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The People Decide: The Effect of the Introduction of the Quasi-Jury System (*Saiban-In Seido*) on the Death Penalty in Japan

Leah Ambler*

I. INTRODUCTION

¶1 The Japanese people will soon decide the fate of criminal defendants for the first time in over 50 years.¹ Under the Lay Assessor Act as of May 2009, randomly selected members of the Japanese public² will preside over criminal trials alongside professional judges and be responsible for determining both verdicts and sentences.³ Japan's retention of the death penalty means that members of the public will ultimately have to decide whether a person lives or dies.⁴

¶2 This article examines the potential impact of the new lay assessor system, or *saiban-in seido*, on capital punishment in Japan, and considers whether it may reduce death sentences to the point of effectively abolishing them at trial stage in the District Court. The article posits that the introduction of the lay assessor system may create the momentum for Japan to align its criminal justice system with that of other developed countries—that is, abolition of the death penalty as an available criminal sanction.⁵

¶3 I approach questions about the lay assessor system and abolition of the death penalty from a normative perspective linked to current trends in international law and human rights law.⁶ Accordingly, this article argues that abolition of the death penalty—*de facto* or *de jure*—is the most desirable outcome of the introduction of lay participation in Japan. It explores the possibilities of a shift in the public conscience from passively

* I would like to thank Professor Kent Anderson for his guidance, patience and support. Thanks also to Japanese prosecutors, defense lawyers and abolitionists who provided views on the new system and to family and friends for their encouragement. Please note that this article reflects the author's personal views and not those of the Commonwealth Department of Foreign Affairs and Trade, or the Australian Government. This paper is dedicated to Kazutoshi Takahashi whose death sentence was confirmed by the Supreme Court of Japan, 28 March 2006.

¹ See Kent Anderson & Mark Nolan, Lay Participation in the Japanese Justice System: A Few Preliminary Thoughts Regarding the Lay Assessor System (*saiban-in seido*) from Domestic Historical and International Psychological Perspectives, 37 VAND. J. TRANSNAT'L L. 935, 937 (2004) (noting that Japan had a jury system between 1923 and 1943).

² *Id.* at 954; *Saiban-in no sanko suru keiji saiban ni kansuru horitsu* [Act Concerning Participation of Lay Assessors in Criminal Trials], Law No. 63 of 2004, art. 13 [hereinafter Lay Assessor Act], translated in 6 ASIAN-PAC. L. & POL'Y J. 233, 243 (2005) (noting lay assessors must be selected from Japanese citizens who are eligible to vote); *Koshoku senkyo ho* [Public Election Act], Law No. 100 of 1950, art. 9 (providing requirements for eligibility to vote).

³ *Id.* at art 6, translated in 6 ASIAN-PAC. L. & POL'Y J. 233, 240-41 (2005).

⁴ See *Keiho* [Penal Code], Law No. 45 of 1907, art. 9 (listing the available criminal penalties, namely death, imprisonment with hard labour, imprisonment, fine, detention or fine with added forfeiture).

⁵ See WILLIAM A. SCHABAS, THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW 14-15 (3d ed. 2002).

⁶ See, e.g., *id.*; ROBERT BADINTER ET AL., DEATH PENALTY – BEYOND ABOLITION (2004).

pro-capital punishment to abolitionist through active participation in the judicial system. It is without doubt that any outcomes will depend upon the roles played by each of the parties involved in the criminal justice system: the ministry of justice, judiciary, prosecutor's office, defendant and defense lawyers. This article will examine the development and possible impact of these roles through an analysis of the vested interests of each of the parties, from the staunchly pro-capital punishment to the violently opposed, and perhaps most importantly, to the fence-sitters.

Part One of this article describes developing international norms that are moving towards *de jure* abolition of the death penalty under all circumstances. Part Two describes the current capital punishment system in Japan—from arrest to execution—and the reasons used to justify its retention. Part Three explores Japan's twenty-year jury system in the pre-World War II period in light of the future role of lay assessors in deciding verdicts and sentences. Part Four considers how the lay assessor system may impact Japan's current attitude towards the death penalty and may even lead to a suspension of death sentences or *de facto* abolition. In assessing its impact, the article analyses the vested interests of each party involved. It concludes that the introduction of the *saiban-in seido* may prove a vital first step towards eventual *de facto* abolition of the death penalty in Japan, provided each party abides by rules of fairness and justice.

II. ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW

A. Background

Since the end of the Second World War, the international stance on capital punishment has shifted from retentionist to abolitionist—more than half the countries in the world have instated either *de facto* or *de jure* abolition of the death penalty. As of December 2001, only seventy-one countries and territories had retained the death penalty.⁷ Of these, thirty-four had *de facto* abolition, that is, no executions were carried out in the previous decade.⁸ Currently seventy-five countries and territories are *de jure* abolitionist and fourteen are *de jure* abolitionist for all but exceptional crimes, such as war crimes.⁹ The overwhelming trend towards *de facto* and *de jure* abolition in state practice, along with a growing body of international and regional instruments urging abolition, suggest that abolition of the death penalty is on the way to becoming a customary rule of international law.¹⁰

B. Abolition in International Instruments

Modern developments in international law and capital punishment began with the proclamation of the right to life in the 1948 Universal Declaration of Human Rights.¹¹ This right encompasses the right to protection of one's life from arbitrary deprivation by

⁷ ROGER HOOD, *THE DEATH PENALTY: A WORLDWIDE PERSPECTIVE* app. 1, table A1.1 (3d ed. 2002)

⁸ *Id.* at app. 1, table A1.2.

⁹ *Id.* app. 1, tbls. A1.3, A1.4.

¹⁰ *See, e.g.*, William A. Schabas, *International Law and the Death Penalty*, in *CAPITAL PUNISHMENT: STRATEGIES FOR ABOLITION* 36 (Peter Hodgkinson & William A. Schabas eds., 2004); SCHABAS, *supra* note 5; BADINTER ET AL., *supra* note 6.

¹¹ Universal Declaration of Human Rights, G.A. Res 217A, at art. 3, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 10, 1948).

the State.¹² The 1966 International Covenant on Civil and Political Rights¹³ further espoused the right to life¹⁴ and specifically referred to the death penalty and its abolition.¹⁵ The ICCPR also established a prohibition on cruel, inhumane or degrading treatment and torture. In addition, it codified the doctrine of due process, the presumption of innocence and the right to review.¹⁶ However, it did not impose any specific obligation to abolish or suspend capital punishment upon the ratifying States.¹⁷

Several scholars have argued that by separating the death penalty from the right to life, provisions of the ICCPR render the former an exception to the latter. However, the adoption in July 1991 of the Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty casts doubt on the validity of such arguments.¹⁸ The Second Optional Protocol came after a raft of UN Resolutions on abolition,¹⁹ and although Japan opposed the Draft Protocol, it voted in favor of the resolution that mandated its drafting.²⁰

C. Abolition in Regional Organizations

Even before the Second Optional Protocol entered into force, regional developments towards abolition began with the 1985 Council of Europe Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty.²¹ Subsequently in 1991, the Organization of American States adopted the Protocol to the American Convention on Human Rights to Abolish the Death Penalty.²² Most recently and perhaps most controversially on May 3, 2002, the Council of Europe opened for signature a further Protocol No. 13 to the Convention for the Protection of Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty in All Circumstances.²³ Signed by all member states except Azerbaijan and Russia and ratified by all but seven states,²⁴ Protocol No. 13

¹² For approaches considered by the drafters, see SCHABAS, *supra* note 5, at 24.

¹³ International Covenant on Civil and Political Rights, 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (entered into force 23 March 1976), [hereinafter ICCPR].

¹⁴ *Id.* at art. 6(1).

¹⁵ *Id.* at arts. 6(2), 6(4)-(6).

¹⁶ *Id.* at arts. 7, 14.

¹⁷ Japan ratified the ICCPR on September 21, 1979. See e.g., Office of the United Nations High Commissioner for Human Rights, *Status of Ratifications of the Principal International Human Rights Treaties as of 09 June 2004*, 6, <http://www.unhcr.ch/pdf/report.pdf>.

¹⁸ Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, opened for signature Dec. 15, 1989, G.A. res. 44/128, annex, 44, U.N. GAOR Supp. (No. 49) at 207, U.N. Doc. A/44/49 (entered into force July 11, 1991).

¹⁹ SCHABAS, *supra* note 5, at 156-167.

²⁰ See *id.* at 176 (Japan (UN Doc. A/C.3/37/SR.32, para. 44, UN Doc. A/C.3/37/SR.53, para. 4, UN Doc. A/C.3/37/SR.67, para. 84)).

²¹ Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, Apr. 28, 1983, Europ. T.S. No. 114.

²² Protocol to the American Convention on Human Rights to Abolish the Death Penalty, June 8, 1990, O.A.S. T.S. No. 73, 29 I.L.M. 1447.

²³ Protocol No. 13 to the Convention for the Protection of Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty in All Circumstances, May 3, 2002, Europe. T.S. No. 187.

²⁴ Armenia, Azerbaijan, Italy, Latvia, Poland, Russia, Spain. See Council of Europe Treaty Office, *Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty in All Circumstances CETS No. 187 - Status as of: Nov. 9, 2007*, <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=187&CM=&DF=&CL=ENG>.

permits neither reservations nor derogations and calls for outright abolition of the death penalty in all circumstances.²⁵ The strongly abolitionist Parliamentary Assembly of the Council of Europe has passed recommendations and resolutions calling on Japan, as a country with observer status, to institute a moratorium on executions and take the necessary steps towards abolition of the death penalty.²⁶

D. Abolition in Asia

¶9 The death penalty is most widely used in Asia. Only Nepal,²⁷ Hong Kong,²⁸ Cambodia²⁹ and Timor Leste have established *de jure* abolition.³⁰ Other attempts at abolition have met with little success. For example, after becoming the first country in Asia to abolish the death penalty in 1987, the Philippines reintroduced it in 1994.³¹ The prospect for eventual *de jure* abolition exists in many countries which maintain *de facto* abolition of the death penalty, including Laos (no executions since 1993), Myanmar (1989), Brunei Darussalam (1957) and Bhutan (1964).³² The abolition debate is also gaining traction in Taiwan and South Korea.³³

¶10 On May 17, 1998, the Hong Kong-based Asian Human Rights Commission pushed for abolition at the regional level by drafting and declaring Article 3.7 of the Asian Charter on Human Rights.³⁴ Article 3.7 specifically calls for the abolition of the death penalty in all states and sets out minimum standards to be complied with in countries

²⁵ See Peter Hodgkinson, *Capital Punishment: improve it or remove it?*, in CAPITAL PUNISHMENT: STRATEGIES FOR ABOLITION, *supra* note 10, at 21-22.

²⁶ Abolition of the Death Penalty in Council of Europe Observer States, EUR. PARL. ASS. 17th Sitting, Res. 1253 (June 25, 2001), *available at* http://assembly.coe.int/Documents/AdoptedText/ta01/eres1253.htm#_ftn1 (last visited Nov. 9, 2007); EUR. PARL. ASS., 17th Sitting, Rec. 1522 (June 25, 2001), *available at* <http://assembly.coe.int/Main.asp?link=http://assembly.coe.int/Documents/AdoptedText/TA01/EREC1522.htm>; EUR. PARL. ASS., 30th Sitting, Res. 1349 (Oct. 1, 2003), *available at* <http://assembly.coe.int/Main.asp?link=http://assembly.coe.int/Documents/AdoptedText/ta03/ERES1349.htm>; Eur. Parl. Ass., 30th Sitting, Rec. 1627 (Oct. 1, 2003), *available at* <http://assembly.coe.int/Main.asp?link=http://assembly.coe.int/Documents/AdoptedText/ta03/EREC1627.htm>.

²⁷ See HOOD, *supra* note 7, at 43 (Nepal abolished capital punishment in 1990 through insertion of Article 12 of the Constitution of the Kingdom of Nepal).

²⁸ *Id.* (Hong Kong abolished capital punishment in 1993 while under British administration and maintains it abolished under the 'one nation two systems' form of government under China).

²⁹ *Id.* (Cambodia abolished capital punishment in 1993 through insertion of Article 32 of the Constitution).

³⁰ *Id.* (East Timor abolished capital punishment on declaring independence from Indonesia in December 2001).

³¹ Law Reimposing the Death Penalty for Heinous Crimes, Republic Act 7659 (1994). Hodgkinson, *supra* note 25, at 25; HOOD, *supra* note 7, at 44.

³² *Id.* at 45.

³³ Hodgkinson, *supra* note 25, at 26. In particular, a Special Bill on Abolishing the Death Penalty was introduced to the seventeenth South Korean National Assembly in February 2005; however, the legislation is still under consideration. See Submission of the New South Wales Council for Civil Liberties to the Joint Standing Committee on Foreign Affairs, Defense and Trade: Inquiry into Australia's Relationship with Korea (Oct. 3, 2005), *available at* <http://www.nswccl.org.au/docs/pdf/south%20korea%20and%20death%20penalty.pdf>.

³⁴ Asian Human Rights Commission, *Asian Human Rights Charter*, art. 3.7, May 17, 1988, *available at* <http://material.ahrchk.net/charter/pdf/charter-final.pdf>.

where it still exists.³⁵ The Charter is an unofficial document that was used initially as a lobbying tool to urge countries in the Asian region to protect fundamental human rights.³⁶

III. THE DEATH PENALTY IN JAPAN

¶11 Against this international backdrop of declining use, Japan is an outlier in retaining the death penalty. It has continuously maintained an active system of capital punishment excepting two periods of *de facto* abolition.³⁷ Japan suspended death sentences for three and a half centuries during the *Heian* period from 818 A.D until 1156,³⁸ and for three years from November 1989 until March 1993.³⁹

¶12 This section describes current legal authority, procedures and practices for the death penalty in Japan. It then examines the varying justifications made by Ministers of Justice and the Public Prosecutors Office, along with references to public opinion polls, which serve to promote Japan's retentionist policy.

A. Capital Offences, Charges and Sentencing

¶13 Article 9 of the Penal Code lists the death penalty as one of six possible criminal punishments.⁴⁰ Eighteen crimes are punishable by death under the Penal Code and other special laws.⁴¹ In practice though, death sentences have been limited to convictions of murder, robbery-murder and rape-murder.⁴²

¶14 Despite the availability of the death penalty, prosecutors and judges lack guidelines for determining when to seek and impose it.⁴³ One formula for prosecutorial charges and judicial sentencing that was developed by a Japanese defense lawyer provides:⁴⁴

³⁵ *Id.*

³⁶ Seth R. Harris, *Asian Human Rights: Forming a Regional Covenant*, 1 ASIAN-PAC. L. & POL'Y J., at 4 (2000). Japanese groups and individuals—such as the Catholic Human Rights Committee, the International Human Rights Centre, the Japan Union of Civil Liberty, and academics from Sophia University Institute of International Relations and Kanagawa University—participated in the drafting of the charter.

³⁷ See PETRA SCHMIDT, CAPITAL PUNISHMENT IN JAPAN 9-31 (2002).

³⁸ Except for two occasions. See Daniel Foote, "The Door that Never Opens"?: *Capital Punishment and Post-Conviction Review of Death Sentences in the United States and Japan*, 19 BROOK. J. INT'L L. 367, 376 (1993); SCHMIDT, *supra* note 37, at 11-12.

³⁹ Foote, *supra* note 38, at 376.

⁴⁰ Penal Code, *supra* note 4, at art. 9.

⁴¹ *Id.*, at art. 77(1) (Insurrection); art. 81 (Instigation of Foreign Aggression); art. 82 (Assistance to the Enemy); 108 (Arson of Inhabited Buildings); art. 117 (Detonating by Explosives); art. 119 (Damage to Inhabited Buildings by Flood); art. 126 (Overturning of Trains); art. 127 (Endangering Traffic by Overturning a Train); art. 146 (Pollution of Water Supplies with Poisonous Materials and Causing Death Thereby); art. 199 (Homicide); art. 240 (Robbery Causing Death or Injury); art. 241 (Rape at the Scene of the Robbery; Causing Death Thereby); see also SCHMIDT, *supra* note 37, at 30 (use of explosives; causing death as a result of a duel; causing death as a result of an aeroplane crash; causing death by hijacking an aircraft; killing a hostage); Yoshihiro Yasuda, *The Death Penalty in Japan*, in DEATH PENALTY, *supra* note 6, at 215, 217.

⁴² Foote, *supra* note 38, at 380.

⁴³ Joachim Herrmann, *The Death Penalty in Japan: An "Absurd" Punishment*, 67 BROOK. L. REV. 827, 830 (2002).

⁴⁴ David T. Johnson, *The Death Penalty in Japan: Secrecy, Silence and Salience*, in THE CULTURAL LIVES OF CAPITAL PUNISHMENT: COMPARATIVE PERSPECTIVES 251, 262-63 (Christian Boulanger & Austin Sarat eds., 2005).

- (i) Single murders without prior convictions do not result in death charges or convictions;
- (ii) Double murders without prior convictions may result in a sentence of life imprisonment instead of a death sentence; and
- (iii) Triple murders will definitely result in a death charge and sentence.⁴⁵

¶15 Other criteria often used to impose the death penalty have been derived from the 1983 Supreme Court decision in the famous Nagayama trial⁴⁶ and include the circumstances of the crime, motive, number of victims and effect on society.

¶16 The new Lay Assessor Act contains nothing in the way of sentencing guidelines for lay assessors or judges. Whether the yet-to-be-drafted Supreme Court Rules will provide such guidance remains to be seen.

B. Appeals

¶17 Once sentenced to death at the trial stage in a District Court, a convicted person may lodge a direct appeal to the High Court for review of the original judgement, and subsequently to the Supreme Court on constitutional matters or precedential consistency.⁴⁷ Once a second appeal fails and the sentence is confirmed, the convicted person may seek retrial, pardon, amnesty or extraordinary appeal, all of which are granted at the discretion of the Cabinet.⁴⁸ Such requests do not guarantee a stay of execution.⁴⁹

¶18 Although this article focuses on the effect of lay participation on the death penalty at the trial phase, subsequent High Court and Supreme Court review of *saiban-in* decisions will ultimately decide whether death sentences will continue to be handed down.

C. Executions

¶19 Seven detention centers are equipped for executions, which are carried out by hanging under Japanese law.⁵⁰ Executions must be carried out within six months of the judgment becoming final⁵¹ and within five days of the issuance of an order by the Minister of Justice.⁵² However, the lengthy nature of appeals and applications for retrial usually extends the period between confirmation of sentence and execution to fifteen to twenty years.⁵³

⁴⁵ *Id.*

⁴⁶ Nagayama v. Japan, 37 Keishu 6, 609 (Sup. Ct., Jul. 8, 1983). See also SCHMIDT *supra* note 37, at 50.

⁴⁷ Yasuda, *supra* note 41, at 220.

⁴⁸ Nihonkoku Kenpo [Constitution of Japan], art. 73, para. 2 [hereinafter Kenpo] (“The Cabinet shall . . . decide on general amnesty, special amnesty, commutation of punishment, reprieve, and restoration of rights”); SCHMIDT, *supra* note 37, at 123.

⁴⁹ Shikei Haishi Henshu Iinkai, 2004 Nenpo: Mujitsu no shikeiin tachi [2004 Annual Report: The Innocent Condemned] 88 (2004) (Teruo Ono was executed 17 December 1999 with a pending request for retrial).

⁵⁰ Keiji soshoho [Code of Criminal Procedure], Law No. 131 of 1949, art. 475.

⁵¹ *Id.* at art. 476.

⁵² *Id.* at art. 475.

⁵³ SCHMIDT, *supra* note 37, at 196.

Table 1. Death Sentences and Executions Since 1988⁵⁴

Year	88	89	90	91	92	93	94	95	96	97	98	99	00	01	02	03	04
District Court Decisions	10	2	2	3	1	4	8	11	1	3	7	8	14	10	18	13	14
High Court Decisions	4	5	2	4	4	1	4	4	3	2	7	4	6	16	4	17	15
Supreme Court Decisions	7	5	7	4	4	5	2	3	4	4	5	4	3	4	2	0	13
Newly confirmed sentences	11	5	6	5	5	7	3	3	3	4	7	4	6	5	3	2	15
Executions	2	1	0	0	0	7	2	6	6	4	6	5	3	2	2	1	2
Number of people with confirmed sentences	38	40	46	51	56	56	57	54	51	51	52	50	53	56	57	56	68

D. *Justification for Japan's Retention of the Death Penalty*

1. The Ministry of Justice

¶20 The Japanese Minister of Justice is responsible for signing execution orders (*shikei shikko meirei*) and has ultimate control over the continuation of executions. I have classified Japanese Ministers of Justice into three categories of approaches to signing execution orders. The first is the “Sheriff”-- a Minister of Justice who exercises his duties in the pursuit of social stability. For example, Minister Masaharu Gotoda justified signing three execution warrants, which ended a forty-month moratorium from November 1989 to March 1993 by stressing his obligation as Minister of Justice to “protect law and order.”⁵⁵

¶21 The second category consists of the “Servants,” or Ministers of Justice who prioritize their official duties above any contrary personal beliefs. For instance, at current Minister of Justice Seiken Sugiura’s first press conference upon taking office, he announced that he would not sign an execution order for philosophical and religious reasons.⁵⁶ The very next day, speaking in his official capacity, he retracted that statement:

The statement I made at yesterday’s press conference in relation to executions was an expression of my individual sentiments and not a statement in relation to the performance of my role as Minister of Justice and guardian of the law. In this respect I regret that there has been a misunderstanding and seek to rectify it.⁵⁷

⁵⁴ Shikei Haishi Henshu Iinkai, *supra* note 49, at 141.

⁵⁵ Johnson, *supra* note 44, at 257.

⁵⁶ Minister of Justice Seiken Sugiura, Homu daijin hatsutochogo kisha kaiken no gaiyo [Overview of press conference after the Minister of Justice first took up office] (Oct. 31, 2005).

⁵⁷ *Id.* (Nov. 1, 2005).

¶22 The final group are the “Samaritans,” those Ministers of Justice who refuse to sign executions on principle. Minister Akama Bunzo was perhaps the first of these; he reportedly refused to sign any execution orders presented to him during his term from November 1967 until November 1968.⁵⁸ Other Samaritans include Ministers Hasegawa, Kajiyama, Sato and Tahara who held office between November 1989 and March 1993.⁵⁹ During this period, not a single execution took place, effectively resulting in a forty-month moratorium on executions.

2. The Judiciary and the Public Prosecutors Office

¶23 While Ministers of Justice play the decisive role in finalizing death sentences, prosecutors initiate the process by deciding whether to seek the death penalty at the trial stage and whether to continue to seek it on appeal. In turn, decisions by prosecutors to seek death sentences place pressure on judges to grant them, as Japanese judges tend to give weight to the exercise of prosecutorial discretion.⁶⁰ Due in large part to judges and prosecutors sharing similar social and educational backgrounds,⁶¹ judges rely heavily on evidence of confessions extracted by prosecutors for convictions.⁶² This reliance results in a seemingly concerted effort between prosecutors and judges in criminal cases. A further factor contributing to the judiciary’s pro-retentionist stance is its conservatism.⁶³ Trained and nurtured by the Ministry, the judiciary demonstrates a strong tendency to defer to government policy. Death sentences prove no exception.⁶⁴ The greatest imperative on judges to continue death sentencing is, however, a perception of public pressure. High profile cases attract extensive media attention which arouses public sentiment and creates a perceived obligation on the judiciary to give defendants in more violent crimes the ultimate penalty.⁶⁵

3. Public Opinion Polls

¶24 The most frequently cited reason for continued sentencing and execution in Japan is public support for capital punishment. The Japanese government has relied on public opinion polls to respond to criticism and justify its stance both domestically and

⁵⁸ SCHMIDT, *supra* note 37, at 63.

⁵⁹ Shihei Haishi Henshu Iinkai, *supra* note 49, at 205.

⁶⁰ See, e.g., DAVID T. JOHNSON, THE JAPANESE WAY OF JUSTICE: PROSECUTING CRIME IN JAPAN 62 (2002) (Judges not only convict what prosecutors charge, but they also impose sentences which prosecutors seem to like).

⁶¹ *Id.*

⁶² SCHMIDT, *supra* note 37, at 152.

⁶³ There is general consensus among Japanese and foreign academics on the conservatism of the Japanese judiciary. However, different reasons are identified. See, e.g., Setsuo Miyazawa, *Administrative control of Japanese Judges*, in LAW AND TECHNOLOGY IN THE PACIFIC COMMUNITY 263 (Philip S.C. Lewis, ed., 1994); J. Mark Ramseyer, *Judicial (In)dependence in Japan*, in UNIV. OF CHICAGO LAW SCHOOL RECORD 1993-1995 at 4 (volume 39 Fall) (1993); John O. Haley, *Judicial Independence in Japan Revisited*, 25 *Law in Japan* 1, 2, 8-18 (1995), in JAPANESE LAW IN CONTEXT: READINGS IN SOCIETY, THE ECONOMY AND POLITICS 89 (Curtis J. Milhaupt et al., eds., 2001).

⁶⁴ ‘Courts,’ *infra* Part III. E(a).

⁶⁵ SCHMIDT, *supra* note 37, at 122; see also, Mayumi Negishi and Kaho Shimizu, *Young killers at the heart of capital punishment fight*, THE JAPAN TIMES, May 20, 2006, <http://search.japantimes.co.jp/print/nn20060520f2.html> (last visited Nov. 9, 2007).

internationally.⁶⁶ Linking the will of the people to retention of capital punishment gives such sentences a certain democratic legitimacy.

¶25 Public opinion polls regularly demonstrate widespread support for capital punishment. In the most recent poll conducted in 2004 by the government, an unprecedented 81.4% of people surveyed agreed with the statement that in certain circumstances the death penalty is unavoidable.⁶⁷ Arguably, public opinion polls are relatively more empirical and form a more rational and universal basis⁶⁸ for retention.⁶⁹

Table 2. Public opinion poll results concerning the death penalty in the last 50 years⁷⁰

Year	Implementing Agency	Retentionist	Abolitionist
1953	Prime Minister's Office	65.0%	18.0%
1967	Prime Minister's Office	70.5%	16.0%
1975	Prime Minister's Office	56.9%	20.7%
1980	Prime Minister's Office	62.3%	14.3%
1989	Prime Minister's Office	66.5%	15.7%
1990	Tokyo Newspaper	53.0%	34.0%
1993	Asahi Television	62.1%	20.6%
1993	Yomiuri Newspaper	63.9%	28.3%
1994	Japan Broadcasting Corporation (NHK)	62.8%	17.2%
1994	Prime Minister's Office	73.8%	13.6%
1994	Forum 90	58.3%	22.2%
1999	Prime Minister's Office	79.3%	8.8%
2003	Asahi Television	45.7%	32.0%
2004	Cabinet Office	81.4%	6.0%

¶26 Critics point out many deficiencies in the public opinion polls, including a lack of cross-sectional quality in the audience surveyed; problematic phrasing of questions; and the political motivations of the agency conducting the poll.⁷¹ Nonetheless, overall support for Japan's system of capital punishment is undeniably high.

¶27 Judging from the normative perspective grounded in international law that the death penalty should be abolished under all circumstances, one argument may be that the Japanese public is wrong in its support of the death penalty. This article asserts instead that the Japanese public is uninformed. Due to their relative ignorance about the system of capital punishment in their own country, the Japanese are ill-equipped to make judgments required in these opinion polls. This lack of information permeates every

⁶⁶ See ICCPR Human Rights Committee, *Fourth Periodic Reports of States Parties Due in 1996: Japan*, 01/10/97, CCPR/C/115/Add.3 art. 6, para. 62 (Jan. 10, 1997) ('under present conditions, the majority of the Japanese people insist that capital punishment should be maintained to punish those who commit extremely atrocious offences'), available at

<http://www.unhcr.ch/tbs/doc.nsf/0/9afe294abf7c3f628025663900556e44?Opendocument>; see, e.g., SCHMIDT, *supra* note 37, at 61-62; NOEL WILLIAMS, *THE RIGHT TO LIFE IN JAPAN* 44 (1997).

⁶⁷ See Government Publications Office, Department of the Minister for the Cabinet Office, *Kihonteki ho seido ni kansuru yoronchosa [Public opinion poll in relation to the basic legal system]* (Dec, 2004), <http://www8.cao.go.jp/survey/h16/h16-houseido/index.html> (last visited Nov. 9, 2007).

⁶⁸ See SCHMIDT, *supra* note 37, at 160.

⁶⁹ *Id.* at 158.

⁷⁰ *Id.* at 117.

⁷¹ *Id.* at 157-188.

stage of the process—from interrogation of suspects⁷² to post-trial detention⁷³ to most importantly, execution.⁷⁴

¶28 Up until now the direct impact of this judgment has been minimal. However, the introduction of the lay assessor system in May 2009 will require the Japanese public to determine whether to sentence individual defendants to death, not whether to retain or abolish the death penalty as a system. Already future lay assessors have indicated that they do not want to be involved in the system; in one public opinion poll, 46.5 percent of those surveyed did not want to become lay assessors because they did not want to judge people. Another 46.4 percent responded that they did not wish to participate because of the difficulty in determining guilt or innocence.⁷⁵ For the first time, the new *saiban-in seido* will educate and equip the public with the necessary tools to make an informed decision about the future of capital punishment in Japan. While predictions about the nature of this decision are difficult, a certain shift in the public’s stance on the death penalty is foreseeable.

E. Abolition of the Death Penalty in Japan

¶29 Despite overwhelming support for retention of the death penalty in the judiciary, legislature and general public, abolitionist groups do exist in each of these sectors. This section applies an institutional analysis to attempts thus far as well as plans in the future to abolish Japan’s system of capital punishment.

1. The Courts

¶30 To date, challenges to the constitutionality of the death penalty have been few and unsuccessful. By the end of the 1950s, the Supreme Court had ruled on almost all major constitutional challenges to capital punishment and made no subsequent revisions thereafter.⁷⁶

¶31 Perhaps the most unequivocal of judicial precedents on the death penalty is the Japanese Supreme Court’s 1948 decision⁷⁷ that considered whether capital punishment contravenes the right to life⁷⁸ and the prohibition on cruel punishment.⁷⁹ The court found

⁷² A suspect may be detained and questioned for twenty-three days between arrest and indictment without any form of mandatory recording of the interrogation process. *See id.*, at 152.

⁷³ Once a death sentence is confirmed, all communication with the outside world is severed, except brief, supervised meetings with lawyers and close family. *See, e.g.,* Herrmann, *supra* note 43; Yasuda, *supra* note 41.

⁷⁴ Most executions take place when Parliament is not sitting and the practice of publishing the number and date of executions has only been in place since November 1998. *See, e.g.,* Johnson, *supra* note 44, at 258; SCHMIDT, *supra* note 37, at 75.

⁷⁵ *See* Government Publications Office, Department of the Minister for the Cabinet Office, *Saiban-in seido ni kansuru yoron chōsa [Public opinion poll in relation to the Lay Assessor System]* (Feb. 2005), <http://www8.cao.go.jp/survey/h16/h16-saiban/>.

⁷⁶ SCHMIDT, *supra* note 37, at 100.

⁷⁷ *A v. Japan*, 2 Keishu 3, 191 (Sup. Ct., 1948).

⁷⁸ Constitution of Japan, art. 13, provides, “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.” KENPO, *supra* note 48, at art. 13.

⁷⁹ *Id.* at art. 36 (“The infliction of torture by any public officer and cruel punishments are absolutely forbidden”).

that the Constitution protects an individual's right to life only to the extent that that right does not interfere with the public welfare. Therefore, in eliminating threats to the public welfare, the death penalty trumped the right to life.⁸⁰ The Court also held that capital punishment does not contravene the prohibition of cruel punishment contained in article 36.⁸¹ Although the four judges in the minority allowed scope for reconsideration of this doctrine in the event of a shift in public opinion against the death penalty, this remains the definitive stance on the issue.⁸²

¶32 In the final constitutional challenge to capital punishment, *Ichikawa et al v. Japan*,⁸³ defense counsel argued that the current method of execution violates Article 31's requirement that criminal penalties be imposed according to procedure established by law. Defense counsel claimed that the Act concerning the Validity of Provisions which were in Force at the Time of Enactment of the Japanese Constitution⁸⁴ rendered ineffective Cabinet Order No. 65 of 20 February 1873,⁸⁵ which created the framework for executions; hence, the death penalty was not being carried out according to procedure established by law. The Court rejected this argument and with no further successful challenges to capital punishment's constitutionality as of June 2006, has unequivocally excluded a judicially-driven abolition of the death penalty.

¶33 Nevertheless, there are judges opposed to the death penalty, including former Justice of the Supreme Court of Japan Shigemitsu Dando.⁸⁶ Yet even Dando spoke of death sentencing as unavoidable during his term as Supreme Court Justice,⁸⁷ as prosecutors continue to press for the death penalty where it remains a legal form of punishment.⁸⁸ Accordingly, legislative change alone can remove this constraint, which ultimately requires a shift in the official government stance.

2. The Legislature

¶34 The official position of the Japanese government is retentionist. Apart from an unofficial three-year moratorium on the death penalty by virtue of individual Ministers of Justice choosing not to sign execution orders, there has been at least one execution annually.⁸⁹ Bills on abolition were presented to the Diet four times in 1901, 1902, 1906 and 1956. None of these bills passed.

⁸⁰ See SCHMIDT, *supra* note 37, at 99.

⁸¹ *Id.* at 91.

⁸² *Id.*

⁸³ *Ichikawa et al v. Japan*, 15 KEISHU 7, 1106 (Sup. Ct., July 19, 1961), translated in THE CONSTITUTIONAL CASE LAW OF JAPAN: SELECTED SUPREME COURT DECISIONS, 1961-70, at 161-164 (Hiroshi Itoh & Lawrence Ward Beer eds., 1978).

⁸⁴ Nihon koku kenpo shiko no sai ni gen ni koryoku wo yusuru meirei no kitei no koryokuto ni kansuru horitsu [Act Concerning the Validity of Provisions which Were in Force at the Time of Enactment of the Japanese Constitution], April 18, 1947.

⁸⁵ Dajokan fukoku [A Revised Chart of Hanging Equipment], Cabinet Order No. 65 of 1873, available at <http://hourei.ndl.go.jp/help/ilabhelp.html#dajyoukan>.

⁸⁶ See Shigemitsu Dando, *Toward the Abolition of the Death Penalty*, 72 IND. L.J. 7 (1996).

⁸⁷ See *id.* at 15.

⁸⁸ See *id.* at 16.

⁸⁹ Shikei Haishi Henshu Inkaikai, *supra* note 49, at 169 ("It is considered that abolition of the death penalty would be inappropriate." (quoting *Chieko Nono*, *Item 9, Minutes of the Justice Committee*, 161st Sess. of the H. of Councillors (7 November 2004) (response of former Minister of Justice))).

¶35 In 1994, however, several members of the Diet formed an all-party Diet Members' League for the Abolition of the Death Penalty (Parliamentary Union for the Abolition of the Death Penalty).⁹⁰ As of 2003 the League had 122 members, the equivalent of one-sixth of the Diet.⁹¹ In conjunction with the Japan Federation of Bar Associations (JFBA),⁹² in November 2004 the League drafted an Act for a Moratorium on Executions. The League considered the passage of this Act to be the best first step towards abolition, based on advice from Parliamentary Assembly members of the Council of Europe who attended a Justice and Human Rights Seminar hosted by the Diet Members' League on May 17, 2002.⁹³ The subsequently established JFBA Committee on the Realization of a Moratorium on Executions⁹⁴ produced the first draft of the Act, which also incorporated the establishment of a House of Councillors Committee on the Death Penalty on May 17, 2005.⁹⁵ As of June 2006, the Bill has yet to be presented to parliament. Nevertheless, increased abolitionist activity at a governmental level suggests that if the momentum continues, *de jure* abolition may be possible.

3. The People

¶36 Around two dozen abolitionist groups have established themselves in Japan,⁹⁶ the largest of which is Forum 90.⁹⁷ Forum 90 was set up in 1990 as a collaboration among Amnesty International's Japan Section, private citizens, community organizations, lawyers, politicians, academics, members of religious groups and convicted persons. Originally established to support Japan's ratification of the Second Optional Protocol, Forum 90 now has over 5,000 members. It conducts seminars, holds interviews with the Minister of Justice, and cooperates with abolitionist movements in Korea and the United States.⁹⁸ Forum 90, along with other organizations such as Amnesty International and the Japan Civil Liberties Union, has submitted NGO reports on the death penalty in Japan to the United Nations Human Rights Committee.⁹⁹

¶37 Despite gradually changing attitudes towards capital punishment in Japan, the legislature, judiciary, administration and the populace continue to support the death penalty. The following section examines Japan's previous jury system, the new lay assessor system, and their past and future impact on the death penalty in Japan.

⁹⁰ *Shikei haishi giin renmei*.

⁹¹ Yasuda, *supra* note 41, at 229.

⁹² *Nihon bengoshi rengokai (nichibenren)*.

⁹³ See Shikei Haishi Henshu Iinkai, *supra* note 49, at 184.

⁹⁴ *Nichibenren shikei shikko teishi jitsugen iinkai*.

⁹⁵ Shikei seido chosakai no secchi oyobi shikei shikko no teishi ni kansuru horitsu [Act Concerning the Establishment of the Committee on the Death Penalty and a Moratorium on Executions], First Draft of the Committee 17 May 2005.

⁹⁶ See Shikei Haishi Henshu Iinkai (2004) *Mujitsu no shiheishu-tachi*. Tokyo Impakuto Press, 177-186 (for a list of these groups).

⁹⁷ Shikei haishi kokusai joyaku no hijun wo motomeru Forum 90.

⁹⁸ Shikei Haishi Henshu Iinkai, *supra* note 49, at 179.

⁹⁹ See, e.g., FORUM 90, ALTERNATE REPORT ON ARTICLE 6 OF THE ICCPR WITH REGARD TO THE FOURTH PERIODIC REPORT OF THE GOVERNMENT OF JAPAN (Sept. 1998); AMNESTY INT'L, JAPAN: THE DEATH PENALTY: SUMMARY OF CONCERNS, AI INDEX: ASA 22/01/97 (1997); INT'L FED'N FOR HUMAN RIGHTS, THE DEATH PENALTY IN JAPAN: A PRACTICE UNWORTHY OF A DEMOCRACY, REPORT NO. 359/2, at 8-9 (2003), <http://www.fidh.org/IMG/pdf/jp359a.pdf> (citing JAPAN CIVIL LIBERTIES UNION, 1998 REPORT CONCERNING THE PRESENT STATUS OF HUMAN RIGHTS IN JAPAN (Oct. 1998)).

IV. LAY PARTICIPATION AND THE DEATH PENALTY IN JAPAN

¶38 The concept of lay participation in the criminal justice system in Japan is not new. For example, civil conciliation proceedings (*chotei*) involved lay persons during the Tokugawa period,¹⁰⁰ in the pre-WWII jury system that lasted for twenty years¹⁰¹ and in prosecutorial review commissions (*kensatsu shinsa kai*).¹⁰² This section briefly describes the twenty-year jury system that was suspended in the midst of World War II and examines its outcomes relative to the new lay assessor system and its role in potential abolition of the death penalty. It then describes the new lay assessor system and its future shape and influence as the greatest grant of judicial decision-making power to the Japanese people to date.

A. *The Japanese Jury (1923-1943)*1. Background

¶39 Japan's pre-war jury system (*baishin seido*) was introduced by the 1923 Jury Act,¹⁰³ which, like the Lay Assessor Act,¹⁰⁴ imposed a five-year grace period before the Act entered force. After taking effect in 1928, the jury system was then suspended in 1943.¹⁰⁵ The pre-war jury system was based on systems for lay participation in France, Germany, England and the United States.

¶40 In the pre-war system, a jury presided over death or life imprisonment trials unless the accused chose otherwise.¹⁰⁶ In all other cases, juries were only empanelled if specifically requested by the defendant,¹⁰⁷ in which case the defendant had to bear the costs of the jury.¹⁰⁸ Only Japanese males over the age of thirty who paid three yen or more in taxes over the previous two years were eligible to serve as jurors.¹⁰⁹ Rather than returning a verdict of guilty or not guilty, the jury deliberated and formulated responses to questions of fact posed by the judge.¹¹⁰ A simple majority of the twelve jurors¹¹¹ determined the responses, which were ultimately not binding on the outcome of the case.¹¹² The Jury Act did not allow for objections to the judge's jury instructions.¹¹³

¹⁰⁰ The Tokugawa period ran from 1603 to 1868. Lester W. Kiss, *Reviving the Criminal Jury in Japan*, 62 LAW & CONTEMP. PROBS. 261, 280 (1999); See also DAN FENNO HENDERSON, CONCILIATION AND JAPANESE LAW: TOKUGAWA AND MODERN, VOLUMES I AND II (1965).

¹⁰¹ See 'The Japanese Jury', *infra* Part IV. A.

¹⁰² See, e.g., Mark West, *Prosecution Review Commissions: Japan's Answer to the Problem of Prosecutorial Discretion*, 92 COLUM. L. REV. 684, 695 & n.61 (1992).

¹⁰³ Baishin ho [Jury Act], Law No. 50 of 1923 [hereinafter Jury Act].

¹⁰⁴ Lay Assessor Act (Supp. 2004), art. 1, *supra* note 2, at 280.

¹⁰⁵ Baishin ho no teishi ni kansuru horitsu [Act to Suspend the Jury Act], Law No. 88 of 1943.

¹⁰⁶ *Id.* at art. 3.

¹⁰⁷ *Id.*

¹⁰⁸ Takashi Maruta, *The Criminal Jury System in Imperial Japan and the Contemporary Argument for Its Reintroduction*, 72 INT'L REV. PENAL L. 215, 216 (2001) (Fr.).

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* at 217.

¹¹³ Jury Act, *supra* note 103, at art. 78.

2. Death Sentences and the Japanese Jury

¶41 In contrast to jurors in the future Japanese *saiban-in seido*, pre-war jurors in Japan did not have to decide directly whether to sentence a particular defendant to death. Nevertheless, the experience of those jurors offers a glimpse into how jurors in the new lay assessor system may act when called upon to sentence a criminal. Data collected from Japan's original jury system suggests that lay people are more lenient than professional judges in criminal sentencing. Juries returned significantly more acquittals than modern judge-only trials across the board and despite wartime mobilization and other impediments.¹¹⁴ For example, a study of the criminal courts in Sendai between 1928 and 1943 indicates a certain leniency in the overall jury decisions; of sixteen defendants tried by juries, ten were acquitted and three were found guilty of a lesser charge.¹¹⁵ A second study found that juries acquitted sixty-three percent of murder suspects and accused arsonists, while judges acquitted only .07% of persons accused of those crimes during the same period.¹¹⁶ Scholars argue that this dramatic difference in outcomes resulted from jurors' heavier reliance on physical evidence, replacing the traditional judicial reliance on prosecutorial dossiers and written confessions in convictions.¹¹⁷ If the new lay assessors act similarly to their predecessors, this may allow room for *de facto* abolition in the form of lesser sentences or acquittals and may even create a momentum for *de jure* activism.

B. *The New Lay Assessor System*

¶42 While not the first form of lay participation in Japanese history, the *saiban-in seido* is the first of its kind in Japan and the world.¹¹⁸ A hybrid of the classic common law jury system and the mixed courts of the civil system, this model for a new lay assessor system significantly reconstructs criminal justice in Japan and thereby may change Japan's fundamental approach to capital punishment. This section highlights areas for potential development and change through an analysis of articles in the Lay Assessor Act related to the role of *saiban-in* in death sentencing.

1. Purpose

¶43 The Lay Assessor Act was enacted on May 28, 2004, as one of a suite of judicial reforms proposed by the Justice System Reform Council (*shihō seido kaikaku shingikai*) in its 2001 report.¹¹⁹ The main goals of the *saiban-in seido* are to deliver better justice and promote a more democratic society through citizen involvement in the judicial process.¹²⁰ The explicit purpose of the Lay Assessor Act is “to contribute to the

¹¹⁴ See Anderson & Nolan, *supra* note 1, at 964.

¹¹⁵ Maruta, *supra* note 108, at 217.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ For a detailed background of the political lead-up to the drafting of the law, see generally Anderson & Nolan, *supra* note 1.

¹¹⁹ See generally JUSTICE SYSTEM REFORM COUNCIL, RECOMMENDATIONS OF THE JUSTICE SYSTEM REFORM COUNCIL—FOR A JUSTICE SYSTEM TO SUPPORT JAPAN IN THE 21ST CENTURY, ch. IV, pt. 1(1), 88-92 (June 12, 2001), available at <http://www.kantei.go.jp/foreign/judiciary/2001/0612report.html>.

¹²⁰ Anderson & Nolan, *supra* note 1, at 941-44.

promotion of the public's understanding of the judicial system and thereby raise their confidence in it."¹²¹ From the outset, even before the Act was drafted, there was no consideration of the protection of defendants' rights as a reason for reform.¹²² Neither the drafters nor the text itself envisage the introduction of the new system as a catalyst for reform and ultimate abolition of capital punishment in Japan. Any such reform must therefore begin at a grassroots level upon implementation of the system.

2. Lay Assessor Trials

¶44

In a typical lay assessor trial, six *saiban-in* will sit on a panel with three judges and determine both the verdict and sentence in criminal cases.¹²³ To this end, lay assessors and judges will make joint decisions in recognizing the facts, applying the laws to those facts and determining sentences.¹²⁴ Decisions of the mixed panel will be made on the basis of a simple majority, which must include the vote of one judge.¹²⁵ Lay assessors are to be selected by lottery¹²⁶ from a list of eligible voters in each district¹²⁷ and will preside over all capital trials.¹²⁸ In 2004, 3,308 trials would have been eligible for lay assessment. Notably, prosecutors could have sought capital punishment in up to two-thirds of those trials.

Table 3. 2004 Trials Eligible for Lay Assessment (by offence)¹²⁹

Offence	Number of Trials
Robbery causing bodily injury	890
Murder	795
Arson of an inhabited structure	297
Bodily injury causing death	277
Robbery and rape causing death	270
Forcible Indecency resulting in death or injury	141
Robbery causing death	126
Robbery and rape	105
Offences against the Special Drugs Act	83
Offences against the Stimulant Drug Control Act	80
Currency forgery	79
Dangerous driving causing death	50
Offences against the Possession of Firearms and Weapons Control Act	40
Money laundering	24

¹²¹ Lay Assessor Act, art. 1, *supra* note 2, at 236.

¹²² The Justice System Reform Council, *Recommendations of the Justice System Reform Council - For a Justice System to Support Japan in the 21st Century*, June 12, 2001, available at http://www.kantei.go.jp/foreign/policy/sihou/singikai/990612_e.html.

¹²³ *See id.* at art. 2, at 237, art. 6, at 240.

¹²⁴ *See id.* at art. 6, at 240-241 (in relation to interpretation of relevant law, lay assessors may comment but do not have a vote).

¹²⁵ *Id.* at art. 66, at 273.

¹²⁶ *Id.* at art. 26, at 252.

¹²⁷ *See id.* at art. 13, at 243.

¹²⁸ *Id.* at art. 2, at 237.

¹²⁹ Supreme Court of Japan, *Zaimei betsu ni mita taisho jikensu (heisei 16 nen) [Number of subject cases by offence (2005)] (2005) Saiban-in Seido [Lay Assessor System]*, <http://www.saibanin.courts.go.jp/shiryō/pdf/06.pdf>.

Capture and imprisonment resulting in death	15
Kidnap and ransom	15
Others	21
Total	3,308

3. Qualification of Lay Assessors

¶45 Lay assessors will initially be selected at random from the general public. They must be eligible to vote; that is, they must be Japanese citizens who are twenty years of age or more.¹³⁰ Certain persons are prohibited or disqualified from service, namely lawyers, quasi-lawyers and politicians, and persons who have not completed compulsory education, were subject to imprisonment, or for whom lay assessor duties would be a burden.¹³¹ Lay assessor candidates may decline service if they are elderly, members of local councils, students, or have recently served as a lay assessor or on a Prosecutorial Review Commission.¹³²

¶46 Lay assessors who have difficulty executing their duties due to illness, carers' duties, potential damage to business, or attendance at a parent's funeral or important social obligation are also excused from service.¹³³ These allowances for declining service leave significant leeway for self de-selection by those who oppose the death penalty and/or do not wish to be involved in sentencing a defendant to death, even as a minority vote.¹³⁴

¶47 Another provision of the Lay Assessor Act pertaining to capital punishment is Article 18, which grants courts discretion to disqualify lay assessor candidates whom the court deems may act unfairly in a trial.¹³⁵ This provision may effectively eliminate lay assessor candidates identified as being opposed to the death penalty. Arguably, as long as the death penalty remains a valid sentence under the Penal Code, an abolitionist lay assessor is incapable of acting fairly in determinations of whether to sentence a defendant to death.

4. Dismissal

¶48 The Lay Assessor Act contains a procedure similar to the American voir-dire, whereby the prosecutor, defendant or defense counsel may invoke a number of grounds to request dismissal of lay assessors.¹³⁶ In particular, a request for dismissal may be based on "fear that any lay assessors or reserve lay assessors would conduct a trial unfairly,"¹³⁷ but only where the causes have already arisen or are learned after the appointment of the particular lay assessor. Pursuant to this provision, the court is entitled

¹³⁰ See Anderson & Nolan, *supra* note 1, at 992.

¹³¹ Lay Assessor Act, art. 14-15, *supra* note 2, at 243-246.

¹³² *Id.* at art. 16, at 246-247

¹³³ See *id.*

¹³⁴ See *id.*

¹³⁵ *Id.* at art. 18, at 249.

¹³⁶ See *id.* at art. 41, at 260-261 (allowing for dismissal of lay assessors for failure to take the oath, failure to attend or appear, failure to carry out their obligations, falling under a ground for disqualification, fear that they would conduct a trial unfairly, false entries on the lay assessor questionnaire, and inappropriate behavior).

¹³⁷ *Id.* at art. 41, at 261.

to conduct a questionnaire of lay assessors before the Lay Assessor Selection Proceeding¹³⁸ and to question them at the Proceeding itself.¹³⁹ The court may do this to ascertain whether the person is someone who may conduct the trial unfairly.¹⁴⁰ Given the open-ended nature of this provision, a lay assessor's stance on capital punishment could be the subject of such questioning and prosecutors could seek their dismissal on the basis of their response.¹⁴¹

¶49 This criterion therefore leaves the door open for American-style death qualification by prosecutors in capital cases. In *Lockhart v McCree*,¹⁴² the United States Supreme court addressed the practice of death qualification in Arkansas courts where jurors decide upon both the verdict and sentence in capital cases. The trial judge removed eight prospective jurors on the basis of their statements that they could not vote to impose the death penalty under any circumstance. The Court upheld the practice as coming within the “representative cross-section” interpretation of a defendant's constitutional right to an impartial jury.¹⁴³ The selection of death-qualified jurors has ramifications beyond an increased likelihood of death sentences, especially in models for lay participation that involve concomitant deliberation on verdict and sentence, such as the new Japanese lay assessor system. Specifically, death qualified jurors are more likely to convict and influence the dynamics of deliberations.¹⁴⁴

¶50 How often and under what circumstances the death-qualification procedure will be used is unclear. However, the “simple majority plus judge”¹⁴⁵ rule for verdict and sentencing, as opposed to the traditional requirement of unanimity, largely allays the risk of biased jurors threatening procedural integrity. This safeguard renders the voir dire-like procedure somewhat superfluous. Furthermore, considering its potential to draw out proceedings and enlarge workload, prosecutors may be reluctant to request a dismissal. While worth noting then, the death-qualification system is unlikely to affect criminal justice rendered in *saiban-in* courts given that unanimous verdicts are not required.

5. Powers, Duties and Penalties

¶51 In addition to imposing affirmative duties on lay assessors to attend trial,¹⁴⁶ deliberations,¹⁴⁷ and verdict,¹⁴⁸ the Lay Assessor Act also penalizes those who leak secrets,¹⁴⁹ make fraudulent statements,¹⁵⁰ or fail to appear.¹⁵¹ In the execution of their

¹³⁸ *Id.* at art. 30, at 254-255.

¹³⁹ *Id.* at art. 34, at 256-257.

¹⁴⁰ *Id.* at art. 30, at 254-255.

¹⁴¹ It is also possible that defense lawyers may seek to have jurors removed on the basis of an avowed propensity to vote for the death penalty in all cases in which it is sought. It is, however, unlikely that such requests will succeed.

¹⁴² *Lockhart v. McCree*, 476 U.S. 162 (1986).

¹⁴³ *Id.* at 173.

¹⁴⁴ See generally Claudia L. Cowan, William C. Thompson & Phoebe C. Ellsworth, *The Effects of Death Qualification on Jurors' Predisposition to Convict and on the Quality of Deliberation*, 8 LAW & HUM. BEHAV. 1/2 (1984).

¹⁴⁵ ‘Deliberation, Verdict and Sentencing’, *infra* Part IV. B(f).

¹⁴⁶ Lay Assessor Act, art. 52, *supra* note 2, at 266.

¹⁴⁷ *Id.* at art. 66, at 273.

¹⁴⁸ *Id.* at art. 63, at 269.

¹⁴⁹ *Id.* at art. 79, at 277.

¹⁵⁰ *Id.* at art. 81, at 279.

duties, lay assessors have the authority to question witnesses,¹⁵² victims¹⁵³ and defendants.¹⁵⁴ In mock lay assessor trials currently being conducted across Japan, lay assessors prove unhesitant to exercise this authority.¹⁵⁵ The possibility of personal interaction between lay assessors and defendants, victims and eyewitnesses will bring the Japanese public closer to criminal trials than they have ever been before. This signals a shift away from the traditional format for criminal trials in Japan, in which judges had little room for exploring evidence independent of prosecutorial influence. Both the Japanese Supreme Court and the Supreme Court Public Prosecutors Office have drafted reports aimed at minimizing voluminous trial paperwork and introducing a more interactive, verbal trial to facilitate greater lay involvement.¹⁵⁶ Because lay assessors, unlike judges, have no legal training and are unaccustomed to the routine of the criminal justice system, prosecutors will have to work harder to validate their cases through admitted evidence and live witness testimony, rather than complicated dossiers.

6. Deliberation, Verdict and Sentencing

¶52 Although the Act does not specify that verdict deliberations should take place before sentencing deliberations, there is speculation among academics studying the new system that, despite the fact that verdict and sentence will be determined in the single sitting, verdict deliberations will take place prior to sentencing. In whichever order they occur, deliberations on one will undoubtedly influence the shape of deliberations on the other. No specifications for deliberation procedure exist other than that a verdict must be determined on the basis of a simple majority and that it “shall include both an empanelled judge and a lay assessor holding that opinion.”¹⁵⁷ While relatively simple for deciding guilt or innocence, this decision formula becomes complicated when applied to sentencing.

¶53 Given the range of possible sentences for any one crime, sentencing deliberations will likely yield a confusing range of different opinions as to which sentence is most appropriate in a particular case; a distinct majority comprising both lay assessors and judges will be unlikely. In this situation, the law requires:

[T]he number of opinions for the option most unfavourable to the defendant will be added to the number of opinions for the next favourable option, until a majority opinion of the members of the judicial panel which includes both an empanelled judge and a lay assessor holding that opinion is achieved.¹⁵⁸

¹⁵¹ *Id.* at art. 83, at 279.

¹⁵² *Id.* at art. 56, 267.

¹⁵³ *Id.* at art. 58, 268.

¹⁵⁴ *Id.* at art. 59, 268.

¹⁵⁵ See e.g., Supreme Court of Japan, *Summary of Minutes of the Fifth Meeting of the Matsuyama District Court Committee* (2005) (a report on the mock trials conducted by the Matsuyama District Court, August 3-4th, 2005) (on file with author).

¹⁵⁶ See Yusuke Yoshino & Fumio Tanaka, *Cut in Trial Paperwork Eyed*, *Yomiuri Shimbun*, (Apr. 2006) (on file with author).

¹⁵⁷ See Lay Assessor Act, art. 67, *supra* note 2, at 273-274.

¹⁵⁸ *Id.* at 274.

¶54 The formula is a windfall for *de facto* abolition. In the likely absence of a majority opinion for the death penalty in a capital case, the vote of those in favor of the harshest sentence will be added to those in favor of the second harshest, and so forth, until the requisite majority is attained. Therefore, votes in favor of the death penalty, if not constituting the requisite simple majority, will be added to the next harshest penalty and capital punishment will be eliminated from the equation.

¶55 The requirements that each lay assessor express an opinion at verdict and sentence deliberations,¹⁵⁹ and that the chief judge sitting on the mixed panel facilitate such expressions of opinion,¹⁶⁰ further mitigate the likelihood that a suspect will receive the death penalty. Given its controversial nature and profundity, a decision to condemn a defendant to death will likely result in a wide spread of opinion in mixed panel deliberations, and hence, a greater range within which to apply the above-described formula.

¶56 The success of the lay assessor system will depend upon how the various members of the *saiban-in* court play their roles. The following section identifies each of the parties involved in the new system, their vested interests, and how the overall dynamics among the parties may produce a shift towards *de facto* abolition.

V. ABOLITION AND THE *SAIBAN-IN SEIDO*

A. *The Saiban-in Court*

¶57 Moving from a closed system in which capital cases were largely dominated by prosecutors and judges¹⁶¹ to the *saiban-in seido* will open the Japanese court system to the closest public scrutiny it has ever had. Beginning in May 2009, with six lay assessors sitting on mixed panels with three judges, the public will potentially be the most represented party in the courtroom. This revolutionary change in dynamics between the parties will largely dictate the outcomes of the system and thus the potential for *de facto* abolition. This section examines the varying perspectives and expectations of prosecutors, judges, defendants and defense lawyers, and future lay assessors regarding the *saiban-in seido*.

1. Prosecutors

¶58 As long as the death penalty remains a valid form of punishment, prosecutors have the duty to charge and pursue the sentence in applicable cases. Regardless of the introduction of the lay assessor system then, prosecutors are first and foremost interested in obtaining a conviction and death sentence in every case for which they seek it. Once the lay assessor system commences, prosecutors will face difficulties in successfully pursuing these interests.

¶59 The predictability of the system up until now means that a prosecutor often brings charges in accordance with what he expects the outcome to be in a case.¹⁶² Scholars have

¹⁵⁹ *Id.* at art. 66, at 273.

¹⁶⁰ *Id.*

¹⁶¹ Only 0.3% of Japan's 18,000 lawyers are willing to defend prisoners sentenced to death. See Yasuda, *supra* note 41, at 229.

¹⁶² See Johnson, *supra* note 44, at 45.

argued that this is one principal reason for Japan's extraordinarily high conviction rate.¹⁶³ The unpredictability associated with lay involvement in the system carries with it the potential for prosecutors to lose their power to anticipate outcomes. Given that acquittals are regarded as a threat to prosecutors' legitimacy,¹⁶⁴ the introduction of lay participation may lead prosecutors to bring more moderate charges and fewer capital cases than previously.

¶60 Versed and rehearsed in a largely inquisitorial system involving little oral evidence or cross-examination at trial phase, prosecutors working with the lay assessor system will need to focus on developing advocacy skills that are appropriate in a much less formal, adversarial proceeding. In preparation for this new role, prosecutors are undergoing training both in Japan and abroad to become educated in the art of trial advocacy.¹⁶⁵

¶61 The Supreme Court Public Prosecutors Office has finalized a draft report proposing a reduction in trial documentation to better facilitate the introduction of the new system.¹⁶⁶ Still, the report falls short of abolishing the system of written records of investigators' questioning of defendants. Thus, courts may continue to rely on written confessions in determining guilt or innocence. In failing to exclude such written confessions, prosecutors reveal their intent for lay assessors to also rely on written confessions obtained during initial investigation rather than verbal statements given by defendants in court.¹⁶⁷ However, the Minister of Justice indicated in recent statements that even this shady area of Japanese criminal procedure will soon become more transparent as prosecutors prepare to make audio and video recordings of suspect interrogations on a trial basis.¹⁶⁸ Although the Public Prosecutors Office states that not every stage of the interrogation process would be recorded, this change in documentation demonstrates willingness on the part of the procuracy to increase transparency, give greater credibility to evidence of confessions, and facilitate more easily understandable trials in anticipation of lay involvement.

2. Judges

¶62 Judges face the same dilemma as prosecutors in interacting with members of the public, but to a much greater extent. First, where a prosecutor must persuade, a judge must cooperate with other judges and lay assessors during verdict and sentence deliberations. In the lay assessor system, judges—noted for their conservatism and reputation for being out-of-touch with society¹⁶⁹—may no longer maintain an arms-length relation to jurors. Instead, they must aim to explain the relevant laws in a more easily understandable fashion and facilitate the participation of each lay assessor.¹⁷⁰

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 46.

¹⁶⁵ See Tim Winkler, *ANU Opens Export Market: Training Japanese Lawyers*, (Jan. 21, 2004), http://info.anu.edu.au/mac/Media/Media_Releases/_2004/_210104Japaneselawyers.asp (explaining that Japanese prosecutors have participated in a cooperative training program being conducted in both Japan and Australia through the Australian National University's Legal Workshop).

¹⁶⁶ Yusuke Yoshino & Fumio Tanaka, *supra* note 156.

¹⁶⁷ *Id.* ("If a suspect confessed, investigators' records of oral statements is [sic] easier to understand in many cases.").

¹⁶⁸ Yomiuri Shimbun, *Prosecutors plan to try recording interrogations*, May 10, 2006 (on file with author).

¹⁶⁹ See SCHMIDT, *supra* note 37, at 122.

¹⁷⁰ Lay Assessor Act, art. 66, *supra* note 2, at 273.

Accordingly, they must exhibit a degree of empathy and patience, a much greater change in conduct than for prosecutors.

¶63 Second, the *saiban-in-seido* will pose new ethical challenges to judges in light of the significant amount of discretionary power that the Lay Assessor Act grants the judiciary. For example, judges will have power, directly or at counsel's request, to dismiss lay assessors on the basis of a belief that they will act unfairly.¹⁷¹ An even more important ethical challenge, though the Act does not consider it, is that judges may have to exercise personal discretion to avoid unduly influencing lay assessors during deliberations, since judges are predisposed to relying on confessions and entering judgments imposing the death penalty.¹⁷² It is of significant concern that, because the content and procedure of deliberations are to be kept secret,¹⁷³ the degree of judicial influence on the outcomes of lay assessor trials will not be ascertainable. The judiciary is, however, taking measures in the lead-up to the system's introduction to make participation as accessible and worthwhile as possible for future lay assessors.

¶64 Some of the suggested improvements may indirectly pave the way for *de facto* abolition, and to some extent alleviate fears of undue judicial influence in deliberations mentioned above. For example, in contrast to the draft report of the Supreme Public Prosecutors Office,¹⁷⁴ a Supreme Court draft report published in November 2004 emphasized the importance of relying principally on oral submissions during trial and considering written statements from pre-trial proceedings only when necessary for clarification purposes.¹⁷⁵ In formulating this proposal, the Supreme Court considered the risk that professional judges, who are accustomed to dealing with such written statements, will instruct lay assessors on how to decide whether a particular defendant is guilty.¹⁷⁶

3. Defendants and Defense Lawyers

¶65 Defendants and defense lawyers have the greatest interest in seeing the new system pave the way for *de facto* and eventual *de jure* abolition of the death penalty. Certain obstacles, however, may impede progress toward those goals. First, defense lawyers are as disadvantaged as prosecutors in terms of a lack of advocacy experience and training. Their access to the same or similar training schemes as Japanese prosecutors will determine how level the playing field will be post-introduction of the system. If the JFBA and the defense counsel committees of its regional counterparts (*keiji bengo iinkai*) cannot prepare defense lawyers for their new roles in the same way that the Supreme Public Prosecutors Office and Ministry of Justice are doing for prosecutors, the introduction of the lay assessor system could prove very detrimental to the defense.

¶66 Second, depending on the prosecution's use of the so-called *voir dire* procedure, defense lawyers will need to learn to play the game of jury stacking to their benefit. However, recent trends towards both recording pre-trial interrogations and reducing

¹⁷¹ *Id.* at art. 18, at 249.

¹⁷² SCHMIDT, *supra* note 37, at 152.

¹⁷³ Lay Assessor Act, art. 70, *supra* note 2, at 274.

¹⁷⁴ Shimbun, *supra* note 168.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

reliance on written confessions give hope to defendants and defense lawyers whose clients face the ultimate penalty.

4. Lay Assessors

¶67 Surveys and forums held prior to and after the enactment of the Lay Assessor Act reveal a general reluctance among the Japanese public to participate as a lay assessor.¹⁷⁷ This reluctance appears to stem not only from a desire to avoid disruption to daily life and business, but also from a general feeling that it lacks the education and qualifications necessary to fulfil the role.¹⁷⁸ Another reason for this reluctance is the public's hesitance to be directly involved in harsh sentencing.¹⁷⁹ During the question and answer session of a Ministry of Justice-sponsored forum on the introduction of the *saiban-in seido*, members of the public voiced a reluctance to vote for the death penalty even in the most heinous crimes.¹⁸⁰ Satoru Shinomiya, a lawyer presiding over the "Town Meeting in Kanazawa," responded by stating that the new lay assessor system would provide a good opportunity for those Japanese people who previously supported capital punishment, but left its administration to lawyers and the government, to review their stance and reconsider the issue. He concluded with the hope that public debate on capital punishment would further deepen as a result of the public's newly imposed obligation to grapple with the issue.¹⁸¹

B. *The Potential Outcomes*

¶68 Although the drafting of the Lay Assessor Act expressly excluded abolition of capital punishment as a reason for reform, each party in the new *saiban-in* court since then has appeared to directly or indirectly contemplate the prospect of *de facto* abolition of the death penalty. At least three avenues for *de facto* abolition exist, though the possible outcomes of the new lay assessor system are multitudinous. The first scenario may happen where prosecutors seek the death penalty and it is outvoted in accordance with the simple majority formula. The second may occur when prosecutors seek the death penalty and it is outvoted upon applying the complex sentence reduction formula, despite some members of the mixed panel voting for it. Finally, prosecutors may very well not seek the death penalty in some cases, due to the unpredictability of success, and instead seek a lesser penalty for which they have greater chances of success.

¶69 Of course much will depend upon the interaction among each of the parties involved. However, procedural changes in place and under consideration that are aimed at facilitating the *saiban-in seido* indicate positive first steps towards achieving some form of abolition.

¹⁷⁷ Government Publications Office, *supra* note 75.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ Koizumi Cabinet, *Shihô seido kaikaku: Town Meeting in Kanazawa* [Justice System Reform: Town Meeting in Kanazawa] (June 25, 2005), <http://www8.cao.go.jp/town/kanazawa170625/index.html> (the Minister of Justice Chieko Nôno, Chairman of the Justice Reform Promotions Office Criminal Investigation Council Masahito Inoue, and Waseda University Professor and Lawyer Satoru Shinomiya presided over the meeting).

¹⁸¹ *Id.*

VI. CONCLUSION

¶70 Japan, like any other democracy, grounds its national policies in the will of its people. This is especially so in the case for retention of the death penalty. With *de jure* abolition of the death penalty close to becoming a norm of customary international law, and absent affirmative steps by the Japanese ministry, judiciary or procuracy towards abolition, the task will fall to the people to effect the change necessary to bring Japan in line with its international legal obligations and to set an example in Asia.

¶71 The introduction of the lay assessor system in May 2009 will place Japan's system of capital punishment squarely within the public domain and provide the Japanese public with the tools to initiate a change towards *de jure* abolition. For the first time, the Japanese people will make decisions on capital sentencing, which may play an essential role in abolition at a grassroots level. Many factors will influence the decisions of lay assessors, not the least of which are the roles played by the prosecutors, judges, defendants and defense lawyers in the new system. Each of these members of the future *saiban-in* courtroom is surely anxious about how the introduction of the new system will affect their interests. However, attempts already made and currently under consideration to make the system more transparent, accessible and efficient suggest that any change will be positive for the criminal justice system overall.

¶72 From the perspective that *de jure* abolition of Japan's system of capital punishment is desirable if not imperative, the *saiban-in seido* may well prove to be the necessary first step towards that end. Allowing the people to decide may turn out to be the necessary catalyst for a shift in conscience away from support of capital punishment. Although the Japanese government ultimately will decide whether to pass legislation abolishing the death penalty once and for all, the decisions that the Japanese people make as participants in the *saiban-in seido* will surely inform that decision.