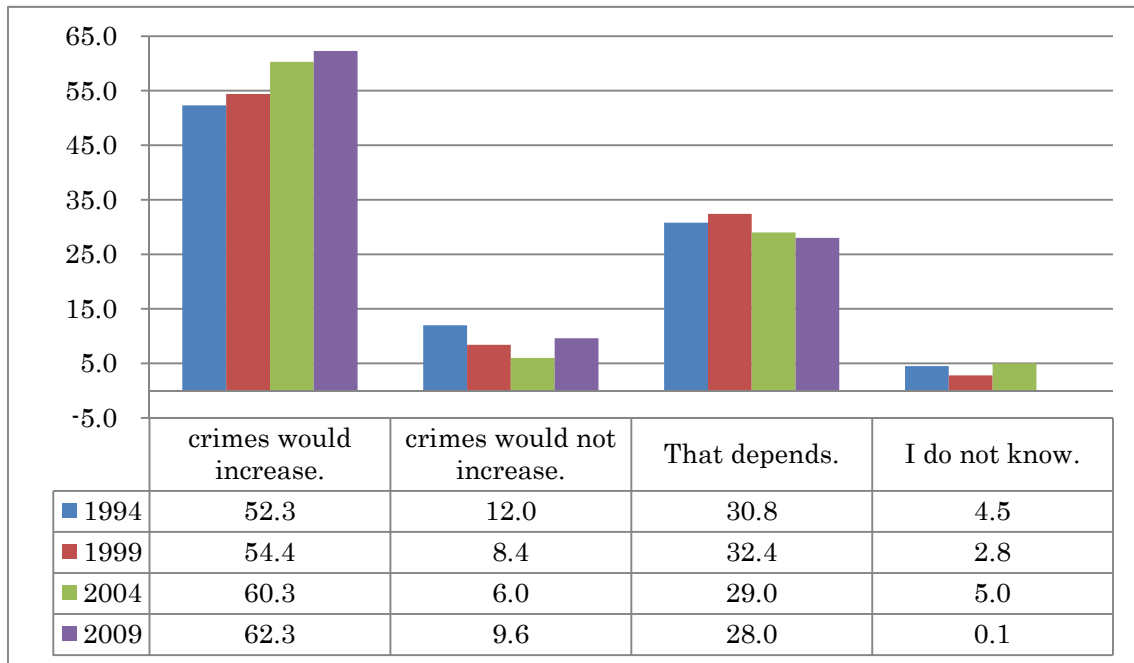
**Q.2 In case of abolishing capital punishment, which do you think is better?: (1) abolish it straight away or (2) decrease the number of the use of capital punishment first?**



**Q.3 Do you think Japan should not abolish capital punishment in the future; or can abolish the system when the situation changes?**



**Q.4 What do you think about the argument that serious crimes would increase if capital punishment is abolished, or remain unchanged?**

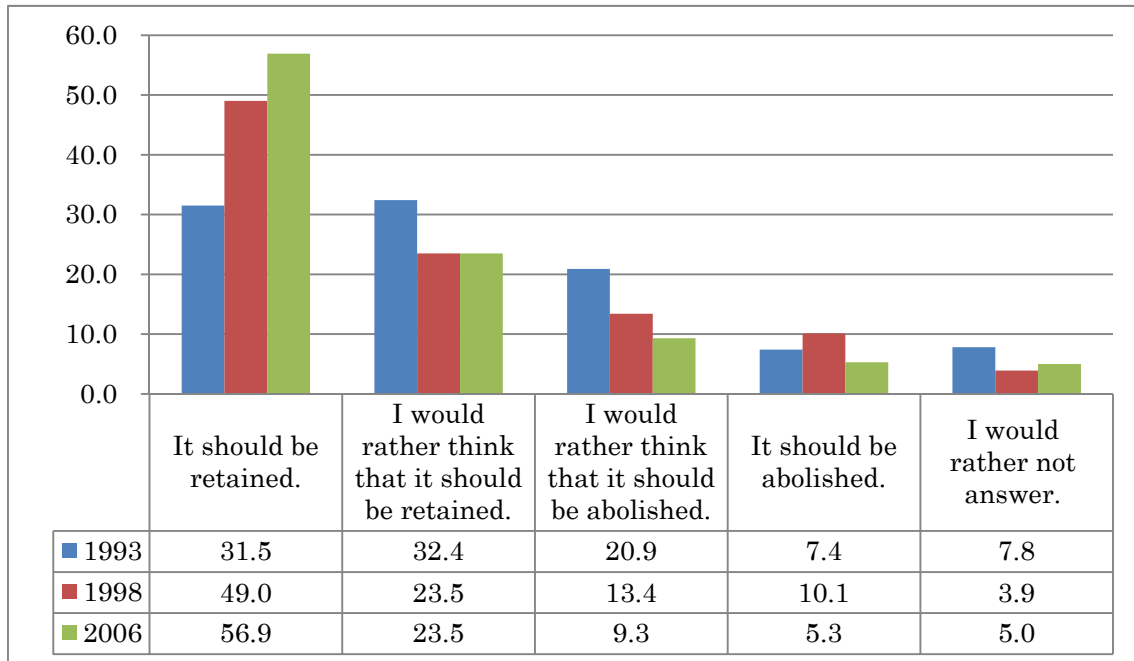


(The Prime Minister's Office 1956; 1967; 1975; 1980; 1989; 1994; 1999; 2004b; 2009a)



## Appendix V: Opinion Poll by Yomiuri

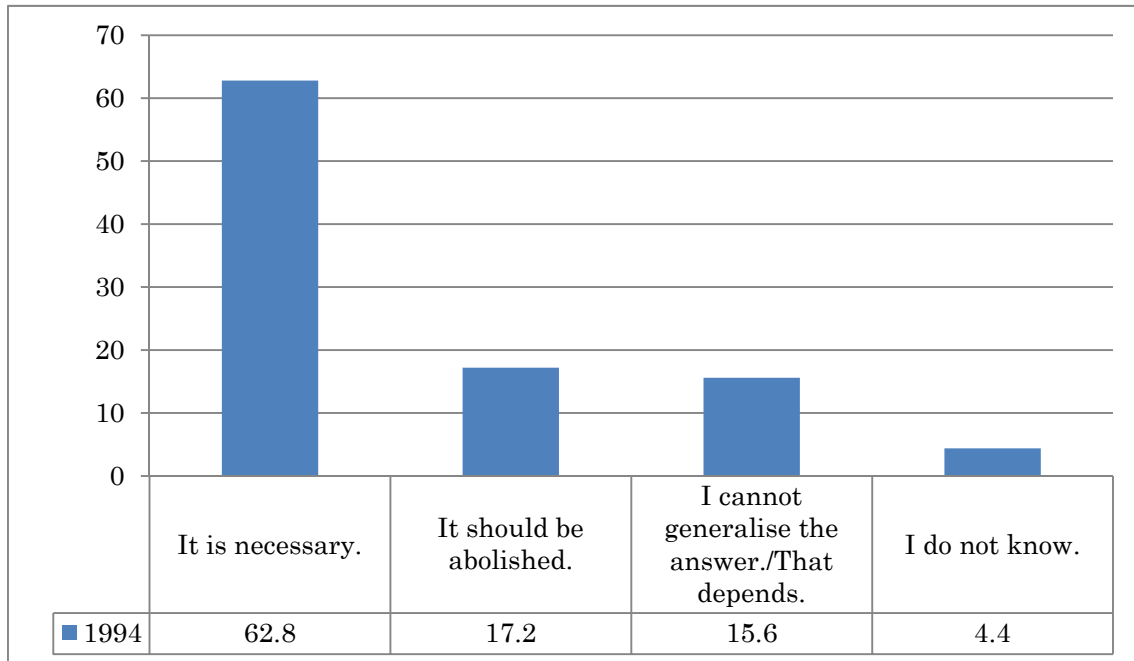
**Q. Do you think the capital punishment system should be retained, or abolished?**



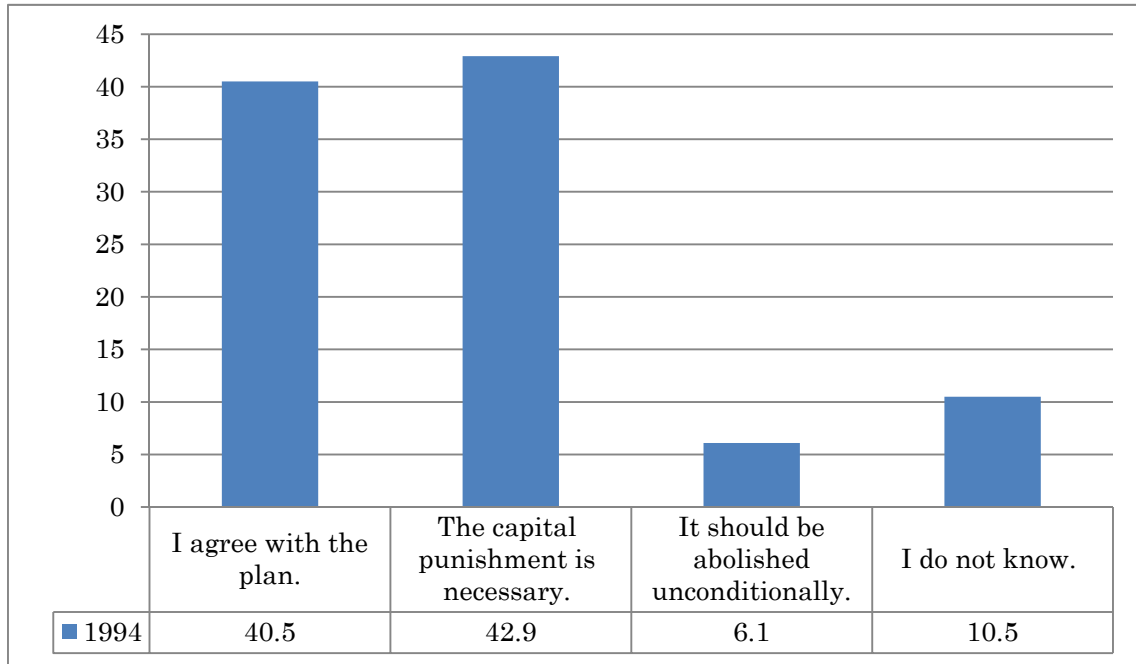
(The House of Representatives 2008:17)

## Appendix VI: Opinion Poll by the Japan Broadcasting Corporation (NHK)

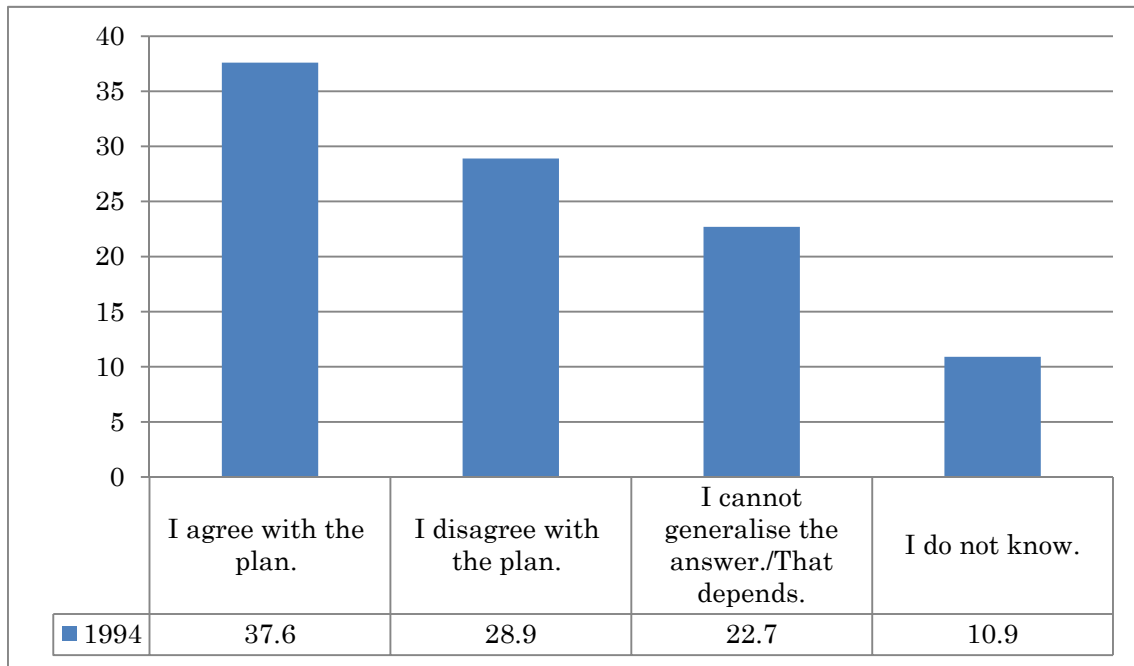
**Q. 1 Do you think the capital punishment system is necessary or should be abolished?**



**Q.2 What do you think about the plan for abolishing capital punishment if we place an alternative such as a life imprisonment without parole?**



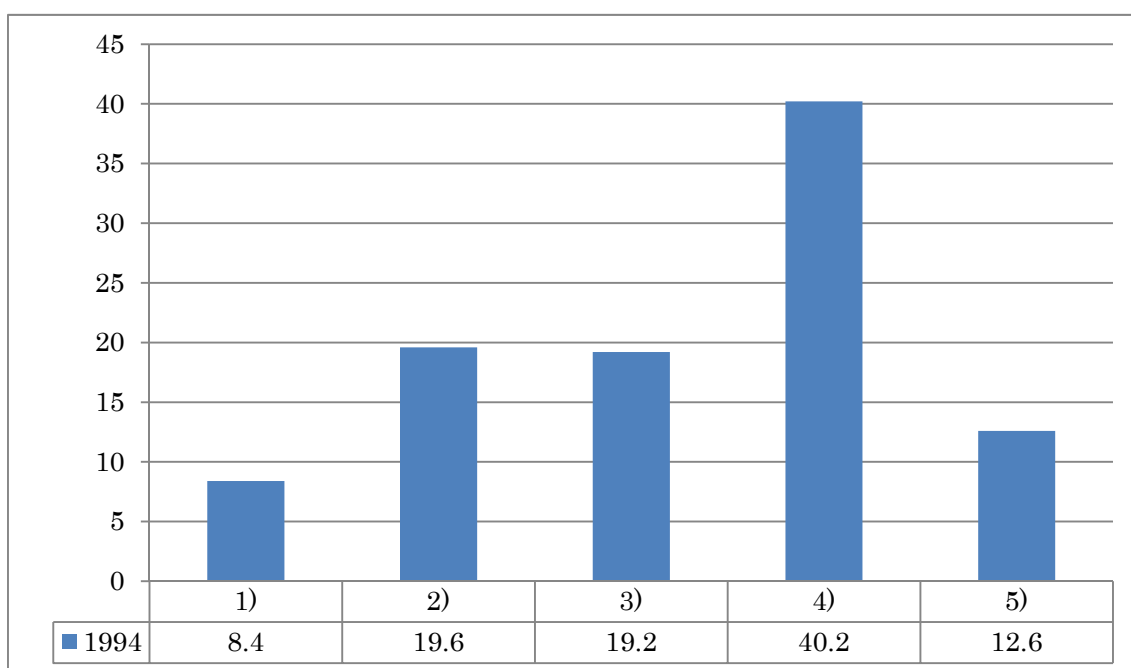
**Q.3 Do you agree with the idea that we put executions on hold and discuss the issue of capital punishment fundamentally?**



(The House of Representatives 2008:18)

## Appendix VII: Opinion Poll by Asahi

### Q.1 What do you think about capital punishment?



1) It should be abolished right now.

2) It should be abolished with introduction of an alternative punishment such as life imprisonment without parole.

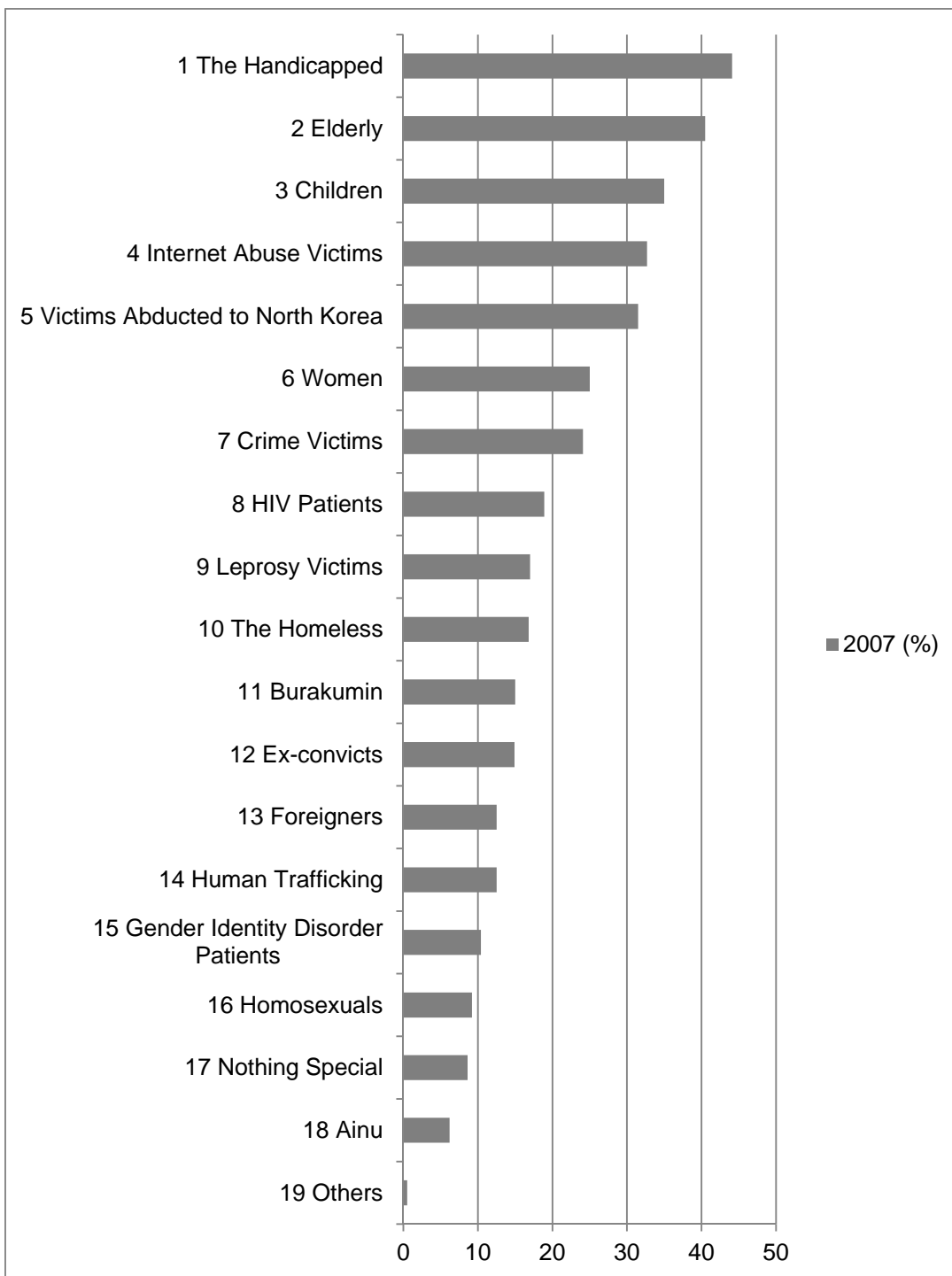
3) Executions should be put on hold and the debate should be spurred meanwhile.

4) It should be as it is right now.

5) Others/I do not know.

(The House of Representatives 2008:19)

**Appendix VIII: Opinion Poll on Defence of Human Rights  
by the Prime Minister's Office 'Which of the Following Human Rights  
Issues are you Concerned with?' (The Prime Minister's Office 2007)**



**Appendix IX: Ministers of Justice from 1980 to 2013**

Name	Sex	Year	Length of Appointment (Approximate)	Numbers of Executions	View on Capital Punishment	Party	Cabinet
Okuno Seisuke	Male	17 Jul 1980 to 20 Nov 1981	1 year and 4 months	1	hawk	Liberal Democratic Party (LDP)	Suzuki Zenko
Sakata Michita	Male	30 Nov 1981 to 27 Nov 1982	1 year	1	hawk	LDP	Suzuki Zenko
Hatano Akira	Male	27 Nov 1982 to 27 Dec 1983	1 year and 1 month	1	hawk	LDP	Nakasone Yasuhiro
Sumi Eisaku	Male	27 Dec 1983 to 1 Nov 1984	11 months	1	hawk	LDP	Nakasone Yasuhiro
Shimasaki Hitoshi	Male	1 Nov 1984 to 28 Dec 1985	1 year and 1 month	3	hawk	LDP	Nakasone Yasuhiro
Suzuki Seigo	Male	28 Dec 1985 to 22 Jul 1986	6 months	2	hawk	LDP	Nakasone Yasuhiro
Endo Kaname	Male	22 Jul 1986 to 6 Nov 1987	1 year and 4 months	2	hawk	LDP	Nakasone Yasuhiro
Hayashida	Male	6 Nov 1987 to 27	1 year and 1	2	hawk	LDP	Takehito

Yukio		Dec 1988	month				Noboru
Hasegawa Takashi	Male	27 Dec 1988 to 30 Dec 1988	4 days	0	Not known	LDP	Takehita Noboru
Takatsuji Masami	Male	30 Dec 1988 to 3 Jun 1989	6 months	0	Not known	Public Sector	Takehita Noboru
Tanigawa Kazuo	Male	3 Jun 1989 to 10 Aug 1989	2 months	0	Not known	LDP	Uno Sosuke
Goto Masao	Male	10 Aug 1989 to 28 Feb 1990	6 months	1	hawk	LDP	Kaifu Toshiki
Hasegawa Shin	Male	28 Feb 1990 to 13 Sep 1990	7 months	0	Not known	LDP	Kaifu Toshiki
Kajiyama Seiroku	Male	13 Sep 1990 to 29 Dec 1990	3 months	0	Not known	LDP	Kaifu Toshiki
Sato Megumu	Male	29 Dec 1990 to 5 Nov 1991	11 months	0	dove	LDP	Kaifu Toshiki
Tawara Takashi	Male	5 Nov 1991 to 12 Dec 1992	1 year and 1 month	0	hawk	LDP	Miyazawa Ki-ichi
Gotoda Masaharu	Male	12 Dec 1992 to 9 Aug 1993	8 months	3	hawk	LDP	Miyazawa Ki-ichi
Mikazuki Akira	Male	9 Aug 1993 to 28 Apr 1994	8 months	4	hawk	Public Sector	Hosokawa Morihiro
Nagano Shigeto	Male	28 Apr 1994 to 8 May 1994	11 days	0	Not known	Japan Renewal	Hata Tsutomu



						Party	
Nakai Hiroshi	Male	8 May 1994 to 30 Jun 1994	2 months	0	Not known	Democratic Socialist Party	Hata Tsutomu
Maeda Isao	Male	30 Jun 1994 to 8 Aug 1995	1 year and 2 months	5	hawk	LDP	Murayama Tomi-ichi
Tazawa Tomoharu	Male	8 Aug 1995 to 9 Oct 1995	2 months	0	Not known	LDP	Murayama Tomi-ichi
Miyazawa Hiroshi	Male	9 Oct 1995 to 11 Jan 1996	3 months	3	hawk	LDP	Murayama Tomi-ichi
Nagao Ritsuko	Female	11 Jan 1996 to 7 Nov 1996	10 months	3	hawk	Public Sector	Hashimoto Ryutaro
Matsu-ura Isao	Male	7 Nov 1996 to 11 Sep 1997	10 months	7	hawk	LDP	Hashimoto Ryutaro
Shimoinaba Kokichi	Male	11 Sep 1997 to 30 July 1998	10 months	3	hawk	LDP	Hashimoto Ryutaro
Nakamura Shozaburo	Male	30 Jul 1998 to 8 Mar 1999	8 months	3	hawk	LDP	Obuchi Keizo
Jin-nouchi Takao	Male	8 Mar 1999 to 5 Oct 1999	7 months	3	hawk	LDP	Obuchi Keizo
Usui Hideo	Male	5 Oct 1999 to 5 Apr 2000	9 months	2	hawk	LDP	Obuchi Keizo

		5 Apr 2000 to 4 Jul 2000					Mori Yoshiro
Yasuoka Okiharu	Male	4 Jul 2000 to 5 Dec 2000	5 months	3	hawk	LDP	Mori Yoshiro
Komura Masahiko	Male	5 Dec 2000 to 26 Apr 2001	4 months	0	dove	LDP	Mori Yoshiro
Moriyama Mayumi	Female	26 Apr 2001 to 22 Sep 2003	2 years and 5 months	5	hawk	LDP	Koizumi Jun-ichiro
Nozawa Daizo	Male	22 Sep 2003 to 27 Sep 2004	1 year	2	hawk	LDP	Koizumi Jun-ichiro
No-ono Chieko	Female	27 Sep 2004 to 31 Oct 2005	1 year and 1 month	1	hawk	LDP	Koizumi Jun-ichiro
Sugiura Seiken	Male	31 Oct 2005 to 26 Sep 2006	11 months	0	dove	LDP	Koizumi Jun-ichiro
Nagase Jin-en	Male	26 Sep 2006 to 27 Aug 2007	11 months	10	hawk	LDP	Abe Shinzo
Hatoyama Kunio	Male	27 Aug 2007 to 26 Sep 2007	1 year	13	hawk	LDP	Abe Shinzo
		26 Sep 2007 to 2 Aug 2008					Fukuda Yasuo
Yasuoka Okiharu	Male	2 Aug 2008 to 24 Sep 2008	1 month	3	hawk	LDP	Fukuda Yasuo
Mori Eisuke	Male	24 Sep 2008 to	1 year	9	hawk	LDP	Aso Taro

		16 Sep 2009					
Chiba Keiko	Female	16 Sep 2009 to 8 June 2010	1 year	2	in-between	Democratic Party of Japan (DPJ)	Hatoyama Yukio
		8 June 2010 to 17 Sep 2010					Kan Naoto
Yanagida Minoru	Male	17 Sep 2010 to 22 Nov 2010	2 months	0	hawk	DPJ	Kan Naoto
Sengoku Yoshito	Male	22 Nov 2010 to 14 Jan 2011	2 months	0	dove	DPJ	Kan Naoto
Eda Satsuki	Male	14 Jan 2011 to 2 Sep 2011	8 months	0	dove	DPJ	Kan Naoto
Hiraoka Hideo	Male	2 Sep 2011 to 13 Jan 2012	4 months	0	dove	DPJ	Noda Yoshihiko
Ogawa Toshio	Male	13 Jan 2012 to 4 Jun 2012	5 months	3	hawk	DPJ	Noda Yoshihiko
Taki Minoru	Male	4 Jun 2012 to 1 Oct 2012	4 months	4	hawk	DPJ	Noda Yoshihiko
Tanaka Keishu	Male	1 Oct 2012 to 23 Oct 2012	23 days	0	dove	DPJ	Noda Yoshihiko
Taki Minoru	Male	24 Oct 2012 to 26 Dec 2012	2 months	0	hawk	DPJ	Noda Yoshihiko
Tanigaki Sadakazu	Male	26 Dec 2012 to today	ongoing	5	hawk	LDP	Abe Shinzo

