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THE DEATH PENALTY IN JAPAN: AN "ABSURD" PUNISHMENT*

Joachim Herrmann[†]

INTRODUCTION

In 1957, Albert Camus, the famous French writer and philosopher, published his reflections about the guillotine, *Réflexions sur la Guillotine*.¹ He began his essay, a crusade against capital punishment, with a story about his father. Camus had never met his father, and the anecdote was allegedly one of the very few things he knew about him. Here is an abbreviated version of what Camus reported in his reflections.

Shortly before World War I, a man who had committed a most atrocious crime—he had killed a farmer's entire family, parents and children—was sentenced to death by an Algiers court. The man, a farmhand, had killed in a blood lust but had also taken property from his victims. It was a sensational case in Algiers. The general public believed that decapitation was too mild a punishment for such a monster. This was also the opinion of Camus' father who was, above all, upset over the killing of the children. As a consequence, he decided to watch for the first time the public execution. In the middle of the night, he arose and joined the crowd which was walking to the

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¹ ALBERT CAMUS & ARTHUR KOESTLER, *RÉFLEXIONS SUR LA PEINE CAPITALE* 125 (1957).

other end of the city where the execution would be carried out early in the morning.

When the father returned, he did not tell anyone what he had seen. He seemed to have come home in a great hurry, his face expressing bewilderment. Without saying a word, he laid down on his bed and suddenly began to vomit. He had discovered the reality hidden behind the bombastic and deceptive phrases of justice. The father did not think of the massacred children; he could only think of the trembling and shaking body, thrown on a plank to have his head cut off.

Like the other great existentialist philosopher Jean Paul Sartre, Camus expressed his philosophical ideas not in scholarly treatises but in essays and novels. One of his philosophical keynotes is the "absurdity" of life. Camus did not say that all life is "absurd." Rather, he explained that there are certain events in life which can only be properly understood if their "absurdity" is considered.

What had happened to Camus' father was such an "absurd" event. His father had a strong feeling of justice, so rather than sleep, he walked through the night to see justice take its course. Yet, after exposure to the execution, he broke down, disgusted by what he had thought to be justice. Camus' father did not talk because there was nothing he could have said about a punishment that he had discovered was senseless, unreasonable, and inexplicable or, in another word, "absurd." The father had no objection against the imposition of justice but he was shocked to see how it was executed.

"Absurdity" to Camus was not only an emotional experience. If it had been limited in this way his father's problem could have been solved by simply executing criminals behind closed doors. This has become common practice in almost all countries that still retain the death penalty. In Japan, executions are even shrouded in peculiar secrecy.

Camus' concept of "absurdity" is much broader because it also has an intellectual dimension. Certain events in life which are ordinarily accepted without much questioning may become senseless, unreasonable, and inexplicable, in brief, "absurd," if we are willing to take a closer view. The concept of "absurdity" thus opens new perspectives and helps to gain a deeper insight. At the same time, it may provide an opportunity for developing new answers.

As Camus was not a lawyer, he was not concerned with whether capital punishment or the law providing for its imposition and the manner of its execution, may be considered "absurd." For lawyers it will, however, be a worthwhile endeavor to take a step beyond Camus and ask whether and to what extent the law that serves as a basis for imposing and executing the death penalty appears to be unreasonable, irrational, senseless, and inexplicable. This will be an interesting approach if one is willing to accept that the death penalty is not just another kind of punishment. Rather, it is qualitatively different from the other penalties and, therefore, requires special legal safeguards.

This Essay will ask to what extent Japanese law and practice of capital punishment can be considered "absurd." The Essay will analyze the "absurdity" of Japanese capital punishment with the help of comparative law. Since Japanese criminal law and procedure has been strongly influenced by German and American law and Japanese scholars are closely following what is going on in these two legal systems, it seems only natural to take the two systems as points of reference. Because the United States, like Japan, has retained capital punishment, comparisons will be mainly concentrated on American law. However, even though Germany has abolished capital punishment, looking at German law will also provide some interesting aspects. Provisions of the German Penal Code define various types of homicide and, thus, offer a rational basis for distinguishing different levels of punishment.

The following discussion will be divided into two parts. Part I examines in which cases capital punishment may be, and actually is, imposed in Japan. A comparison of Japanese law with German law, where life imprisonment is the severest penalty, will reveal interesting differences about the legal structures of the sentencing decisions. The differences will be even more striking when looking at the United States where the thirty-eight states that still retain capital punishment have enacted statutes that try to provide a new basis for the capital punishment decision. Part II will then try to shed some light on the procedure followed in Japan after the imposition of the death sentence until its execution and compare it with the American practice. The analysis will reveal that capital

punishment in Japan—and also in the United States—must in many respects be deemed “absurd.”

I. CRIMINAL LAW AND CAPITAL PUNISHMENT

A. *Japan*

The Japanese Penal Code provides capital punishment for some seventeen offenses, but according to Japanese statistics this penalty is imposed in practice only in cases of homicide and killing committed in the course of a robbery.² The Japanese Penal Code does not, however, offer any criteria to guide the judge in deciding what punishment to impose.³ The penalty for killing while committing a robbery is either death or life imprisonment.⁴ In homicide cases the judge's discretion is still wider because punishment may be death, life imprisonment, or a prison term of not less than three years.⁵ The execution of a three-year term may even be suspended. Toshino Maeda, a Japanese criminal law scholar, has tried to demonstrate using empirical research that the discretion of Japanese judges is strictly limited because they closely follow unwritten rules and standards when choosing between death and imprisonment.⁶ Koichi Miyazawa, a famous Japanese scholar of criminal law and criminology, has not agreed however.⁷ He stated that it may be mainly a question of good or

² José Llompart, *La Pena de Muerte en el Japon*, 2 REVISTA DE DERECHO PENAL Y CRIMINOLOGIA 349, 353 (1992).

³ KEIHŌ [Japanese Penal Code], 1907, art. 199, 240. There are no jury trials in Japan. Capital cases are heard by courts sitting with three professional judges.

⁴ *Id.* at art. 240.

⁵ *Id.* at art. 199.

⁶ RYUICHI HIRANO, *Die Japanisierung des westlichen Rechts im Japanischen Strafrecht und Strafprozeßrecht*, in DIE JAPANISIERUNG DES WESTLICHEN RECHTS 387, 391 (Helmut Coing et al. eds., 1988). See also José Llompart, *Die Vollstreckung der Todesstrafe in Japan*, in 1 THE REVIEW OF COMPARATIVE LAW 155, 158 (1988).

⁷ KOICHI MIYAZAWA, *Die Todesstrafe in Japan*, in STRAFGERECHTIGKEIT, FESTSCHRIFT FÜR ARTHUR KAUFMANN 729, 737-738 (Fritjof Haft et al. eds., 1993). See also PETRA SCHMIDT, DIE TODESSTRAFE IN JAPAN 485 (1996); Llompart, *supra* note 2, at 354 (pointing out that courts in the Osaka region impose capital punishment more readily than courts in the Tokyo region).

bad luck what kind of punishment the defendant will receive. Miyazawa reported that an experienced and prominent Japanese judge had told him about two homicide cases where one defendant was sentenced to death and the other received a prison term. The judge was of the opinion that the main reason why the death penalty was imposed in one of the two cases was that the judges sitting in that court were generally in favor of capital punishment. In the judge's opinion, the defendant who was sentenced to imprisonment had committed the more serious crime.⁸

Obviously, the unwritten rules and standards Maeda has talked about do not work as perfectly as he tried to demonstrate. This is, however, not the main problem. The principal question is whether relying on unwritten rules and standards rather than on legal provisions is in conformity with modern constitutional law and constitutional theory. Article 31 of the Japanese Constitution provides: "No person shall be deprived of life or liberty nor shall any other criminal penalty be imposed except according to procedure established by law."⁹ This article has been interpreted by Japanese scholars as including the *nulla poena sine lege* principle. As Shigemitsu Dando, a famous scholar at Tokyo University and former Justice at the Japanese Supreme Court, has stated in his famous treatise on Japanese criminal law, this principle requires "both the type and magnitude of punishment to be fixed by law."¹⁰

Ryuichi Hirano, a famous criminal law scholar at Tokyo University, has pointed out, however, that the Japanese Penal Code performs, to a considerable extent, only a "symbolic function" because it leaves many legal questions to be decided by the judge, prosecutor, and police officer.¹¹ Hirano has argued that Japanese judges, prosecutors, and police officers generally exercise a great amount of discretion in Japanese criminal justice and that their discretion is not unlimited, but guided

⁸ MIYAZAWA, *supra* note 7, at 737-38.

⁹ NIHON KOKU KEMPŌ [Constitution of Japan], 1946, art. 31, *translated in*, CONSTITUTIONS OF THE COUNTRIES OF THE WORLD—JAPAN 17 (Albert P. Blaustein & Gisbert H. Flanz eds., 1990).

¹⁰ SHIGEMITSU DANDO, THE CRIMINAL LAW OF JAPAN: THE GENERAL PART 23 (B.J. George, trans., 1997).

¹¹ HIRANO, *supra* note 6, at 391.

and structured. Under modern constitutional law such a combination of "symbolic legislation" and non-legal standards and rules may be considered an adequate mechanism for handling less serious and trivial cases. Regulating every detail with the help of legal provisions would be too burdensome and difficult to understand.

It seems questionable, however, whether "symbolic legislation" can be accepted as the basis for solving important cases, and there can be no doubt that capital cases have to be ranked among them. *Nulla poena*, due process, and the idea of "*Rechtsstaat*," i.e., a state governed by law, are also guiding principles of Japanese constitutional law and require that government power in the field of criminal justice be restricted and structured by law. Legal provisions have a democratic foundation, they guarantee predictability and uniformity in the administration of criminal justice in a much better way than unwritten rules and standards could ever do. Rules and standards are developed by invisible institutions within the Japanese criminal justice administration, they can easily be changed and they are, as Miyazawa has pointed out, not always followed.

In contrast to legal provisions, rules and standards are often unknown to the defendant and defense counsel because they are not published. This seems to be the case with the rules guiding Japanese judges in their decisions on capital punishment. As a consequence, defense counsel and defendant, who in a Japanese trial try to offer arguments why the death penalty should not be imposed, have to defend against an unknown. This may be compared to the fight of Don Quixote, the tragic Spanish knight, against the sails of a windmill which he thought were an enemy attack.

Don Quixote's fight against the sails of the windmill is a perfect example of the "absurdity" of life Camus has talked about. In all deference, it may be asked whether "symbolic legislation," the broad discretion of Japanese judges, the way the judges seem to exercise discretion in practice, and, not the least, the requirement that defendant and defense counsel

fight against invisible rules and standards do not show traces of an "absurd" quality.¹²

B. *Germany*

In trying to find new answers to this problem, it may be helpful to look beyond the borders of Japan and ask how homicide is punished in other legal systems. Germany, which has abolished capital punishment, has nevertheless detailed provisions in its Penal Code distinguishing various types of homicide and, thus, providing for different levels of punishment.

Under German law, manslaughter is punished with imprisonment of not less than five and not more than fifteen years. Life imprisonment must be imposed in cases of murder where the judge finds that the killing was committed under aggravating circumstances. The German Penal Code lists the following aggravating circumstances:

- killing out of murderous lust
- killing to satisfy sexual desires
- killing for pecuniary gain
- killing from base motives
- killing treacherously
- killing cruelly
- killing with means dangerous to the public
- killing to make another crime possible or to cover it up¹³

For less serious cases of manslaughter, for example if the perpetrator was provoked, the German Penal Code provides for a prison term of not less than one year and not more than ten years.¹⁴

¹² See generally MIGUEL DE CERVANTES, *ADVENTURES OF DON QUIXOTE* (J.M. Cohen, trans., reprint ed. 1988).

¹³ STRAFGESETZBUCH [German Penal Code] § 211(2) StGB, translated in Criminal Code (Strafgesetzbuch, StGB), available at <http://www.iuscomp.org/gla/statutes/StGB-.htm#211>.

¹⁴ *Id.* at § 212-213, available at <http://www.iuscomp.org/gla/statutes/StGB-.htm>.

Unquestionably, some of the clauses defining murder in the German Penal Code are rather abstract and vague. It is, for example, unclear what is a "base motive" and in what cases a killing may be called "treacherous." German courts have, however, in a great number of cases offered interpretations to shape those clauses and make them more concrete. Courts have developed a kind of "case law" on which they will rely in deciding future cases. Many of the decisions of the German courts are published so anyone interested can find out what the law is and what it most likely will be in the future.¹⁵

In other European penal codes the law on homicide is structured similarly. The new French Penal Code of 1994 is one example. The Code lists two types of homicide. Ordinary homicide is punished with imprisonment of thirty years; the court is, however, authorized to impose a prison term of not less than one year.¹⁶ Life imprisonment is provided for in a number of cases where homicide is committed under aggravating circumstances; the punishment may, however, be reduced to a prison term of not less than two years.¹⁷ The Code defines as an aggravating factor, for example, that the perpetrator acts with premeditation; that he or she kills while committing or preparing another crime; or that the homicide victim is a minor, lineal ascendant, person suffering from corporal or mental impairment, judge, prosecutor, attorney or witness.¹⁸ Similar to German practice, French courts have handed down decisions making these clauses more concrete and manageable.

It is not argued here that the definitions of European codes, together with the accompanying "case law," offer ready answers for the judge who has to decide what punishment to impose in the individual case. However, unlike the Japanese Penal Code, European codes and "precedents" restrict the most severe punishment to a number of more or less narrowly

¹⁵ ADOLF SCHÖNKE ET AL., STRAFGESETZBUCH KOMMENTAR [German Penal Code Commentary], § 211, notes IV-VI (2001).

¹⁶ §§ 132-18, 221-1 - 221-4 C. PÉN. [French Penal Code] 1994, *translated in*, THE AMERICAN SERIES OF FOREIGN PENAL CODES—31 FRANCE 66, 94 (Edward A. Tomlinson ed., 1999).

¹⁷ *Id.*

¹⁸ *Id.*

defined cases of homicide. Thus, "road signs" are set up to guide and structure the judge's discretion.

C. *United States*

The question of how much discretion the judge or the jury should have in capital cases was also the cause of the dramatic controversy over the constitutionality of capital punishment in the United States. In 1972, the U.S. Supreme Court held in the landmark decision *Furman v. Georgia* that unguided, standardless discretion in capital cases violates the Eighth Amendment's prohibition against cruel and unusual punishment.¹⁹ In a five to four decision, two of the Justices in the majority thought that the death penalty violated the Eighth Amendment under all circumstances.²⁰ The three other Justices in the majority took the view that unguided discretion made the death penalty an unpredictable and, therefore, a cruel and unusual punishment.²¹ Some of the Justices added that the death penalty was disproportionately inflicted on the basis of race, poverty, and ignorance.²² It is important to note that the Justices did not require proof of such discrimination in the individual case. Rather, they considered it sufficient that unguided discretion created a risk that capital punishment might be imposed in an arbitrary or discriminatory manner.

The effect of *Furman* was to strike down every death penalty statute in the United States because none of the statutes provided any guidance for the exercise of discretion.²³ The majority of the American states, however, were not ready to dispense with capital punishment. Within a few years many states had enacted new capital punishment statutes.²⁴ Some of those statutes provided for mandatory or automatic capital

¹⁹ *Furman v. Georgia*, 408 U.S. 238, 239-40 (1972).

²⁰ *Id.* at 286 (Brennan, J., concurring), 370-71 (Marshall, J., concurring).

²¹ *Id.* at 255-57 (Douglas, J., concurring), 306-10 (Stewart, J., concurring), 311-15 (White, J., concurring).

²² *Id.* at 250 (quoting Rupert C. Koeninger, *Capital Punishment in Texas, 1924-1968*, 15 CRIME & DELINQ. 132, 141 (1969)), 310 (Stewart, J., concurring).

²³ STEPHEN A. SALTZBURG ET AL., CRIMINAL LAW: CASES AND MATERIALS 351 (2d ed. 2000).

²⁴ *Id.*

punishment in particular cases.²⁵ They tried to solve the problem of unguided and excessive discretion by eliminating discretion all together. In 1976, the Supreme Court held, however, that mandatory death penalty statutes violated the Eighth Amendment because it required respect for the offender's personality.²⁶ Mandatory death penalty statutes forbade distinguishing degrees of culpability among defendants who were found guilty of the same category of crime.²⁷ They also made it impossible to take the defendant's character and prior record into consideration.²⁸

As a consequence, most of the statutes enacted after *Furman* took a new approach. They provided for a system of guided and structured discretion by enumerating aggravating as well as mitigating circumstances that the jury or the judge has to consider when deciding whether the death penalty should be inflicted.²⁹ Criminal trials in the United States may be conducted before a jury or a judge. While most criminal cases are decided either by guilty pleas or bench trials, capital cases are often tried before a jury because of their unique nature. After the defendant is found guilty, a separate sentencing hearing is conducted to decide on punishment. Traditionally, this sentencing hearing has been held before a judge. The majority of the post-*Furman* capital punishment statutes provide, however, that the sentencing hearing be held before a jury.³⁰ By requiring that the jury decide on capital punishment the statutes have tried to create a special procedural safeguard for the defendant. Only a few of the post-*Furman* statutes follow the traditional pattern and exclude the jury from the sentencing hearing.³¹

At the sentencing hearing, the prosecutor and defense counsel introduce evidence not already offered at the trial and present arguments. Based upon what they have heard about the aggravating and mitigating circumstances, the judge or

²⁵ *Id.*

²⁶ *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976); *see also* *Roberts v. Louisiana*, 431 U.S. 633, 637 (1977).

²⁷ SALTZBURG, *supra* note 23, at 352.

²⁸ *Id.* *See also* *Sumner v. Shuman*, 483 U.S. 66, 74-75 (1987).

²⁹ SALTZBURG, *supra* note 23, at 352.

³⁰ JOHN KAPLAN ET AL., *CRIMINAL LAW: CASES AND MATERIALS* 527 (4th ed. 2000).

³¹ *Id.* at 528.

jury decides whether to impose the death penalty or life imprisonment. Sometimes they can provide for the possibility of parole.

The Supreme Court has held in a number of cases that such statutes are constitutional because they reduce the likelihood of arbitrary sentencing.³² The Court considered the separate sentencing hearing, as well as the structuring of the sentencing decision with the help of aggravating and mitigating criteria, to be essential mechanisms for the protection of the defendant. This deserves special attention because the American criminal justice administration is dominated in many ways by unfettered and uncontrolled discretion of the prosecutor, the judge, and the jury. For example, the American prosecutor is free to decide whether or not to bring a capital charge or to engage in plea bargaining over a capital offense. Whenever the defendant is charged with a capital crime the American jury or the judge may find the defendant guilty of a lesser included offense that is not subject to the death penalty.

The Supreme Court was aware of this imbalance between ordinary cases, where broad and uncontrolled discretion is not considered a problem, and capital punishment cases where discretion should be limited and structured.³³ The Supreme Court was of the opinion that in capital cases special procedural safeguards, as well as increased predictability, were indispensable because capital punishment was considered a penalty qualitatively different from any other penalty.³⁴ The Court reasoned in one of its capital punishment decisions that the "fundamental respect for humanity underlying the Eighth Amendment" required consideration of "the character and record of the individual offender in the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death."³⁵ The reason why the procedural safeguards needed to be increased in capital

³² See, e.g., *Gregg v. Georgia*, 428 U.S. 153, 193-95 (1976); *Proffitt v. Florida*, 428 U.S. 242, 252-53 (1976); *Jurek v. Texas*, 428 U.S. 262, 263 (1976).

³³ For example, in *Woodson v. North Carolina*, the Court noted that "[d]eath, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two." 428 U.S. at 304-05.

³⁴ *Id.*

³⁵ *Id.* at 304.

cases were, according to the Court, the "evolving standards of decency that mark the progress of a maturing society."³⁶

From a comparative point of view, it is interesting to note that in the Japanese Constitution there is also a clause outlawing cruel and unusual punishment.³⁷ Other clauses of the Japanese Constitution provide for the protection of life and the respect of the individual.³⁸ As far as can be ascertained, Japanese judges, however, have never embarked on interpreting these clauses in a dynamic way comparable to the approach taken by the U.S. Supreme Court. Justice Shima of the Japanese Supreme Court stated in a decision the Court handed down in 1948 that "cruel punishment" is a flexible concept that may change over time as feelings of the people change.³⁹ This was, however, only an obiter dictum that remained without consequence. Japanese judges seem to interpret the Japanese Constitution in a more static way—a method which may better conform to traditional Japanese values.

American capital punishment statutes enacted after *Furman* provide for more or less detailed lists of aggravating circumstances.⁴⁰ Some of these circumstances resemble traditional common law homicide categories, such as the felony murder rule. Typical aggravating factors in U.S. state statutes are the following:

- The murder was committed during the course of a robbery or another crime involving violence.
- The murder was committed to avoid a lawful arrest or to make an escape from lawful custody possible.

³⁶ *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion).

³⁷ *NIHON KOKU KEMPŌ*, *supra* note 9, at art. 36.

³⁸ *Id.* at arts. 11, 13, 31.

³⁹ Chin Kim & Gary D. Garcia, *Capital Punishment in the United States and Japan: Constitutionality, Justification and Methods of Infliction*, 11 *LOY. L.A. INT'L & COMP. L. REV.* 253, 261 (1989).

⁴⁰ *KAPLAN ET AL.*, *supra* note 30, at 529-36; *SALTZBURG*, *supra* note 23, at 374-76.

- The murder was committed by someone serving a prison sentence.
- The murderer had a previous conviction of another murder or a felony involving violence.
- The murderer knowingly created a great risk of death to many persons.
- The murder was committed for pecuniary gain.
- The murder was committed in an especially heinous, atrocious, or cruel manner.

Some statutes include special clauses to cover common crimes in America.⁴¹ Examples include clauses on murder committed in the furtherance of a criminal drug conspiracy or a drive-by-shooting.⁴²

To some extent, the clauses of the new American statutes are comparable to the aggravating criteria in the European penal codes. The American clause that the killing was committed in an “especially heinous, atrocious or cruel manner” must be considered vague in a way similar to the requirement in the German Penal Code that the defendant acted “treacherously.” Like the German courts have done with “treacherously,” the American courts have interpreted the “heinous, atrocious or cruel” clause to give it a more definite content.⁴³ Legislatures and courts have cooperated in

⁴¹ KAPLAN ET AL., *supra* note 30, at 529 n.11. *See, e.g.*, criminal street gangs, 18 U.S.C. § 521 (2000).

⁴² KAPLAN ET AL., *supra* note 30, at 529 n.11. The death penalty may be imposed for gun murders committed during federal drug trafficking crimes, 18 U.S.C. § 924 (2000) and for a “drive-by shooting,” 18 U.S.C. § 36 (2000).

⁴³ *See, e.g.*, Maynard v. Cartwright, 486 U.S. 356 (1988) (the “especially heinous, atrocious, or cruel” characterization could be made constitutional by a “limiting instruction.” Such construction would not have to be limited to torture or serious physical abuse); As to other aggravating factors see *Arave v. Creech*, 507 U.S. 463 (1993) (the phrase “cold-blooded, pitiless slayer” meets constitutional requirements as an “utter disregard for human rights”); *Riley v. State*, 366 So.2d 19 (Fla. 1978) (aggravating circumstance of “terribly cruel, ruthless and heinous murder” misapplied for death penalty purposes); *Lewis v. State*, 398 So.2d 432 (Fla. 1981) (murder by shooting not “heinous, atrocious and cruel” as a matter of law for purposes of sentencing).

developing clear and manageable definitions that provide guidance and restrict discretion.

In an American sentencing hearing, if the jury or the judge finds at least one aggravating circumstance enumerated in a post-*Furman* statute, they may inflict the death penalty. They are, however, not required to do so, especially if they find one or more mitigating factors. The most important mitigating factors are also enumerated in the new statutes.⁴⁴ In general, the statutes offer the following criteria as mitigating factors:

- Diminished mental capacity or emotional disturbance.
- Duress or domination of another person.
- Belief that the circumstances provided a moral justification or extenuation of the crime.
- The actual killing was committed by another participant of the murder and the defendant's role in the crime was relatively minor.
- Youth of the defendant at the time of the crime.
- Absence of a serious criminal record.

There is no question that some of these factors may also serve as defenses to reduce or exclude liability when the defendant's guilt is decided. If the evidence the defendant has introduced at the trial has proven insufficient to save him or her from a first-degree murder conviction, the defendant can offer it again at the sentencing hearing.

The U.S. Supreme Court held that mitigating circumstances that may be considered at the sentencing hearing may not be limited by statute.⁴⁵ Some of the non-statutory mitigating circumstances often introduced by the defendant are that the defendant was an abused or neglected

74. ⁴⁴ KAPLAN ET AL., *supra* note 30, at 536-38; SALTZBURG, *supra* note 23, at 372-

⁴⁵ *Lockett v. Ohio*, 438 U.S. 586, 604 (1978).

child or that the defendant had problems with drug or alcohol abuse. Mitigating circumstances do not need to relate to the defendant's culpability, they can refer to anything that may be helpful, such as the defendant's good behavior in prison while awaiting trial. If the judge or the jury finds a mitigating factor they are not obligated to automatically grant mercy. Rather, they have to take mitigating as well as aggravating circumstances into consideration and balance them. This is not done by applying a mathematical formula that, for example, three mitigating factors outweigh one aggravating factor. Balancing the different circumstances is a value judgment in which the judge or the jury has to consider the totality of what has been offered in aggravation and mitigation.

There is, however, one mitigating factor mandating against imposition of the death penalty. The Supreme Court held that there was "social consensus" that imposing the death penalty on a defendant who was fifteen-years-old or younger when he had committed the murder violated evolving standards of decency.⁴⁶ Whether such "social consensus" really exists in the United States remains an open question because the statutes of nine American states expressly provide for capital punishment in cases where the killer is fifteen years old.⁴⁷ The "social consensus" argument must, therefore, be taken as another example of the Supreme Court's dynamic interpretation of the American Constitution rather than as a description of the social reality in America.

The wide scope of mitigating circumstances, as well as the unguided balancing of mitigating and aggravating circumstances, leave the American jury and judge with much freedom in their decisions. Arguably this is not very different from the discretion Japanese judges enjoy in capital cases. There are, however, two decisive differences between Japanese and American law. First, American juries and judges are authorized to consider only those aggravating factors that are enumerated in a statute. The legislature must have defined the particular instances where the death penalty may be inflicted. Second, it is not kept secret in the United States which aggravating and mitigating criteria may be taken into

⁴⁶ *Thompson v. Oklahoma*, 487 U.S. 815, 830, 838 (1988).

⁴⁷ SALTZBURG, *supra* note 23, at 372.

consideration. There is an open debate about the proper interpretation of those criteria and there is also an open discussion about which non-statutory mitigating circumstances should be admitted at the sentencing hearing. The new American statutes with their lists of aggravating and mitigating circumstances are certainly far from perfect, but they prove that in the United States serious efforts are undertaken to make decisions on capital punishment more rational, reasonable, and explicable.

In most of the American states retaining the death penalty, the defendant has a right to a sentencing hearing conducted before a jury.⁴⁸ Unless the defendant waives this right, the jury listens to the evidence presented by the prosecutor and defense counsel and then decides by unanimous vote whether the defendant shall be executed or sent to prison. In the majority of the death penalty states, the jury's decision is binding on the judge; in other states, the jury can only make a non-binding recommendation.⁴⁹ In the latter ones, the judge is authorized to sentence to imprisonment where the jury has recommended death, but the judge can also impose a death sentence where the jury has recommended life.⁵⁰ There are also a few states where the judge alone decides on life and death without any input from the jury.⁵¹

The Supreme Court did not find the restriction or exclusion of a jury unconstitutional.⁵² One Justice noted, however, that jury sentencing is desirable in capital cases in order "to maintain a link between contemporary community values and the penal system."⁵³ In this context, the Justice also referred to the "evolving standards of decency" and the

⁴⁸ KAPLAN ET AL., *supra* note 30, at 527; SALTZBURG, *supra* note 23, at 377.

⁴⁹ KAPLAN ET AL., *supra* note 30, at 528; SALTZBURG, *supra* note 23, at 377.

⁵⁰ KAPLAN ET AL., *supra* note 30, at 528.

⁵¹ *Id.*; SALTZBURG, *supra* note 23, at 377.

⁵² See, e.g., *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) (holding that the death penalty "is not a form of punishment that may never be imposed, regardless of . . . the procedure followed in reaching the decision to impose it"); *Furman v. Georgia*, 408 U.S. 238, 297-298 (1972) (noting that juries can refuse to convict in capital cases and "committing to the untrammelled discretion of the jury the power to pronounce life or death in capital cases" is not unconstitutional) (quoting *McGautha v. California*, 402 U.S. 183, 199, 207 (1971)).

⁵³ *Gregg*, 428 U.S. at 190 (internal citations omitted).

"progress of a maturing society."⁵⁴ These statements can again be taken as an example of the dynamic interpretation that, to some extent, is typical of contemporary American legal reasoning. At the same time, the statements are an expression of the effort to make the law on capital punishment more rational and better explicable, i.e. less "absurd."

Empirical research has revealed, however, that the American practice in capital cases does not always live up to these high expectations.⁵⁵ American juries obviously do not always follow the legally prescribed program in their decisions on life and death. They appear, above all, to be influenced by the evidence of the defendant's guilt that they heard during the trial. They also seem to work under the erroneous assumption that they are required to impose a death sentence whenever they agree that the killing was committed under aggravating circumstances. Mitigating factors seem to play hardly any role in their decision.⁵⁶

The American practice can, however, not be taken as evidence that aggravating and mitigating circumstances do not provide any guidance in capital cases. The way American juries function is, rather, a consequence of the peculiar features of American criminal justice administration.⁵⁷ No similar problems seem to exist when the decision on life and death is left to the judge.⁵⁸

One can also not ignore the disproportionate number of blacks, poor, uneducated and mentally impaired on death row. There are obviously a number of additional factors in the American criminal justice administration that influence the decision on life and death. This is not the place to speculate about those factors. It seems, however, that certain aspects of the American practice of imposing capital punishment must be

⁵⁴ *Id.*

⁵⁵ Ursula Bentele & William J. Bowers, *How Jurors Decide on Death: Guilt is Overwhelming; Aggravation Requires Death; and Mitigation is No Excuse*, 66 BROOK. L. REV. 1011 (2001).

⁵⁶ *Id.* at 1052.

⁵⁷ *Id.* at 1050; see also KAPLAN ET AL., *supra* note 30, at 528, 544-546; SALTZBURG, *supra* note 23, at 377-78.

⁵⁸ Issues that do not arise in judicial imposition of the death penalty, for example, are unanimous as opposed to majority jury decisions, and "death-qualified juries," that is, juries that exclude individuals so opposed to the death penalty that they would vote against it in any circumstance.

considered racist, inegalitarian, and irrational—in brief “absurd.”

II. FROM IMPOSITION OF CAPITAL PUNISHMENT TO ITS EXECUTION

“Absurdity” is a concept that may also help to evaluate the proceedings after capital punishment is imposed and before it is executed. In Japan, these proceedings show peculiar characteristics: The Minister of Justice has broad and uncontrolled discretion whether or not to issue a death warrant. In general, convicts languish on death row for a long time. Conditions of confinement on death row are extremely harsh. Executions are veiled in secrecy.

A. *The Broad and Uncontrolled Discretion of the Japanese Minister of Justice*

Article 475 of the Japanese Code of Criminal Procedure provides that the death penalty shall be executed upon an order of the Minister of Justice and that this order shall be given within six months after the judgment has become final.⁵⁹ Under Article 476 of the Code the execution shall be carried out within five days after the minister has issued the death warrant.⁶⁰ In both provisions, the term “shall” (*shinakereba naranai*) is used. According to the general rules of statutory construction, the term means that the law must be followed.

In Japanese practice, however, only the five-day period seems to have been taken seriously.⁶¹ Japanese Ministers of Justice did not always issue the execution order within six months.⁶² In a number of cases the reason was that the convict had brought an appeal or requested a pardon. Whenever such

⁵⁹ KEIJI SOSHŌHŌ [Japanese Code of Criminal Procedure], 1948, art. 475; see also SHIGEMITSU DANDO, JAPANESE LAW OF CRIMINAL PROCEDURE 471-72 (B.J. George, trans., 1965).

⁶⁰ KEIJI SOSHŌHŌ, art. 476; see also DANDO, *supra* note 59, at 472.

⁶¹ Llompart, *supra* note 6, at 161; Llompart, *supra* note 2, at 356; Daniel H. Foote, “The Door that Never Opens”?: Capital Punishment and Postconviction Review of Death Sentences in the United States and Japan, 19 BROOK. J. INT’L L. 367, 413 (1993).

⁶² *Id.*

an appeal or request is pending the six months period is suspended.⁶³ Yet, Japanese Ministers of Justice have also in other cases felt free not to adhere to the six months limit. Thus, they have changed the legal requirement into a simple recommendation even though it should be expected that a Minister of Justice takes special pains to follow the law.

No official reasons have been given for delaying the issuing of death warrants. One might assume that ministers have refrained from ordering an execution to give convicts a chance, but it seems questionable what such a chance could have been. The case of Hirasawa Sadamichi proves that the reason for not issuing a death warrant may be more mundane. Hirasawa had languished on death row for thirty-two years until he died in 1987 of illness at the age of ninety-five. When a former Minister of Justice was later asked in an interview why he had not signed an order to execute Hirasawa, he answered that he had hesitated to do what so many Ministers of Justice before him had not done.⁶⁴

Japanese statistics show that each year only a few offenders are sentenced to death and the number of executions that are carried out is small. In 1999, there were eight convictions and "only" five executions.⁶⁵ In the year 2000, the figures were fourteen and three respectively.⁶⁶ In the first years of the 1990s there was a period of three years and four months when no executions had taken place.⁶⁷ The reason for that was, however, not the beginning of a general tendency to show mercy. The tide turned in 1993 when a new coalition government of conservative and left wing forces replaced the government of the Liberal Democratic Party that had been in power for a long time. Two Ministers of Justice of the new government ordered seven executions, three to be carried out on the same day in March 1993 and four on the same day in November of that year.⁶⁸

⁶³ Foote, *supra* note 61, at 413-14.

⁶⁴ Llompart, *supra* note 2, at 362; Manako Ihaya, *The Death Penalty*, JAPAN TIMES WKLY., Apr. 20, 1991, at A5.

⁶⁵ Nempo Shikei Haishi (Death Penalty Abolition Annual) 2000-2001, Impact Press 3, at 173 (2001).

⁶⁶ *Id.*

⁶⁷ Foote, *supra* note 61, at 385; Domiková-Hashimoto, *Japan and Capital Punishment*, 6 HUM. AFF. 77 (1966).

⁶⁸ Foote, *supra* note 61, at 516; Domiková-Hashimoto, *supra* note 67, at 77.

As usual, the Ministers declined to comment on the executions. There is, however, reason to assume that the death warrants were issued by the members of the new government in order to avoid criticism that had been leveled against the former government by advocates of the death penalty.⁶⁹ Obviously, politics have taken priority over legal considerations—an approach that is popular also in the United States today.

One should not forget that Japanese Ministers of Justice⁷⁰ are generally not lawyers and, thus, not used to thinking in legal categories. Often the Ministers do not seem to take the initiative in issuing a death warrant. Instead, they wait for their subordinates in the ministry to present the cases. Therefore, it may not always be the Minister but a subordinate working somewhere in the hierarchy of the ministry who plays the most important role in the decision on life and death.⁷¹

It is questionable how the practice of not issuing death warrants—a practice that is, at least to some extent, directed by politics and dominated by wide and uncontrolled discretion—can avoid displaying features of irrationality, unreasonableness, inexplicability, and, “absurdity.”

Likewise, in some American states the decision to execute a convict rests with an administrative agency, or sometimes with the governor. Hardly anything is known about this procedure even though there is much debate about all other aspects of capital punishment. Keeping in mind that over 3500 convicts are languishing on death row and that their number has been steadily rising,⁷² one can only guess to what extent political and other considerations might influence the final decision on life and death.

B. *Long Terms on Death Row*

Another problem is that Japanese convicts generally spend long terms on death row before they are executed. It has

⁶⁹ Domiková-Hashimoto, *supra* note 67, at 88; SCHMIDT, *supra* note 7, at 531.

⁷⁰ Japanese Ministers of Justice are politically appointed.

⁷¹ SCHMIDT, *supra* note 7, at 310; Ihaya, *supra* note 64, at A3.

⁷² See Death Penalty Information Center, Size of Death Row by Year, at <http://www.deathpenaltyinfo.org/DrowInfo.html#year> (last visited Mar. 15, 2002).

been reported that, on average, they wait between five and ten years, but a considerable number wait between two and three decades.⁷³ As mentioned above, Hirasawa spent thirty-two years on death row until he finally died. Menda Sakae also languished in prison for thirty-two years before he was released. As is well known, Menda was the first death row convict to eventually win an acquittal in post-war Japan.⁷⁴ Thus, in some cases delays in Japan have been much longer than in the United States.⁷⁵

Article 32 of the Japanese Penal Code provides for a thirty year period of limitation for the execution of the death penalty.⁷⁶ In spite of this clear legal requirement, Hirasawa, Menda, and other convicts were not released from death row after the thirty year period had expired. Hirasawa brought a complaint requesting that he be released, but the Ministry of Justice did not grant his request. It argued that "execution" in Article 32 should be interpreted to include not only the hanging itself but all steps that are taken in executing the judgment.⁷⁷ According to this interpretation, execution begins as soon as the convict starts waiting on death row until the hanging takes place.⁷⁸ Hirasawa appealed, but the Japanese Supreme Court followed the argument of the Ministry of Justice.⁷⁹

This kind of legal reasoning must be considered a typical example of conceptual jurisprudence, which tries to achieve the desired result by bending the clear language of the Code. It neglects to ask what interests are protected by the legal norm. Provisions limiting the execution of punishment in penal codes of other countries are mainly based on the idea that human justice should not result in eternal revenge and deterrence. It should be asked whether this idea is alien to Japanese criminal justice.

The consequence of the Supreme Court's interpretation of Article 32 is that the court imposing capital punishment

⁷³ MIYAZAWA, *supra* note 7, at 738; Foote, *supra* note 61, at 412; Doug Struck, *Where Capital Punishment is Cloaked*, INT'L HERALD TRIB., May 4, 2001, at 2.

⁷⁴ SCHMIDT, *supra* note 7, at 310; Ihaya, *supra* note 64, at 3.

⁷⁵ Foote, *supra* note 61, at 412.

⁷⁶ KEIHŌ, art. 32, *translated in*, DANDO, *supra* note 10, at 409.

⁷⁷ Llompart, *supra* note 6, at 166; SCHMIDT, *supra* note 7, at 278.

⁷⁸ *Id.*

⁷⁹ *Id.*

officially inflicts two penalties: first a prison term to be spent on death row—a term that may last longer than thirty years; and second, the hanging itself. It seems questionable whether this kind of legal reasoning is reconcilable with the prohibition against punishing someone twice for the same offense.

Actually, in Japan a third kind of punishment is imposed with each death penalty: The life of the convict on death row is totally dominated by the uncertainty of whether and when the execution will be carried out. The essence of the convict's life is reduced to waiting to be killed. The permanent fear of being forced to die at the hands of another is an exquisite psychological torture that creates severe emotional, mental, and also physical suffering. Convicts have become insane; they have been driven to commit suicide.⁸⁰ There can be no doubt that these dehumanizing effects make long detention on death row unreasonable, senseless, inexplicable—and "absurd."

In the United States some argue that to an extent convicts themselves are responsible for the long periods they have to spend on death row because they delay their execution by bringing a great number of appeals and applications for mercy.⁸¹ This must, however, be considered a cynical argument because convicts are only exercising their rights. The dehumanizing effect of the lengthy detention on death row does not get less severe only because an appeal or an application for mercy is pending. Courts in several countries have viewed such extended periods on death row as illegal or unconstitutional. As a consequence, they have replaced death sentences by life imprisonment.⁸²

⁸⁰ See generally H. Bluestone & C.L. McGahee, *Reaction to Extreme Stress: Impending Death by Execution*, 119 AM. J. PSYCHOL. 393 (1962); Robert Johnson, *Under Sentence of Death: The Psychology of Death Row Confinement*, 5 LAW & PSYCHOL. REV. 141 (1979); John Kaplan, *Administering Capital Punishment*, 36 U. FLA. L. REV. 177 (1984) (discussing the death row syndrome).

⁸¹ Chessman v. Dickson, 275 F.2d 604, 607 (1960); U.S. ex rel. Townsend v. Twomey, 322 F. Supp. 158, 174 (1971); Richmond v. Lewis, 948 F.2d 1473, 1491 (1990). See also Foote, *supra* note 61, at 412; Potts v. State, 376 S.E.2d 851, 859 (Ga. 1989) (waiting for execution is not intolerably cruel, since innocent, terminally ill patients suffer similar fates).

⁸² E.g., India: Vatheeswaran v. State of Tamil Nadu, A.I.R. [1983] S.C. 361 (eight years on death row); Ahmed v. State of Maharashtra, A.I.R. [1985] S.C. 231 (two years and nine months); Mehta v. Union of India, [1989] 3 S.C.R. 775 (more than eight years); Zimbabwe: Catholic Comm'n v. Attorney-General, [1993] 4 S.A. 239, (several

C. *Harsh Conditions on Death Row in Japanese Prisons*

There is no official information about life on death row in Japanese prisons. In recent years, however, a few reports from private sources have shed some light on this dark area.⁸³ They will be briefly summed up here even though it can only be hoped that some of the reported facts are not true.

Convicts on Japanese death row are kept in solitary confinement. They are not allowed to move about in their small cells. They are not allowed to lie down except at night or for a brief nap at midday. They have to sit at a fixed place all day, but they are not allowed to lean against the wall. No matter how many years or decades convicts have to spend on death row, they are not allowed to talk with other convicts, sometimes they may not even look at each other. Convicts have to keep the strictest military discipline. Prison guards do not address convicts by their names but by numbers. Convicts may do only very simple work, mainly paper-crafts. They are not allowed to have their own radio, television set, personal computer, clock, or calendar. They can only listen to a radio program selected by the prison authority. Convicts can have a limited number of books, but law books and political magazines seem to be excluded.

For convicts who are likely to commit suicide there are special cells with permanent lighting so they can be surveilled by video cameras. Windows in these cells are sometimes closed by iron plates with small holes that do not allow enough fresh air to come in. It is also reported that convicts who never thought about suicide but had brought an appeal against their conviction were placed in these cells, some of them for long periods.

Life on death row in Japan also seems to be dominated by the principle of strict isolation. Convicts are allowed to contact only close relatives and their lawyer if they happen to have one. All communication is, however, strictly supervised. Contacts with the media, Members of Parliament, and other

convicts with terms between four and six years); Jamaica: Pratt v. Attorney General, [1993] 3 W.L.R. 995 (fourteen years).

⁸³ Koichi Kikuta, *Capital Punishment in Japan and the International Code*, 7 MEIJI L. J. 1 (2000); Struck, *supra* note 73, at 2.

politicians are prohibited. Also members of the Human Rights Commission of the Council of Europe, who visited Japan in early 2001, were not permitted to contact a convict on death row even though the convict had, with the help of his wife, given his consent.⁸⁴

It is interesting to compare Japanese conditions on death row with those in American prisons. Death rows in the United States have been criticized as harsh, inhuman, and degrading.⁸⁵ In some respects, however, the convict's fate on death row in Japan seems to be even worse than that of an American convict.

In the United States—like in many other countries—convicts are free to communicate with the media. The media can, on their own initiative, seek contacts with convicts. Under the U.S. Constitution, which protects the freedom of the press, such contacts are considered to be the right not only of the convict but also of the media.⁸⁶ Freedom of the press is essential to a democracy because without such freedom there could hardly be any efficient check on the government. Freedom of the press is also guaranteed by the Japanese Constitution.⁸⁷ It is an open question how the prohibition of contacts between media and convicts on death row can be justified in view of that guaranteed freedom.

In general, convicts on death row in America are allowed to call collect family, friends, and attorneys. They can also have visits by family and friends at regular intervals. Attorneys have the right to visit convicts whenever necessary. In some prisons, "contact visits" are permitted where convicts can freely circulate among family and friends.

⁸⁴ Anne Schnepfen, *Jeden Morgen kann der Henker kommen*, FRANKFURTER ALLGEMEINE, Feb. 24, 2001, at 11.

⁸⁵ For an official statement, see the decision of the European Court of Human Rights in *Soering v. United Kingdom*, 11 Eur. H.R. Rep. 439 (1989).

⁸⁶ *Thornburgh v. Abbott*, 490 U.S. 401 (1989) (publishers have a legitimate First Amendment interest in communicating with prisoners when prisoners willingly subscribe to their publications); *Pell v. Procunier*, 417 U.S. 817, 826, 835 (1974) (regulations prohibiting in-person interviews between prisoners and the press allow prison officials appropriate latitude to preserve security and are constitutional "so long as reasonable and effective means of communication remain open and no discrimination in terms of content is involved").

⁸⁷ NIHON KOKU KEMPŌ, *supra* note 9, art. 21.

In Japan, it is argued that isolating convicts is necessary because outside contacts would disturb the stability of the mind and the peace of the heart.⁸⁸ Convicts should only prepare themselves for their death and seek any opportunity for penance.⁸⁹ These arguments are evidence of a highly moralistic, paternalistic, and authoritarian attitude because they dictate how stability of the mind and peace of the heart is to be found. It is an unfounded assumption that contacts with family and friends could not help the convict find some kind of emotional stability. Also, the repressive conditions on death row in Japan and the tormenting rules regulating every detail of the convict's life hardly seem able to create an environment where stability and peace could evolve. To believe that such inhuman and degrading conditions could in any way help the convict would be "absurd."

D. *Secrecy Surrounding Executions in Japan*

Executions in Japan are shrouded in secrecy. The convict may be informed one or two days in advance when he or she is scheduled to die, but this is not always the case. Ordinarily, convicts learn about their imminent execution only when prison officers come to fetch them from their cell.⁹⁰ Therefore, convicts live in permanent fear. Whenever convicts hear steps coming close to their cell they must be afraid their time has come.⁹¹

Relatives and defense counsel are not informed until after the execution has taken place. When they write a letter they can never be sure the convict will still be able to read it. When they visit the convict they never know whether it is the last time they will have this opportunity. Japanese authorities claim executions must be kept secret in order to avoid last minute appeals and emotional scenes as well as to protect the convict's and his or her family's privacy.⁹²

⁸⁸ Kikuta, *supra* note 83, at 1; Domiková-Hashimoto, *supra* note 67, at 81.

⁸⁹ *Id.*

⁹⁰ Kim & Garcia, *supra* note 39, at 276; Ihaya, *supra* note 64, at 4; Schneppen, *supra* note 84, at 11.

⁹¹ Ihaya, *supra* note 64, at 4; Schneppen, *supra* note 84, at 11.

⁹² Kim & Garcia, *supra* note 39, at 275; Domiková-Hashimoto, *supra* note 67, at 80; Struck, *supra* note 73, at 2.

These arguments are another expression of the paternalistic and authoritarian attitude dominating the administration of death row. Such a secretive process severely curtails defense counsel's right to bring an appeal. As the general public is never informed about an imminent execution, it remains unclear why the convict's and the family's privacy require absolute secrecy.

In the United States executions are always announced to the public. As a consequence, they are often accompanied by protests against capital punishment as well as pro-death penalty demonstrations. Sometimes there is also a media circus around the prison where the execution is carried out. In spring 2001, there even was a public debate whether the execution of Timothy McVeigh should be shown on television. McVeigh had bombed the Federal Building in Oklahoma City, killing 168 people. Claiming that he was an enemy of the United States, McVeigh himself had requested that the execution of the enemy be carried out in public.⁹³

Coming back to Camus' observation, return to public executions would certainly be "absurd." At the same time, are executions shrouded in absolute secrecy with their inhuman and degrading side effects less "absurd"?

CONCLUSION

The purpose of this Essay was not simply to argue that capital punishment should be abolished. Instead, the paper has tried to achieve a more limited goal by pointing out two problem areas of capital punishment in Japan. Objections have been raised against Article 199 of the Japanese Penal Code because it provides the judge with almost unlimited discretion and severely restricts the defense. Criticism has also been leveled against the mental and physical torments the convict has to suffer on death row. It is hoped, however, that this criticism might become a step on the road towards the end of capital punishment in Japan.

⁹³ Anthony J. Blinken, *Listen to the People, Capital Punishment is More Popular in Europe than its Politicians Admit*, TIME (International), May 21, 2001, at 37; *The Rights and Wrongs. Should America Kill the Oklahoma City Bomber?*, THE ECONOMIST, May 12, 2001, at 11.

On the other hand, it must be feared that the criticism will remain purely academic because it has always been claimed in Japan that public opinion is not only in favor of capital punishment but also indifferent to the conditions on death row.⁹⁴ This was supported by public opinion polls that have been taken in Japan at regular intervals.⁹⁵ It seems that those polls are, in general, taken rather seriously by Japanese politicians.

Such wholesale reference to public opinion must, however, be considered the end of any rational debate. The public is invisible, not responsible for anything, it does not give reasons for its opinion. Yet, it is essential for a modern, democratic society to have public debates exchanging rational arguments about important social problems—and capital punishment is certainly one of those problems.

Psychologists have explained that the result of public opinion polls can easily be influenced by the way questions are phrased. It seems that questions asked in Japanese polls have often been one-sided and have invited answers favoring the death penalty.⁹⁶ Such manipulations make it even more questionable to rely on the will of the Japanese people.⁹⁷

In the United States it has also been a common argument that the public is strongly in favor of capital punishment. But the tide seems to be turning. While polls in 1994 showed that some eighty percent of Americans supported capital punishment, the figures were down to about sixty-five percent in early 2001.⁹⁸ There was also no public criticism when Governor Ryan of Illinois decided to suspend all executions in the state after some inmates on death row were found to have been wrongly convicted.⁹⁹

⁹⁴ SCHMIDT, *supra* note 7, at 369; MIYAZAWA, *supra* note 7, at 733; Haruo Nishihara, *Die Idee des Lebens im Japanischen Strafrechtsdenken*, 32 U. AUGSBURG UNIVERSITAETSREDE 17, 27 (1997); Ihaya, *supra* note 64, at 5; Struck, *supra* note 73, at 2.

⁹⁵ SCHMIDT, *supra* note 7, at 621.

⁹⁶ Domiková-Hashimoto, *supra* note 67, at 83; Ihaya, *supra* note 64, at 5.

⁹⁷ *Id.*

⁹⁸ Mark Hansen, *Death Knell for the Death Penalty*, 86 A.B.A. J. 40, 41 (2000).

⁹⁹ *Id.* at 41; Blinken, *supra* note 93, at 37. See also John Harwood, *Death Reconsidered—Despite McVeigh Case, Curbs on Executions are Gaining Support*, WALL ST. J., May 22, 2001, at A1.

Public opinion is obviously elusive, it may change faster than one might expect. It remains to be seen how public opinion will develop in Japan.