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(Citation)
International Symposium on Judicial Justice:544-556

(Issue Date)
2017-05

(Resource Type)
book part

(Version)
Version of Record

(URL)
https://hdl.handle.net/20.500.14094/90004261

WHY DO JAPANESE LAY JUDGES CONTINUE TO PASS THE DEATH SENTENCE?
THE ETHICS OF STATE-SANCTIONED KILLING

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1. Introduction

In May 2009, the lay judge system in Japan finally took effect after nearly eight years of preparation. During this preparatory period, there was a great deal of controversy over the merits and demerits of introducing this system into Japanese legal procedure. Many were critical, particularly because the system was to apply in principle to the first trial for any of several serious crimes that could potentially carry the penalty of death, including murder, robbery murder, and rape murder. Critics pointed out that in such serious cases, citizen judges might possibly be under great psychological pressure, considering their randomly selection from qualified voters and given that they have no right to decline the appointment without a specific reason. Conversely, many critics were also concerned that lay judges might support inappropriately harsh verdicts when heavily influenced by the statements of victims, the victim's family, and prosecutors in court (Maruta 2004; Nishino 2007; Takeda 2008; Inoue 2008; Murai 2008; Inoue and Kadota 2009; Ohkubo and Ikeuchi 2009).

As a rule, a panel in the lay judge system consists of six lay judges and three professional judges, and when it pronounces a guilty verdict by majority vote, the majority must include at least one lay judge and one

professional judge. This means that lay judges alone cannot render a guilty verdict, but it is undeniable that judgments in this new system reflect the opinions of ordinary citizens much more strongly than with professional judges alone.

Japan is one of the few advanced democracies retaining the death penalty. As of late 2014, an opinion poll conducted by the Cabinet Office shows that 80.3% of the Japanese public agreed with the statement that "The death penalty cannot be avoided in some cases" (Cabinet Office 2015). The question is why so many Japanese citizens support capital punishment, especially nowadays? This article will examine the arguments for and against the punishment in Japan and will consider how the death penalty continues to resonate with the Japanese public. I must confess that I am not a convinced advocate for the abolition of the death penalty. Instead, I'm rather inclined to the retentionist view about death penalty. I will explicate the reasons why below.

2. Decline of the Abolitionist Movement

As I said earlier, a quite high percentage of the Japanese public believe that the death penalty cannot be avoided for some atrocious crimes. However, the civic movement to abolish capital punishment was comparatively strong in Japan from the 1980s to the early 1990s, when its members even cried out "Murderer!" to judges as a death sentence was confirmed at the Supreme Court (Yomiuri Shimbun 2013, 270). Shigemitsu Dando, then a Supreme Court Judge, suggests that these kinds of outbursts in court spurred him to elaborate on his theoretical opposition to capital punishment (Dando 2000, 9). Public opinion surveys conducted up until the 1980s showed that fewer people were supporting the continuation of the death penalty, even though the wording of the questions differed slightly from that used presently. In 1989, 66.5% objected to the idea of abolishing the death penalty under any circumstances, but by 1999, this percentage had increased rapidly to 79.3%, which means that the 1990s witnessed a sharp increase in support for capital punishment. From 1999 until now, approximately 80% of the Japanese public have consistently supported the retention of the death penalty.

The major shift in public opinion toward the death penalty was largely a result of the infamous sarin gas attack perpetrated in 1995 in the Tokyo subway by the Aum Cult of Supreme Truth and its leader Shoko Asahara. The poisonous gas killed 13 passengers and train crew, and injured more than 6,000 others. Not only this terror but also a series of similar heinous crimes by Aum, including the sarin attack in 1994 in Matsumoto City that killed seven residents, and the murder of anti-Aum lawyer Tsutsumi Sakamoto and his family, disclosed in 1995 by an Aum member, made the Japanese public furious at Asahara and his followers, and stalled the abolitionist movement in a significant way. Most importantly, the atrociousness of these crimes made it difficult and even unrealistic for abolitionists to oppose the death penalty on Asahara, deemed to be the most heinous criminal in postwar Japan. In 2006, his death sentence was finalized, although he remains alive in the Tokyo Detention House.[184]

Another significant cause of the shift in public opinion toward the death penalty was a drastic improvement in the status and rights that criminal procedure in Japan granted to victims of crime and their family members. Before 2000, victims had not been parties to the criminal trial. However, a revision of the Criminal Procedure Law in 2000 authorized victims or their family members "… to state an opinion on the sentiments or other opinions relating to the case," even though the statements were not permitted as evidence, as they were very likely to contradict the presumption of innocence.[185] Subsequently, in 2007, another revision of the code permitted a victim of certain serious crimes (or a family member) to appear as "participating victim" in the trial and to ask questions of the accused and "… state an opinion on the finding of facts or the application of law."[186] It

184 He is reported to be in a state of complete insanity, and Article 479 of the Code of Criminal Procedure of Japan provides for a stay of execution to be granted if the condemned criminal is found to be mentally ill. Article 479(1) of the Code of Criminal Procedure states that "Where the person who has been sentenced to death is in a state of insanity, the execution shall be suspended by order of the Minister of Justice."

185 Article 292-2(1) The court shall, when a request is made by the victim or others, or the legal representative of such victim to state an opinion on the sentiments or other opinions relating to the case, have them state their opinions at the trial.

186 Articles 316-36, 316-37, 316-38 of the Code of Criminal Procedure.

is obvious that the purpose of these revisions was to protect and expand the rights of victims, a purpose at least partly achieved because since about 2000, it has been rare to hear the cry of "Murderer!" from abolitionists in the court. A core member of the abolitionist movement in Japan confesses that it has become too difficult to cry out in front of the victim's family who almost always demand a severe penalty on the accused (Yomiuri Shimbun 2013, 270).

3. Citizen Judge System and the Death Penalty

As I mentioned earlier, immediately before the Japanese government introduced the lay judge system in 2009, there were a number of predictions about how Japanese citizen judges would react toward death penalty cases. In fact, the result is quite interesting. While the annual number of death sentences imposed at district courts has dropped since its introduction, the percentage of death sentences pronounced on defendants who allegedly have killed only a single person has definitely increased. The former tendency is not surprising, because the number of reported serious crimes has dropped dramatically from 2002 until now, a social phenomenon also observed in many other developed countries. During the decade just before the launch of the lay judge system in 2009, the average number of death sentences handed down at the first trial was 12.3 per year; the average from the introduction of the lay judge system until last year was 4.3 per year. As clearly shown, the number of death sentences at the first trial decreased by approximately two-thirds after the introduction of the system (Justice Ministry 2015).

We can partly explain this with the decrease in the number of serious crimes tried under the lay judge system. During the eight years before the launch of the system, the average number of defendants that must have been adjudicated under the lay judge system was approximately 2,736 per year. However, there were only 1,452 defendants annually on average who were actually adjudicated under the system up until 2014, nearly half the number than before (Justice Ministry 2015). The number of defendants adjudicated under the lay judge system literally indicates the number of accused who have allegedly committed certain types of "serious" crimes,

and the decrease in death sentences after the introduction of the system reflects a significant reduction in major crimes in contemporary Japanese society. Therefore, the first tendency is not very exciting.

The latter tendency, or the increase in death sentences handed down to defendants who have allegedly killed one person, is more remarkable because before the lay judge system was introduced, professional judges in Japan were reluctant to pass the death sentence in a murder case that had only one victim. From 1999 to 2008, among the penalties in the sentences handed down to a murderer of more than three persons, 94% were capital punishment and 6% were life imprisonment. Regarding a murderer of two persons, 73% were sentenced to capital punishment and 27% to life imprisonment. However, regarding a murderer of one person, the ratio of death sentences is only 0.2% (Mori 2012, 21-22). This indicates not only a reluctance of professional judges to pass the death sentence on a murderer of only one person but also an automatic avoidance of death sentences in such cases. This tendency reflected a rather bureaucratic criterion in those days that attached much more weight to the number of victims, and the death sentence was arguable in a murder case with one victim only in special cases, such as a kidnapping murder with intent to demand ransom.

However, this tendency has drastically changed since the introduction of the lay judge system. Since 2009, there have been 138 murder cases with one victim where there was a demand for capital punishment or life imprisonment in a lay judge court, with four defendants sentenced to death to date. The ratio of death sentences on murderers of one person jumped from 0.2% before the launching of the lay judge system to 2.9% following its introduction.

What does this mean amid the overall decline of serious crimes in contemporary Japanese society? Do lay judges in Japan hand down more draconian sentences than professional judges? For a court consisting only of professional judges, the decision to hand down a death sentence is largely a matter of the bureaucratic application of uniform criteria that mainly take into account certain quantitative factors. These include the number of victims and the presence or absence of pecuniary motives, partly because

judges in Japan are professional bureaucrats without any democratic basis. For citizen judges, the question is whether a death sentence really delivers justice to both the accused and the victims of serious crimes. This means that capital punishment under the lay judge system requires the decision of ordinary citizens based on a clear sense of social values, not the bureaucratic application of the formal criteria for appropriate sentencing (Mori 2012, 14-17).

4. Do the Japanese Public Support the Kantian Argument for Capital Punishment?

One of the main reasons that the Japanese government retains a death penalty in the face of international opinion, particularly that of the European Union (EU), is the strong support that Japanese citizens have shown for capital punishment in recent opinion polls. I have shown that heinous crimes committed by, for example, Aum Cult and its members in the 1990s, seriously damaged public sympathy for the abolitionist movement in Japan. Moreover, in my view, the theoretical grounds for abolitionism presented thus far in Japan remain insufficient to convince supporters of the death penalty. It is quite interesting that Jacques Derrida, a self-acknowledged abolitionist, also admits that "abolitionist discourse, in its present state, seems … greatly perfectible, philosophically and politically fragile, also deconstructible." According to Derrida, so long as the Kantian justification of the death penalty that leaves aside the least utility is not deconstructed, abolitionists will be "conditioned by empirical facts and, in its essence,… situated within a logic of means and ends" (Derrida and Roudinesco 2004, 148).

As far as I understand it, the Kantian argument for capital punishment still partly resonates with the feeling of the Japanese public. I do not mean here Kant's strict application of lex talionis (the law of retaliation), for example, when he declares "[i]f he has committed murder he must die." Even though Kant allows "no substitute that will satisfy justice" in this case, the principle that every murderer must be executed is clearly unrealistic. Particularly after the Aum terror attacks, many Japanese people believe that there are some extremely heinous offenses in which, according to Kant,

"… there is no similarity between life, however wretched it may be, and death, hence no likeness between the crime and the retribution unless death is judicially carried out upon the wrongdoer" (Kant 1996, 106). If the term "retribution" sounds a little anachronistic, we may instead demand that the offender should claim and discharge "responsibility" for his own criminal act as a free and responsible person. The question here is whether some odious murderers can properly fulfill responsibility for their heinous crimes with imprisonment, however long. This point closely relates to a radical incommensurability between life and death, which Kant clearly indicated. We can appreciate this fundamental predicament when we realize that an apology or reparation to murder victims is no longer possible in this world. In other words, can a person who has trampled on the right to life of other persons without good reason claim the same right for himself? (Mori 2012, 237) As I discuss later, this is the greatest challenge that Kantian retributivism poses to contemporary society.

The opinion poll commissioned by the Cabinet Office in 2014 shows that 57.7% of the public believe that the death penalty acts as a deterrent to violent crime, even though this figure has decreased by 4.6% from five years ago. This suggests that the myth of the deterrent power of capital punishment is still dominant in Japan, but it seems to be waning slowly under the influence of objective evidence from other countries. Personally, I do not believe that the restraining power of the death penalty is one of the main reasons that the Japanese public generally support its retention, because they are also well aware that Japan is one of the safest countries in the world.

Instead, a major source of the stable support for the death penalty in Japan seems to me to be the strong public demand for substantive justice for heinous crimes. A typical example of heinous crime according to the Japanese public is Shoko Asahara, the leader of Aum Supreme Truth, and the movement's acts of terrorism. In my view, the serial terror attacks by Aum have played a very important role in shaping public sentiment about capital punishment in contemporary Japanese society.

5. Procedural Flaws of the Japanese Criminal Justice System

Shigemitsu Dando, one of the most famous Japanese abolitionists, presented the impossibility of preventing injustice as the decisive argument for abolitionism (Dando 2000, 7-12). In fact, four prisoners under sentence of death were acquitted after retrial, one after another, between 1983 and 1989 in Japan. These miscarriages of justice were caused by undue interrogations that had forced the suspects into making false confessions. Some might argue that the same kind of miscarriage has not taken place since then. However, as far as I know, there is at least one controversial case in which a death sentence was handed down based only on a large amount of circumstantial evidence, and the condemned was already executed in 2008. This is the so-called IIzuka case involving the abduction and murder of two seven-year-old girls in IIzuka City, Fukuoka Prefecture, in 1992. The condemned continued denying the charges right up until the execution (Aoki 2012, 224-63). Without even citing the well-known example of Britain, because miscarriages of justice in serious crimes apparently increase the risk of executing an innocent person, the existence of such a controversial case makes us inclined toward the abolition of capital punishment.

The EU Guidelines on Death Penalty adopted by the Council of the European Union in 2013 clearly state that the most compelling reason behind the idea of abolitionism is "human rights and human dignity," which essentially means that the death penalty violates the human right to life of the condemned. As a matter of course, human rights of condemned inmates can be threatened by capital punishment in aspects of both procedural law and substantive law. As regards procedural aspects, as I mentioned above, any criminal procedure has an irremovable risk of a miscarriage of justice that can lead to "the intentional killing of an innocent person by state authorities" (Council of the European Union 2013, 5). Shigemitsu Dando even argued that the execution of an innocent condemned person would be the utmost injustice that can ever be conceived (Dando 2000, 11).

Moreover, the Japanese criminal law system has some serious flaws that can work against the accused. First, as I mentioned earlier, a victim of

crime for some serious crimes (or a family member) can now appear as a "participating victim" in the trial and can "state an opinion on the finding of facts or the application of law." The serious problem is that there is no separation between the fact-finding and sentencing phases in Japanese criminal procedure. This lack of separation allows the essentially emotional statements of victims to influence citizen judges' factual findings. Some commentators claim that the system of a "participating victim" as it is in Japan undermines the right of the accused to be "presumed innocent until proven guilty" and therefore violates Article 37 of the Constitution of Japan that guarantees the accused "the right to a … public trial by an impartial tribunal" (Foot 2007; Johnson 2012).

Second, in our lay judge system, all guilty verdicts are decided by a majority vote that must include at least one lay judge and one professional judge, and this rule applies to the death sentence. In other words, Japanese criminal procedure does not require the unanimous agreement of judges to hand down a death sentence, which is argued to be incompatible with international human rights standards.

6. Human Right to Life According to the Humean Contractarian Ethics

However, the point that I want to make here is that with regard to capital punishment, procedural aspects and substantive aspects are distinguishable, and abolitionism has a questionable point in its substantive argument against the death penalty. According to the EU Guidelines on Death Penalty mentioned earlier, the most important substantive case against the death penalty is the human right to life guaranteed to any criminal defendant. Nevertheless, is the human right to life sufficient to establish the substantive injustice of the death penalty?

Thirty-five years ago, Robert Ewin, a philosopher at the University of Western Australia, drawing on the contractarian ethics of Thomas Hobbes, considered our right to life not as a natural right but as a social construct. To put it simply, according to Ewin, "[e]ach of us has contracted not to kill, so killing is an infringement of contract and therefore unjust" (Ewin 1981,

109). It is quite characteristic of him to compare the prohibition on killing people to the prohibition on promise breaking. These two prohibitions are "of the same logical sort" in that these rules are both constitutive rules of morality (Ewin 1981, 110). This means that these basic rules create social practices and that the existence of the practices logically depends on the rules. Obviously, the prohibition on killing people has a logical priority over the prohibition on promise breaking because we cannot profit from our social interactions without having life.

In fact, I am not a Hobbesian, but as a Humean, I agree with Ewin that the rule against killing people is, just like the rule to keep a promise and the rule to respect the property of others, an artificial virtue. In other words, I argue that all these rules are a product of "convention or agreement betwixt us"; that is, "a general sense of common interest" that leads us to regulate our conduct by the rules on the supposition that others will perform in the same manner (Hume 200, 315). In this sense, the rule against killing people is in fact a social construct, rather than a natural law, and the respect for the right to life of each individual is a requisite condition for the establishment and maintenance of society, that is, a peaceful circumstance of mutual collaboration.

This kind of contractarian ethics, whether Hobbesian or Humean, has the advantage of being able to explicate a suspension of basic norms in some specific circumstances because, according to this theory, the binding force of these norms totally depends on the "common sense of interest" (Hume 200, 315) shared by individuals. In general, we agree that killing a villainous aggressor to defend yourself or even others is both morally and legally justified and sometimes even called for. In other words, it is justifiable to kill in self-defense. The sudden suspension of this basic norm in some exceptions can be consistently elucidated by contractarian ethics, because it makes it clear that a specific condition in which some person is trying to kill me or my accompanying person(s) releases me from the obligation not to kill the aggressor.

The justification of self-defense provides a perplexing paradox. While a villainous aggressor is trying to kill you or your child with you, you are

legally justified in killing him, and this means that he forfeits his right to life during his attack because of his murderous intention. However, immediately after he has accomplished the murder of your child, he becomes the obvious suspect, and police power prohibits from revenge against him. Consequently, his right to life definitely needs to be respected in an abolitionist country. In this scenario, the aggressor, who had forfeited his right to life during his lethal attack, regains the right only because he has accomplished his murder. I cannot but feel uncomfortable with this conclusion.

7. Conclusion

I wonder whether this paradoxical scenario contributes to justifying the execution of an obvious perpetrator of the most heinous crimes, as far as the substantive aspect is concerned. There are certainly other important procedural factors to examine before deciding on the justifiability of capital punishment. And it is obviously true that any criminal justice system should continuously reform itself so as to eliminate procedural flaws and prevent unjust punishments. However, the question that I mentioned earlier never leaves my mind; that is, how can a heinous murderer claim his right to life after he has trampled on the exact same right of others without reason (Mori 2012, 237)? In other words, should Aristotelian corrective justice always give way to the right to life of an odious murderer? I suspect that this question continues to resonate with most of the Japanese public—even more so because while prisoners serving a life term live comfortably in an albeit small society behind fences, unlike their victims, they do so in this life.

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