

# **An Overview of Japan's Death Penalty System**

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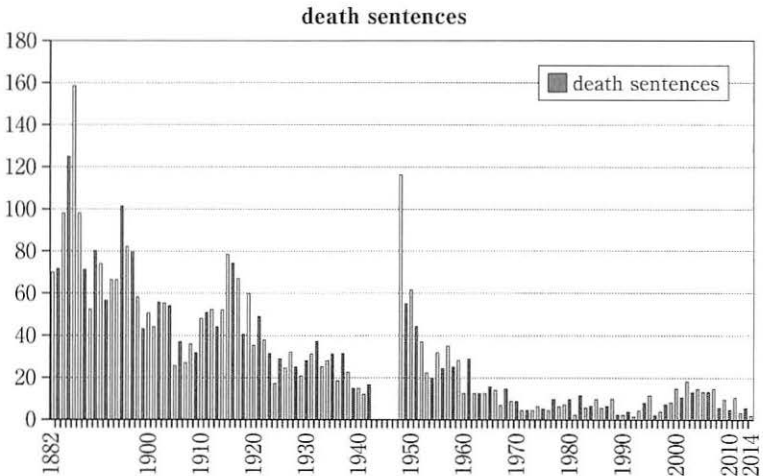
## **Introduction**

This article presents a brief overview of Japan's death penalty system. In doing so, detailed evaluations of fairness and due process concerning the system, which will be described in later sections, may be more easily and deeply understood.

## **Demographics of Japan's Death Row**

The graph below<sup>1</sup> shows the number of first-instance death sentences given in Japan since 1882 when the former Penal Code was enforced. Between 2000 and 2014, the total number of death sentences amounted to 147, including 4 foreign defendants, all of whom were Chinese. We have no statistics available concerning minorities, who are prone to be unfairly treated in Japan, such as Korean Japanese (who were born in North Korea or South Korea and were naturalized in Japan) or a caste-like minority.

The graph below<sup>2</sup> shows the number of executions since 1882.

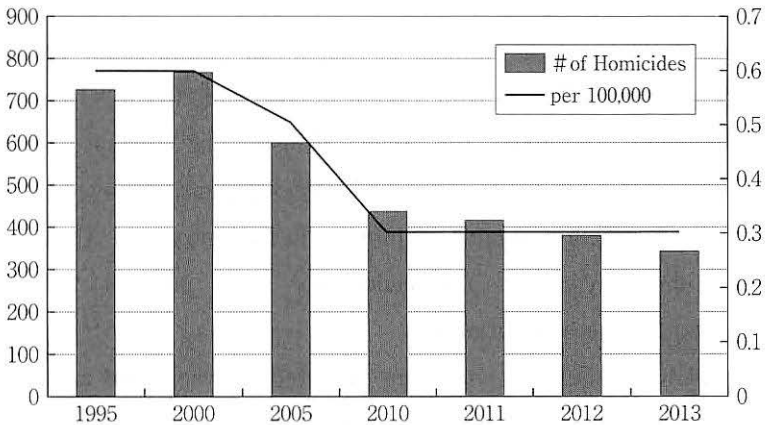
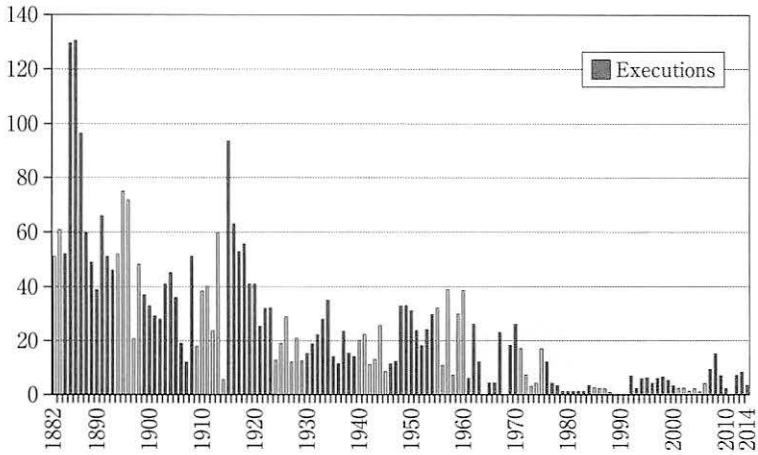


For the last three decades, no execution was carried out between 1990 and 1992 and the number of executions was in single figures every year from 1993 to 2014, except in 2008 and 2011 ( $n = 15$  and  $0$  respectively). In 2008, the then Minister of Justice, Kunio Hatoyama (The Liberal Democratic Party of Japan), approved of his subordinate officers executing 3 inmates in February, 4 in April, and 3 in June. Given the unprecedentedly short interval, he was criticized for the arbitrariness.

Death row inmates who were executed between 2004 and 2013 spent an average of 5 and a half years awaiting their executions after their sentences were fixed<sup>3</sup>. 128 death row inmates, including 6 foreigners, were incarcerated as of the end of 2014<sup>4</sup>.

As the graph below<sup>5</sup> indicates, Japan's homicide rate is not so high.

### Executions



### Retrial

In Japan, four persons whose death sentences had been finalized won retrials and were found innocent between 1983 and 1989: Menda case (1983), Saitagawa case (1984), Matsuyama case (1984), and Shimada case (1989)<sup>6</sup>.

On March 27, 2014, the Shizuoka District Court suspended the death sentence and ordered a retrial for 79-year-old Iwao Hakamada, who had been convicted in the 1966 murder of a family of four persons and whose death sentence had been finalized in 1980. The court said that a DNA analysis obtained by Hakamada's lawyers suggested that investigators had fabricated evidence<sup>7</sup>.

Japan Federation of Bar Associations (JFBA) has been supporting retrial for three death cases—Hakamada, Nabari, and Maruyo Musen cases—which have been deemed worthy of support, free of charge<sup>8</sup>.

## **Pardon**

According to the Pardon Act, special pardon, commutation of sentence with respect to a specific person, remission of execution of sentence or restoration of rights with respect to a specific person shall be granted to persons subject to a recommendation from the National Offenders Rehabilitation Commission (Article 12). Although 25 death sentences were commuted after WWII, no inmate has received a commutation of his/her death sentence since Kenjiro Ishii had his death sentence commuted to life imprisonment in 1975<sup>9</sup>.

## **The Constitution of Japan**

The infliction of torture by any public officer and cruel punishments are absolutely forbidden by Article 36 of the

Constitution of Japan. The Grand Bench of Japan's Supreme Court held in 1948 as follows: The death penalty as a punishment is not generally nor immediately considered to constitute "cruel punishment" as mentioned in Article 36 of the Constitution...Of course, ...we must call the death penalty a cruel punishment if the method of execution (hanging) is deemed cruel from the standpoint of humanity and in the context of the times and circumstances (March 12, 1948)<sup>10</sup>.

## Crimes Punishable by the Death Penalty

Some crimes punishable by the death penalty are stipulated by Penal Code as follows: ① insurrection (a ringleader) ② instigation of foreign aggression ③ assistance to the enemy ④ arson of inhabited buildings ⑤ detonating of explosives ⑥ damage to inhabited buildings by flood ⑦ overturning of trains (a person who causes the death of another person) ⑧ endangering traffic by overturning of a train (a person who causes the death of another person) ⑨ pollution of water supplies with poisonous materials and causing death thereby ⑩ homicide ⑪ robbery causing death ⑫ rape at the scene of a robbery; causing death thereby.

Others are stipulated by Acts or Regulations as follows: ⑬ use of explosives ⑭ death caused by a duel ⑮ death caused by airplane crash ⑯ death caused by hijack of airplane ⑰ homicide of hostage ⑱ organized homicide ⑲ piracy causing death.

Almost all of the death row inmates after WWII were convicted either of homicide or robbery causing death, although crimes

without causing death could lead to the death penalty.

## **Judgment on Standards for Selection of the Death Penalty**

The Supreme Court held in 1983 that selection of the death penalty must be allowed when criminal liability is extremely grave, considering any and all extenuations including: ① the nature of the crime ② the motive ③ its features and in particular the tenacity and cruelty employed in carrying out the murder ④ the gravity of its consequences as reflected especially in the number of victims killed ⑤ the feelings of the bereaved family ⑥ the impact of the crime on society ⑦ the age of the perpetrator ⑧ his/her criminal record ⑨ grounds for leniency after the crime has been committed (July 8, 1983, Judgment of the Supreme Court, Second Petty Bench)<sup>11</sup>. These standards are called Nagayama Standards.

Legal Training and Research Institute, which is affiliated to the Supreme Court of Japan, reported in 2012 that it's hard to say the 9 factors set out in Nagayama Standards are criteria for the death sentence, given that they are merely enumerated as factors to be taken into consideration<sup>12</sup>. Still, the Institute's report (see the table below) concluded that the number of victims killed is the most significant factor. The more victims a defendant kills, the more likely he/she is to be sentenced death.

## **Lay Judge (Saiban-in) System**

Lay judge (saiban-in) system was introduced in Japan in 2009 to

# of victims	death sentence	life sentence	total
1	32 (32%)	68 (68%)	100
2	96 (59%)	68 (41%)	164
3	65 (79%)	17 (21%)	82

The above are the cases where the death or life sentences were finalized between 1980 and 2009 for defendants convicted of homicide or robbery causing death.

reflect “common sense” in criminal trials. Six lay judges randomly selected amongst constituents and three professional judges deliberate, decide whether the defendant is guilty, and sentence. Thus, the new system directly involves the nation in the court procedure including trials of capital cases.

There are some significant differences between lay judge trials and jury trials in the U.S. As for Japan’s lay judge trials, a defendant or a defense counsel does not know for sure before or during the trial if his/her case is a capital case. Only at the closing argument when the prosecutor recommends the penalty to judges and lay judges, he/she makes it clear that the state will seek the ultimate punishment. Unlike a jury trial for capital cases, a lay judge trial is not separated into bifurcated trials, that is, the guilt phase and the sentencing phase. The verdict of death in a lay judge case does not have to be unanimous, which means a majority of votes can sentence someone to death in Japan<sup>13</sup>.

The table below shows the sentencing of lay judge cases where the death sentences were sought<sup>14</sup>.

Concerning “common sense” and precedents, the Supreme Court asserted that, from the point of view of deliberation and fairness, it is indispensable to consider several factors (known as

		Death sentence	Life Sentence	Not Guilty	Total
		25 (*22)	6 (*9)	1	32
# of victims killed	5	2			2
	3	7			7
	2	13	6	1	20
	1	3			3

\*High courts overturned the decisions in three cases where the defendants received new sentences of life imprisonment.

Nagayama Standards) which can be found from the accumulation of precedents, whether lay judges join the trial or not (February 3, 2015, Judgment of the Supreme Court, Second Petty Bench)<sup>15</sup>.

## Life imprisonment

Japan does not have life imprisonment *without* the possibility of parole (LWOP), but only has life *with* parole (LWP). The Penal Code requires that an inmate be paroled by a disposition of a government agency after he/she has served 10 years in the case of LWP (Article 28).

Japan had 1843 prisoners serving LWP at the end of 2013 whereas only 8 prisoners serving LWP, who had been incarcerated for an average of 31 years and 2 months, were paroled in that year. Thus, LWP in Japan virtually equals LWOP<sup>16</sup>.

Japan Diet Members League for Abolition of the Death Penalty has discussed bringing in a bill to introduce LWOP several times since 2003, but it has yet to be realized.

## **Mental Retardation**

The U.S. Supreme Court ruled in *Atkins v. Virginia* (2002) that executing people with mental retardation violated the Eighth Amendment prohibition against cruel and unusual punishment<sup>17</sup>. On the other hand, Japan has no laws or court precedents to deem a defendant less culpable simply because he/she is mentally retarded. The court may make a determination on whether or not the accused had the capacity for criminal responsibility and the degree thereof by taking account of all circumstances concerned including the accused's mental condition at the time of the commission of the crimes, his living situation before the commission of the crimes, and his motive and mode of commission of the crimes<sup>18</sup>.

## **Insanity**

Where the person who has been sentenced to death is in a state of insanity, the execution shall be suspended by order of the Minister of Justice (Code of Criminal Procedure, Article 479 (1)). Nevertheless, we don't know if there have been suspended executions due to insanity because of extreme secrecy surrounding death row in Japan.

## **Juvenile**

"Juvenile" refers to a person under 20 years of age (Juvenile Act, Article 2 (1)). The death penalty is forbidden for those under

the age of 18 at the time of their crime. Instead, life imprisonment shall be imposed when the death penalty ought to fit the crime (Article 51 (1)).

42 juveniles, who were 18 or 19 at the time of their crime, were sentenced to death and whose sentences were finalized after WWII<sup>19</sup>.

## Executions

Although Execution by hanging is carried out based on the Decree No.65 issued in 1873, the way of hanging has been actually different from the method shown in the Decree. Nonetheless, the Grand Bench of Japan's Supreme Court held that it does not violate the due process clause, that is, Article 31 of the Constitution of Japan (July 19, 1961).

It is noteworthy that executions in Japan are extraordinarily shrouded in secrecy. Death row inmates are notified of the date of their execution by the officials on the same morning that it will be carried out, only a few hours before death by hanging. All that the Minister of Justice announces at a press conference is whom and at which Detention House(s) the government has executed and an outline of the final judgment that sentenced the inmate(s) to death. Thus, even the inmate's defense attorneys and relatives cannot contact him/her ahead of the execution.

1 Dando, Shigemitsu. (2000). *Shikei Haishiron*. 6<sup>th</sup> ed. Tokyo: Yuhikaku.; [http://www.courts.go.jp/app/sihotokei\\_jp/search\\_detail](http://www.courts.go.jp/app/sihotokei_jp/search_detail); [http://www.geocities.jp/masakari5910/satsujinjiken\\_shikei02.html#01](http://www.geocities.jp/masakari5910/satsujinjiken_shikei02.html#01)

2 Dando, Shigemitsu. (2000). *Shikei Haishiron*. 6<sup>th</sup> ed. Tokyo:

- Yuhikaku. : [http://www.moj.go.jp/housei/toukei/toukei\\_ichiran\\_kousei.html](http://www.moj.go.jp/housei/toukei/toukei_ichiran_kousei.html); <http://www.abolish-dp.jca.apc.org/content/dataroom/35>
- 3 [http://www.moj.go.jp/hisho/kouhou/hisho08\\_00561.html](http://www.moj.go.jp/hisho/kouhou/hisho08_00561.html)
- 4 [http://www.amnesty.or.jp/library/report/pdf/statistics\\_death\\_penalty\\_20150401.pdf](http://www.amnesty.or.jp/library/report/pdf/statistics_death_penalty_20150401.pdf)
- 5 <http://www.e-stat.go.jp/SG1/estat/List.do?lid=000001108740>
- 6 <http://www.nichibenren.or.jp/en/document/statements/year/2008/20080201.html>
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- 10 <http://sgotolaw.com/jp.html>
- 11 [http://www.courts.go.jp/app/hanrei\\_en/detail?id=74](http://www.courts.go.jp/app/hanrei_en/detail?id=74)
- 12 Oshima, Takaaki, Ida, Makoto, Sonohara, Toshihiko, & Karashima, Akira. (2012). *Saiban-in saiban ni okeru ryokei hyogi no arikata ni tsuite*. Wako-shi: Shiho Kenshujo.
- 13 Sasakura, Kana. (2015). Death Penalty and Due Process. *Corrections and Rehabilitation Center Journal*, 4.
- 14 [http://www.geocities.jp/masakari5910/citizen\\_judge\\_death\\_penalty0.html](http://www.geocities.jp/masakari5910/citizen_judge_death_penalty0.html)
- 15 [http://www.courts.go.jp/app/files/hanrei\\_jp/840/084840\\_hanrei.pdf](http://www.courts.go.jp/app/files/hanrei_jp/840/084840_hanrei.pdf); [http://www.courts.go.jp/app/files/hanrei\\_jp/839/084839\\_hanrei.pdf](http://www.courts.go.jp/app/files/hanrei_jp/839/084839_hanrei.pdf)
- 16 <http://www.moj.go.jp/content/001127913.pdf>
- 17 536 U.S. 304 (2002).
- 18 See 1983 (A) No. 753, decision of the Third Petty Bench of the Supreme Court of September 13, 1983, Saibanshu Keiji No. 232, at 95; 1983 (A) No. 1761, decision of the Third Petty Bench of the Supreme Court of July 3, 1984, Keishu Vol. 38, No. 8, at 2783; 2006 (A) No. 876, judgment of the Second Petty Bench of the Supreme Court of April 25, 2008, Keishu Vol. 62, No. 5, at 1559.
- 19 Nagata, Kenji. (2000). *Shikei sentaku kijun no kenkyu*. Osaka: Kansai Daigaku Shuppanbu.