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The death penalty in a changing society: a survey of recent developments in Japan

Abstract: Japan's society and law in particular has recently undergone some significant changes. This article identifies five of these developments that could potentially impact practices relating to the death penalty there, and investigates the effect that they have had so far. Specifically, the developments introduced are: the amendment of the Prison Law governing for the death penalty; the introduction of citizen participation in death penalty-related trials; the temporary change of power to the Democratic Party of Japan; the adoption of new abolitionist instruments by international and regional organizations in which Japan participates; and, the possible establishment of a National Human Rights Institution with power to make recommendations to the government. I argue that at least some of these developments have had a tangible impact, and at the very least are likely to bring down the veil of secrecy currently shrouding death row inmates.

Keywords: death penalty, institutional change, Prison Law, lay judges, secrecy

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1 Introduction

In 2008, Daniel Foote, a well-known Japanese legal scholar, edited a volume modeled on the seminal, classic work of Arthur Taylor von Mehren, *Law in Japan: The Legal Order in a Changing Society* (1963). Foote's *Law in Japan* echoed Von Mehren's work in that its thrust was the claim that Japan's law is at a turning point, with many a significant change having taken place in the last couple of years, which, he argued, rendered it necessary to take stock and to look into the future (Foote 2008). In Foote's words,

> [i]n sharp contrast [to the period from the 1960s to the 1980s, when gradual, incremental change was what characterized the Japanese law], the 1990s and the first few years of the twenty-first century have witnessed pathbreaking change. The changes are not simply isolated changes to individual statutes, but rather extend to fundamental reform of the justice system. Indeed, in many ways these changes represent reshaping of Japanese society itself. (Foote 2008: xx)

The examples Foote cited of such path-breaking changes included: the 1994 electoral and other reforms aimed at strengthening the power of the prime minister and the cabinet; the bureaucratic overhaul that came with the 1993 Administrative Procedure Act and the 1999 Information Disclosure Act; the early 1990s deregulation of financial services; and the remodeling of the legal education system so as to incorporate a new tier of graduate-level law schools. The extent of these changes, which Foote set out to provide an account of in his volume, was exemplified, according to him, in the 1999–2001 Justice System Reform Council created by Prime Minister Keizō Obuchi and the sweeping reforms resulting from this Council's recommendations.

Law in Japan: A Turning Point contained a general chapter on Japan's criminal justice by legal expert David Johnson. However, the specific issue of the death penalty remained outside of the scope of the book, despite the social, political, and legal changes, and the Council's reforms, highlighted by Foote as potentially having a bearing on this policy, too.

This is not only an omission of Foote's book. Little of the contemporary literature on the subject of the death penalty in Japan examines whether the status of this punishment is being shaken. Rather, much of the work in this area is based on the deterministic assumption that death as a criminal sanction is there to stay. Consider, to begin with, the genres in which the Japanese language books available at bookstores tend to fall. First, there is a significant proportion of reportage by death row inmates themselves, their relatives or their guards about the circumstances in death row blocks (to list but a few: Sakamoto 2003; Mikuni 2004; Sakuma 2005; Gōda 2006; and Horikawa 2011). There are also numerous volumes discussing specific trials involving the death penalty and their legacies, such as the cases of the 1995 Sarin attack on the Tokyo subway by the Aum Shinrikyō sect, or the more recent conviction to death penalty of a juvenile in the Hikari City case. A third type of genre is journalistic-style edited volumes, which are dominated by summaries, if not complete word-for-word minutes, of discussions with clearly discernible normative bias in favor of abolition, typically between lawyers and members of anti-death penalty groups such as Katatsumuri-kai ('Snail Association'), Forum 90, and Amnesty International (e.g., JFBA 2005; also all annual issues of *Nenpō Shikei Haishi* published by Impakuto Shuppankai). Finally, the remaining Japanese-language death penalty literature on the shelves tends to be written in a purely instructive mode for readership unfamiliar with the various aspects of the death penalty practice in Japan (e.g., YSK 2009; Aoki 2012; and YSK 2013).

Even in the academic literature, scant attention has yet been paid to the possibility of new pressures having been generated on the death penalty policy. The dominant themes still tend to be: how steps to keep the death penalty low-

key are taken by the Japanese authorities to extremes not known in other countries (Johnson 2005, 2006a, 2006b; McNeil and Mason 2007); how erroneous myths continue to be held with regards to the death penalty, such as that it deters crime (Hamai 2009), or that the method that has been used for decades of hanging is pain-free (Nagata 2013); and, how successful Japan is in resisting pressure to adopt the international norm of death penalty abolition (Bae 2011), or what the social foundation of the death penalty system is in this country (Wang 2005). There are some studies that do engage in a discussion about the death penalty that relates to recent social, legal, and political developments, such as, for example, Johnson (2010), Satō (2010), and Fukui (2011), which analyze the appropriateness of entrusting laymen, through the new so-called quasi-jury system (*saiban'in seido*), with the decision of whether to hand down the death penalty, or Ogura (2011), which reflects on what is likely to become of the death penalty debate in Japan now that all fugitives in the Aum case have been apprehended. However, none of these studies investigates the issue of the death penalty in Japan from the point of view of whether any signs of policy shift have emerged.

The present article aims to fill this gap. With a view to creating a more informed picture of the direction in which Japan's death penalty policy is likely to evolve in the future, I propose to examine whether any of the significant changes at the turn of the century in the political, legal, and social landscape might have had an impact on this policy. The particular changes I will focus on include: the 2005/2006 revision of the Prison Law (*Kangoku Hō*); the May 2009 quasi-jury system incorporation into the trial system mentioned above; the unprecedented summer-2009 shift in power from the Liberal Democratic Party (LDP) to the Democratic Party of Japan (DPJ); the birth of new international instruments aimed at the eradication of the death penalty; and the submission of a bill to Diet for the establishment of a National Human Rights Institution (NHRI, *Jinken Hogo Iinkai*).

It could be argued that there are other factors as well at the turn of the century that could potentially exert an influence on the death penalty policy-making, such as, for example, Japan's continuing economic problems, recent scandals surrounding prosecutors and police over tampering with evidence, and new exonerations of convicted inmates. The present article, however, does not aim at listing exhaustively these factors or ranking them in terms of importance. Instead, it has the more modest goal of focusing on the impact, or the lack thereof, as the case may be, of those factors in the surrounding context of the death penalty which are related to broad novel institutional changes.

The materials on which the investigation relies include media reports and data gathered during two fieldtrips – one to Japan (July 2007 to January 2008)

and one to Geneva and Strasbourg (October 2008) – as well as a stay in Tokyo as a post-doctoral fellow (November 2009 to January 2012). During the first one of these trips, interviews were undertaken with a large range of individuals, including: cabinet members, opposition politicians, Ministry of Justice (MOJ) Correction Bureau officials, prison guards, judges, prosecutors, lawyers, academics, NGO members, journalists and UN representatives and Council of Europe (COE) spokesmen, and a death row inmate (see the appendix for further details of these interviews and other research activities undertaken). As for the second fieldtrip, its purpose was to observe the 94th Session of the United Nations Human Rights Commission in Geneva, during which the fifth periodic report of the Japanese government on the implementation of the International Covenant on Civil and Political Rights (ICCPR) was examined, and to conduct interviews at the COE in Strasbourg.

In what follows, with a view to providing a frame of reference against which to understand the recent changes, I will first offer an overview of the traditional attitudes of the legislature, the bar, the judiciary, and the public toward the death penalty. The article concludes with a consideration of the prospects for a shift in Japan's policy and the implications this would have for other countries in the region and elsewhere.

2 Background: traditional attitudes toward the death penalty

On 26 December 2006, Japan's MOJ announced that four executions had taken place the previous day, enraging those in Japanese society and abroad who, for various reasons, oppose capital punishment, and in particular those members of the Christian community for whom "Christmas Day is the day to reaffirm humanity."[1] From the point of view of the latter, the timing of the 2006 executions makes them even more controversial than any in previous years. Despite the denial of MOJ officials of there being a reason for the decision to perform these executions on 25 December, the Christians active in the anti-death penalty movement ironically referred to the event as a "callous timing of 'justice'" and "a calculated arrogance."[2]

Whether these executions merely coincided with Christmas or whether critics are right to read more to this timing is an unsolvable mystery. As far as the

1 Makoto Suzuki, *Agence-France Presse*, 25 December 2006.
2 Letter to *Japan Times*, 3 January 2007.

regulations are concerned,[3] executions cannot take place on a national holiday (and Christmas is not an official holiday in Japan), Saturday, Sunday, or between 31 December and 2 January. Furthermore, another restriction upon the timing of executions is that once the final approval for the execution has been signed by the justice minister the execution must take place within five days.[4] Apart from this, *when* executions take place, and more importantly *whether* any at all take place in the given year, depends on the incumbent justice minister.

While there have occasionally been some justice ministers who have refrained from issuing death warrants, most of them appear to regard doing so their "inevitable duty" which is to be strictly separated from their individual opinion on the question. The death penalty is, their argument goes, ultimately something to be decided upon the conscience and the moral feelings of the people's representatives in the Diet, and as long as there is no different decision by the legislature, it remains the justice minister's job, as someone merely sitting at the top of a bureaucratic organization, to order executions. If a minister does not sign execution warrants for personal convictions, despite the death penalty being provided for by law and death sentences being handed down by the courts, the legal system will be, according to Mayumi Moriyama – one such justice minister,[5] undermined. Anybody who wants to abolish the death penalty must not accept an appointment as justice minister in the first place, she argues, as failing to finalize judgments on penalties would contradict the spirit of the Japanese Code of Criminal Procedure.

In the eyes of lawyers, however, it is contentious whether the death penalty could indeed be considered legal in Japan. Lawyers argue in particular that since it is impossible to verify that hanging is not inhumane, the possibility cannot be excluded that it is in breach of Article 36 of the Constitution, which states that "[t]he infliction of torture by any public officer and cruel punishments are absolutely forbidden." Despite rulings by the Supreme Court to the contrary, it is the view of many lawyers that the Japanese practice does fall into the category of "cruel." This is not only because of execution witnesses in Japan having become neurotic, expressing the view that they would never want to observe the scene of hanging again, but also because of the state of suspension in which death row inmates are forced to spend each day until they are finally told of their scheduled execution. Furthermore, members of the bar also argue

3 Penal Code, Section 71, Clause 2.
4 Code of Criminal Procedure, Article 476.
5 Interview with Mayumi Moriyama.

that, if Article 13 of the Constitution is to be taken seriously,[6] the question should be debated as to why life incarceration with parole which can be permitted only after a certain period of time, or even life incarceration without parole, could not be implemented as alternatives to capital punishment.

Intertwined with the issue of constitutionality is the question of the statutory viability of the Penal Code – the document which provides for this penal sanction and which the legal profession also contests. Article 31 of the Constitution reads that "[n]o person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, except according to procedure established by law." However, the "procedure established by law" to be referred to in the case of the death penalty is a document whose validity is deemed dubious by the legal community, since it is of an Imperial-Japan origin (i.e., from 1882) and has never once been revised. For members of the bar, it is unacceptable that executions can be based in modern times upon this antiquated document, which has no standardized criteria for making decisions to execute, lacks provisions guaranteeing the rights for those facing capital punishment during any of the stages of investigation, trial, incarceration, and execution, and is deficient in safeguards against the execution of the insane, pregnant women, juveniles, and the aged (JFBA 2002).

As far as the public is concerned, it has often been portrayed as being overwhelmingly in support of the death penalty, with even the Supreme Court having cited in its rulings such support as a legitimizing factor for this practice. However, as Schmidt's (2002: 165–166) survey of Japanese public polls on the death penalty shows, results have tended to vary so significantly that there seems to be hardly anything to be deduced from them about the public sentiment. Indeed, although most of the public polls have shown overwhelming support for the death penalty, there have also been some which indicate the majority to be opposed to it. A case in point is *Asahi Shinbun*'s poll from 1994, which demonstrated 40.2% of the pollees to be in favor of capital punishment and 47.2% to be against it. These figures are decidedly different to the poll conducted by the Prime Minister's Office the same year (73.8% pro versus 13.6% con) or a 1982 *Asahi Shinbun* poll (76.0% pro versus 40.2% con), suggesting that the Japanese people do not have a clear opinion on the subject, or at least not one as black and white as often presented in the media.

Survey results assessing the degree of support of the death penalty by the Japanese parliamentarians are equally ambivalent. As reported by Schmidt

6 "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."

(2002: 177–178), a 1994 survey among the Diet members from both the House of Councillors and the House of Representatives asked whether they would support a draft bill which would establish a moratorium on executions for four years, during which period an NHRI set up in the Diet would debate and eventually reach a consensus on the issue of the death penalty. Only 179 (or 26.6 %) of all the 673 Diet members who were asked replied. Though the majority of them expressed their support of such a bill, these results more than anything suggest that there is a basic lack of interest in the issue, or desire for change, among parliamentarians.

The attitudes which have just been delineated – politicians either avoiding abolition advocacy or being disinterested, lawyers campaigning to little effect for policy change, and the populace voicing no strong objection to the *status quo* – are by no means exhaustive of those within Japan in the past decades. However, they have been the most significant. With these attitudes remaining steady over time, equilibrium was reached on the death penalty, whereby, unless any political or structural changes were introduced, a shift seemed unlikely to occur. At the turn of the century, however, a number of new developments transpired that on first glance seem to hold some promise of collectively, if not single-handedly, altering Japan's death penalty policy. The following section turns to examine whether this is the case.

3 Potential sources of change

In order to understand the future of the death penalty policy in Japan, this section examines in detail the five factors introduced at the outset, namely the revision of the Prison Law; the adoption of a quasi-jury trial system; the 2009 shift in power to the DPJ; the creation of new international instruments aimed at the eradication of the death penalty; and the steps toward establishing an NHRI.

3.1 The revision of the Prison Law

Until recently, the treatment of Japan's death row inmates, and in fact all prisoners, was regulated for by the Prison Law of 1908. In 2002, however, a scandal broke in Nagoya Prison, which led to the spotlight being placed on criminal detention, with the upshot being legislative amendment for the first time in nearly a century. The scandal at Nagoya involved the mistreatment by a group of prison guards of three inmates, two of which were fatally injured. While it

was initially reported by MOJ that these inmates had been in isolation cells where they had allegedly died of natural causes, it later emerged that shortly before the incidents in question each of the prisoners had been assaulted by guards with a high-pressure fire hose. The way in which this came to light led many to accuse MOJ of having attempted to bury these incidents. Following a row over these events in Diet and the media, many more deaths in suspicious circumstances in the Nagoya and other prison facilities were exposed. The revelation that ultimately resulted from this scandal was that systemic failures exist in Japan with regards to prisoners' filing of complaints. This triggered a sense of urgency for reform within the government, meaning that the issue of Prison Law overhaul which had been procrastinated upon for decades finally came to the fore. So what changes, if any, were instituted to this law in relation to the treatment of death row inmates when the part of it pertaining to penal facilities, as opposed to detention centers and police cells, was amended in 2005?

Perhaps the most significant difference between the old Prison Law and its revised version is the emphasis on the authorities' prerogative to interpret the mental state of these inmates at any particular time for the purpose of deciding upon the inmate's need to communicate with the outside world. The original law had ordained that the same rules pertaining to remand prisoners would be applied to death row inmates. However, in 1963, citing the need to maintain the mental stability of these inmates, MOJ imposed restrictions on the communications, both written and oral, of death row inmates with the outside world as severe as those just described.[7] With the 2005 revisions, a large part of this informal ministerial regulation entered the law, changing the character of death row inmate treatment in Japan to one whereby it began to resemble that of sentenced convicts more than that of remanded detainees. In an attempt to explain the gravity of this transition, the renowned Japanese criminal law scholar Toshikuni Murai laments:

> The cell of the death row inmate has now fallen into such darkness that not even Diet investigations or Information Disclosure can reach it. Today, death row inmates are allowed to meet only with a limited number of family members. Lawyers are allowed to meet a death row inmate only if the latter has made an appeal for re-trial. Even in this case, prison guards are always present during the visitation. (Murai 2006: 3)

As a result, the updating of the Prison Law did not bring any more openness to the system under which death row inmates in Japan are held. If anything,

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7 The name of the ordinance was *Shikei kakuteisha no sekken oyobi shinsho no hatsuju ni tsuite*, 'Concerning the visitations of death row inmates and their sending and receiving of correspondence'.

the secretive conditions seem to have been even more entrenched by the reforms. The practice of restricting these inmates' rights to visitation, letter exchanges, and phone calls, which rested on informal ordinances, is now firmly established in the law.

3.2 The introduction of the quasi-jury system

In May 2009, after several years of discussions and preparations, the Japanese government introduced a quasi-jury system, allowing ordinary people to participate not only in the reaching of verdicts in serious crime cases, but also, and uniquely, in the handing down of death penalty sentences. The rules of the system ordained that, for a sentence of this kind to be rendered, five of the nine panelists (three professional judges and six laymen) needed to be in favor of it, with at least one of these being a professional judge. At the time, there was a strong discontent with this measure within the bar, which saw a perceived simultaneous toughening of public attitudes toward crime as potentially causing the number of death sentences spiral out of hand (*Shizuoka Shinbun* 2009: 28).[8] Lawyers feared in particular that many of the cases which under the old, professional-judge, system would have resulted in a mere life sentence (with the option of parole after ten years, for this is what life sentence in Japan meant in practice) would become, in the absence of a sentence with severity somewhere in-between, death penalties. Today, nearly four years onward, does this fear look justified? Has there been a dramatic increase in the number of death sentences since the introduction of the quasi-jury system?

At the end of April 2013 – more than four years since this new trial system's implementation – 17 of the 24 defendants for whom the prosecution demanded the death penalty had been sentenced to death, six been given life sentences, and one acquitted. The rate of roughly 70 % death penalty sentencing is about the same or higher than it was before the new system started. It is noteworthy, however, that the total number of first-instance death sentences has declined, which is perhaps due, as Johnson (2010) argues, to prosecutors having become more cautious under the new system.

While there does not seem to be any particularly discernible change in sentencing patterns, the introduction of the quasi-jury system seems to have reinvigorated the public interest in the death penalty. More concretely, on 19 January 2012 a group of former jurors submitted a request to the Tokyo District

8 Also, author's observation of abolitionist lawyers' meeting, JFBA's Headquarters, Tokyo, 23 December 2007.

Court that the system be reformed in line with 13 recommendations, among which was that more information be provided to jurors about the implementation of this sanction (Kamiya 2012). It was explained that despite death being a penalty for jurors to consider, not much was known to them in general, including the way it was executed. Subsequently, similar submissions were made in as many as 60 other court branches across the country.

Simultaneously, under the auspices of the Japan Federation of Bar Associations (JFBA), symposia were held across the nation for former jurors to discuss, among other issues, the death penalty.[9] Apparently, jurors had begun to emerge who were suffering from trauma because they had opposed a death sentence based on strong beliefs but their view had been quashed by a majority opinion, and so the JFBA was trying to gather broad-based support for their idea that the majority rule with regards to the death penalty should be abolished in favor of a unanimous decision.

Are these developments to be taken as a sign that a more vigorous debate on the death penalty is likely to occur? Being quite limited in scope, it is hard to see this public action as a harbinger for more significant changes in the national policy, noteworthy as it may be. Indeed, it has rarely ever been the case that the public within a state is the leader in death penalty abolition. Nonetheless, the strength of public opinion is clearly important and it is certainly the case that, as a larger proportion of the population is compelled to consider handing down themselves this sentence to their fellow citizens, the debate is going to deepen.

3.3 The coming to power of the DPJ

Although since December 2012 the political leadership has returned to the LDP, the DPJ – a party which was ready to bring to the forefront of Japanese politics the idea that the status of the death penalty needs to be revised – was the ruling party for about 3 years and 4 months from the summer of 2009. During this time, influential party figures such as Keiko Chiba, Satsuki Eda, and Hideo Hiraoka, all of whom had previously made various statements regarding the need to reinvigorate the death penalty debate in Japan, served as justice ministers. In light of this change of outlook and personnel at the top of Japanese

9 *Shikei shikkō no jitsugen kara kangaeru – Hontō ni kōshukei wa zangyaku na keibatsu de wa nai no ka* ('Considering the execution of the death penalty – Is not really death by hanging a cruel punishment?'), Symposium, JFBA Headquarters, Tokyo, 19 March 2012.

politics, it seems pertinent to consider whether any significant developments were instituted in relation to the death penalty.

The DPJ came to power in 2009 having adopted a policy platform that included the revision of the application of death penalty as well as a consideration of the imposition of moratorium. Indeed, the so-called "INDEX 2009" issued in the run-up to the House of Representatives' election, under a section entitled "Revision of Criminal Punishment, Including a Consideration of Life Imprisonment," stated that:

> [w]ith regards to the death penalty system, it is only America and Japan amongst the developed nations that retain this penalty, and abolition has now become a pre-condition for EU membership. Giving a serious consideration to these kinds of international trends, [the DPJ] will maintain a broad debate both within and outside Diet regarding not only the issue of whether this punishment should be retained, but also the question of whether a moratorium should not be presently imposed, as well as how inmates should be notified of their execution and what the method of this should be. (DPJ 2009: 13)

The DPJ's pledge to re-examine all aspects relating to the death penalty marked a radical departure from the approach which the LDP had hitherto maintained and which the authorities had asserted. Thus, when the party subsequently emerged victorious from the elections, the death penalty was one of the areas where observers were keen to see what changes might ensue.

Well-suited to commencing the process toward fulfilling their pre-election pledge was the first DPJ justice minister – Keiko Chiba. A lawyer-turned-politician, as well as an abolitionist campaigner,[10] Chiba resisted for ten months pressure from victims groups and others to order executions. On 24 July 2010, however, about two weeks after her failure to become re-elected for the House of Councillors, she changed tack. It could only be speculated why Chiba signed two execution orders, since she has not engaged in explaining her motives. Nonetheless, given her unprecedented step of inviting the television camera to the execution chamber, it seems probable that her sudden change of course represented a last-ditch bid to contribute to the abolitionist cause. Indeed, Chiba's actions managed to bring the death penalty to the spotlight, if only for the fact that it was arbitrary that she – a politician who had already lost the support of the public, still had the power to render decisions of such gravity. That this was her motivation is supported by her final act as a justice minister, which was to set up a study panel on the death penalty issue and thus keep

10 Chiba belonged to the Japan Parliamentary League for the Abolition of the Death Penalty, and was formerly the Secretary-General of the *Amunesuti Giin Renmei* ('Amnesty Diet Members' League of Japan').

the discussion going. Did the raised awareness resulting from Chiba's efforts, though, have their intended effect of triggering a more vibrant national debate on the death penalty? Would the changes she brought, especially within MOJ, have any long-lasting effect?

For a time after Chiba's service it seemed as if the abolitionist momentum would continue. Her two immediate successors, Minoru Yanagida and Yoshihito Sengoku, did not institute any other changes, possibly because they did not remain in office long enough. However, lawyers Satsuki Eda and Hideo Hiraoka seemed willing to continue the campaign. In the case of Eda, he stated on the day of his appointment that "the death penalty is a punishment mechanism ridden with flaws (*kekkan*)." Even though he subsequently withdrew his words, explaining that the term "flaws" is too strong, he did maintain that "there will not be a warm human society, if life, as long as it is life, is not regarded precious. For this reason, it is really hard to approach the issue of the death penalty, with which there is no way to bring things back" (*Asahi Shinbun* 2011). Furthermore, Eda during his eight-month term not only refrained from ordering executions, but he also held three more meetings of MOJ's study panel, backing-up Chiba's efforts by inviting experts known to be opposed to the death penalty. As for Hiraoka, in the face of accusations that he was sabotaging the duty of the justice minister by refusing to sign execution orders,[11] he defended himself by saying that "the minister also has the duty to consider how to handle the death sentence amid various international opinions."[12] Also, at his first ministerial study panel meeting on the death penalty he reportedly expressed the determination to initiate a "real national debate" and is said to have been planning the establishment of another, independent study panel (Hurights Osaka 2012).

It would later become clear that the pressure applied to Hiraoka was an early sign that, at least for this DPJ parliament, the abolitionist movement had run its course. Indeed, Hiraoka's successor, the former prosecutor Toshio Ogawa, was much more favorable to the idea of signing off executions, and Prime Minister Yoshihiko Noda would confirm the DPJ's withdrawing of their commitment to this cause. Eventually as well, the study panel would wrap up under Ogawa, providing only a 24-page summary of their meetings and no recommendations (MOJ 2012).

In conclusion, what had begun propitiously for abolitionists when the DPJ came to power petered out in the second half of this party's term in office.

11 See, for example, Chief Cabinet Secretary Osamu Fujimura's challenge toward Hiraoka at the Diet Members' Committee, House of Representatives, 26 October 2011.

12 Judicial Affairs Committee, 27 October 2013.

Despite three justice ministers having pushed this issue onto the political agenda, the impetus was eventually lost. The upper echelons of the party in particular did not seem to want to pick up the baton, especially in light of the gargantuan tasks that the government was faced in dealing with the recovery after the devastating 3/11 earthquake, tsunami, and subsequent nuclear disaster. In the whirlwind of post-quake politics, the death penalty, along with a number of other issues, slipped off the program again, and with the LDP returning to power, it seems that this situation will remain for some time.

3.4 International death penalty developments

Domestic death penalty debates do not exist in isolation, but are embedded within the international human rights regime, as maintained by global and regional human rights bodies. In reflecting on the role of these bodies in eradicating the death penalty, illustrious criminologist Roger Hood asked in 2001 if it is the case that "most of the countries likely to embrace the abolitionist cause [had] by [then] done so." He acknowledged with regards to Europe in the 1990s that no one could have foreseen the vast advancements these bodies made there, but nonetheless saw fit to consider whether "at last a final 'plateau' [has been] reached, from which it is unlikely that further major advances towards abolition as an international 'human rights norm' will be achieved" (Hood 2001: 339).

Japan is one of the countries which have traditionally refused to accept abolition as a human rights norm. During the last two decades, however, the pressure to revise this position has substantially increased, partly due to the formulation of new international instruments. Within both the UN and the COE in particular, the trend toward eradication of the death penalty has deepened. The former implemented in 1991 the so-called Second Optional Protocol to the International Convention on Civil and Political Rights (ICCPR) Aiming at the Abolition of the Death Penalty, while the latter imposed that death penalty abolition be a precondition for membership, and also formulated a new protocol to the European Convention of Human Rights (ECHR), with which it calls for the ceasing of the death penalty in all circumstances, even during wartime.[13] In light of these developments, can one see any signs of Japan's policy shifting?

13 The COE is credited for Europe becoming a death penalty-free continent, with the sole exception of Belarus, which continues to be excluded from the Council on the grounds of upholding this punishment.

How are the UN's and the COE's new commitments to the eradication of this penalty affecting Japan's position, if at all?

As of autumn 2013, Japan has not yet acted upon the Second Optional Protocol to the ICCPR, and there is no indication that it will do so in the near future. However, it is noteworthy that in 1999 the government ratified the 1987 UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) – an instrument which many perceive as being intimately linked to the death penalty. It is also noteworthy that Tokyo, unlike Washington, did not express reservations when ratifying this treaty. Still, in a somewhat contradictory spirit, Japan later blatantly ignored all of the recommendations of the Human Rights Commission (HRC) and the Committee against Torture with regards to the death penalty.[14] It has neither limited the application of this punishment, nor improved death row inmates' conditions. Furthermore, appeal has still not been made compulsory for convicts condemned in their first trials to death.

As for the impact of the COE, since 2000 the pressure from its Parliamentary Assembly (PACE) in particular has also increased. More specifically, PACE has repeatedly called for the suspension of Japan's (and the US's) observer status as a sanction for its upholding of the death penalty.[15] While the higher-ranking Committee of Ministers has not yet officially addressed PACE's recommendations, preferring to use the power of persuasion and encouragement in its interactions with the representatives of these countries,[16] the issue of the suspension of Japan's and America's status continues to come up regularly within PACE.[17] The Assembly also actively seeks reports from Japanese parliamentarians about the steps they have taken domestically to bring about abolition. In October 2003, for example, it heard from a delegation from the Japan Parliamentary League for the Abolition of the Death Penalty, and House of Councillors' Senator Toru Unno in particular, that "the majority of Japanese [Diet] members now supported a moratorium, even though the public were still hostile and remained to be convinced."[18] Furthermore, PACE representatives often visit Japan to aid the local abolitionist campaign.[19]

Overall, it seems that the pressure from the UN and the COE on Japan to accept abolition as a human rights norm has risen. However, Japan still proves

14 CAT/C/JPN/CO/1, 3 August 2007; CCPR/C/JPN/CO/5, 30 October 2008.

15 See PACE Resolutions 1349 (2003), 1253 (2001), and 1760 (2006).

16 For a recent example, see COE (2013).

17 Interview with Kathleen Layle and Mario Henrich, COE, Strasbourg, 20 October 2008.

18 PACE Recommendation 1627, 1 October 2003.

19 Examples include Gunnar Jansson's 2004 trip and Christos Pourgourides' 2005 visit to Tokyo.

resistant and it looks like the major factor behind this is the lack of strong enough support for abolition among parliamentarians.

3.5 The establishment of an NHRI

Another factor that could have a bearing on the death penalty debate in Japan is the potential establishment of a National Human Rights Institution there. NHRIs have recently been emerging across Asia, gaining the attention of human rights advocates and academics in the region, as they become excited by the prospect of these institutions bringing more radical changes to the local human rights landscape than international or regional organizations have hitherto been able to (Smith 2006; Burdekin 2007; Reinshaw et al. 2009–2010; Goodman and Pegram 2012). Regarding the death penalty in particular, the abolition of this sanction has already in two countries – Fiji and Mongolia – been explicitly linked to the efforts of NHRIs within them.[20] Although an NHRI in Japan has not yet been created, plans for doing so have reached Diet. Given the remit of this article, it would be remiss to not consider the chances of this project reaching fruition, and the influence such a body might have on Japan's stance on the death penalty.

The idea that an NHRI-like body be created in Japan was first put forward in 1999 by a MOJ-commissioned group of experts.[21] Its intended purpose was to resolve a range of long-standing human rights problems.[22] Following this proposal, the governing LDP drafted a "Human Rights Protection Bill" (*Jinken Yōgo Hōan*, henceforth HRPB), only to have it rejected on both occasions they submitted it to Diet in the early 2000s.[23] One of the reasons why the HRPB failed the first time was that the opposition, with widespread support, feared that the proposed HRPB, in combination with the Private Information Protection Bill that the government was attempting to pass simultaneously, would restrict journalists' freedom to cover cases in which government employees had been guilty of human rights infringements (such as the ongoing Nagoya Prison scandal discussed above).[24] Furthermore, and this was the sticking point the second time around, there was also the issue of the bill lacking a formal definition of human rights, thus making the role of the NHRI ambiguous. The LDP

20 On Fiji, see Reinshaw et al. (2009–2010). As for the Mongolian case, see APF (2012).
21 *Jinken Yōgo Seisaku Suishin Iinkai* ('Policy Council on Human Rights Protection').
22 See full report at www.moj.go.jp/shingi1/shingi_990729-2.html.
23 In 2002 and in 2005, at the 154th and the 162nd Diet Sessions, respectively.
24 Interview with Mayumi Moriyama.

on its part did not have much room to maneuver against the opposition, as its right-wing faction was worried that the way the HRPB was formulated would give foreign residents the ability to serve on the NHRI and cast judgments on Japanese citizens. With the two sides unable to reach consensus, the HRPB fell off the agenda for a time. Nonetheless, it has recently re-appeared in political discussions, with the DPJ proposing in October 2012 to submit their version of the bill. Although this plan was scrapped when they lost office at the end of that year, the LDP has indicated that they will most likely be replacing it with human rights legislation of their own in the current parliament (*Japan Times* 2013).

Regardless of exactly how the NHRI discussion unfolds from here, one of the main points of contention will be its independence. While in the early 2000s the government of the time wanted to place the new body within MOJ's Human Rights Protection Bureau, the opposition, lobbied by the JFBA and NGOs, argued that the institution ought to be autonomous (Hurights Osaka 2002; Yamazaki 2005; Fukui 2011). An NHRI lacking independence would be unable, the opposition maintained, to offer a real criticism of the government. This argument would, of course, apply to the ability of the NHRI to exert influence on the death penalty issue as well. If, however, an independent NHRI is established, activists can hope that it might have a chance to bring about abolition, just as it has been the case elsewhere, even though the likelihood is that such an NHRI would find it more difficult to influence policy directly. So it seems with regards to an NHRI in Japan affecting the death penalty and human rights debates more generally, the crucial question, which remains to be answered, is how much freedom and power the government would be prepared to give to such a body.

4 Concluding remarks

This article has provided an up-to-date discussion on Japan's death penalty policy and its surrounding context. It has considered a variety of factors not previously considered in the literature that could individually, or in combination, affect current practices in Japan.

To summarize my findings, firstly, the Prison Law amendment did not result in greater openness of the system or any major changes of the conditions under which death row inmates are held; the restrictive ministerial and prison facilities' rules that used to govern the life of and visitations to death row inmates only informally are now part of the formal legal framework. Secondly,

the introduction of citizen participation in death penalty-related trials has resulted in a public request for more information about this punishment and its implementation, which will only increase as the number of jurors rises. Thirdly, despite a radical manifesto pledge, the short-lived stay of power in Diet of the DPJ did not bring any significant, long-term changes – DPJ Ministers did not even refrain from ordering executions. Fourthly, with regards to the raising levels of pressure for abolition from international and regional human rights bodies, Japan still proves immune. While the Japan Parliamentary League for the Abolition of the Death Penalty is keeping active in advancing their cause, their membership is still not powerful enough to pass a bill, thereby showing the leadership that outside observers would hope for. Fifthly, as far as the issue is concerned of a potential NHRI impacting on the death penalty policy, this will only be possible if the institution in question is independent of MOJ. So far, it remains unclear as to whether an autonomous NHRI will be established, as the issue largely depends on the balance of power within the Diet over the next few years.

In conclusion, while nothing has changed with regards to death penalty practices in Japan directly as a result of the social and legal developments I have described, there has been a step change in the transparency of the system. Most importantly, the new quasi-jury system has led to an increased amount of information about the death penalty being available in the public sphere. Moreover, were an independent NHRI established, as is still a possibility, this trend would likely continue. Thus, what has been, and still is, a key characteristic of the death penalty in Japan – secrecy – might not remain as such for a long time.

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Appendix

Interviewees in Japan (2007)

Emi Akiyama, Coordinator, Centre for Prisoners' Rights (CPR) (24 August); *Hideo Hiraoka*, Shadow Justice Minister, DPJ (31 August); *Nobuto Hosaka*, Diet Mem-

ber, SDP, also Secretary-General, Parliamentary League for the Abolition of the Death Penalty (23 August); *Satoko Ikeda*, Civil Servant, Correction Bureau, MOJ (31 August); *Yūichi Kaido*, Lawyer and Secretary-General, CPR (18 July); *Shizuka Kamei*, Party Leader, People's New Party (also Chair, Parliamentary League for the Abolition of the Death Penalty) (19 October); *Moritaka Kamoshita*, former prison guard (29 August, 25 October, and 5 November); *Hiroko Kazama*, Death Row Inmate, Tokyo Detention House (16 August); *Kōichi Kikuta*, Emeritus Professor of Criminal Law, Meiji University (29 October); *Aya Kuwayama*, Contributor, CPR (3 December); *Mayumi Moriyama*, Diet Member, formerly Justice Minister, LDP (17 December); *Jin Nagai*, Director, United Prisoners' Union (23 July); *Kumiko Niitsu*, Political Secretary, SDP (7 November); *Yasuo Ōguchi*, Civil Servant, Correction Bureau, MOJ (31 August); *Tsuneyasu Ozaki*, Lawyer, formerly Criminal Prosecutor, Tokyo District Court (8 August); *Yasuomi Sawa*, Staff Reporter, Kyōdo News (7 November); *Seiken Sugiura,* Diet Member, formerly Justice Minister, LDP (18 October); *Maiko Tagusari*, Lawyer (18 July and 8 November); *Makoto Teranaka*, Director, Amnesty International, Japan Office (28 August); *Kenta Yamada*, Secretary-General, Japan Civil Liberties Union (JCLU) (7 November); *Judge X* and *Judge Y* (names withheld for anonymity purposes), Tokyo District Court (13 December).

Gatherings attended in Japan (2007)

The examination of the Japanese Government's report on the progress towards the implementation of CAT, JFBA Session (19 July); Forum 90 Meeting (10 October); *Towards the Abolition of the Death Penalty*, Forum 90 Seminar featuring a talk by exonerated death row inmate Menda Sakae (13 October); *Death Penalty Abolition Camp*, organized by civil activists (3–4 November); *Criminal Justice and Criminals within the Society*, Discussion Session held to mark the 70th birthday of Prof. Kōichi Kikuta (4 November); JCLU Meeting of the Board of Directors (7 November); Meeting of abolitionist JFBA members (23 December).

Interviewees in Strasbourg, COE (20–21 October 2008)

Gerald Dunn (Directorate General of Human Rights and Legal Affairs, Human Rights Law and Policy Division); *Mario Henrich* (Secretary of the Standing Committee, Committee on Rules of Procedure and Immunities, Secretariat of PACE); *Kathleen Layle* (Secretary, Research and Documentation Unit, Secretariat of the PACE); *Günter Schirmer* (Secretary, Committee on Legal Affairs and Human Rights, PACE).

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