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Domestic Non-Compliance of the EU Norm: Case Study of the Capital Punishment System in Japan

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Abstract

There is a worldwide declining trend in the number of countries that have retained capital punishment since the end of World War II, and the international society has created a series of benchmarks for modern democracies represented by the *acquis communautaire* by the European Union (EU), and relevant covenants by the United Nations (UN). Despite their efforts to urge Japan to abolish capital punishment, the Japanese government does not try to match it up and is rather running backwards in the international trend retaining inhuman and degrading practices. This paper examines the Japanese institutional and cultural context, and clarifies where the governmental resistance to the anti-death penalty norm stems from. It will critically investigate which institutional frameworks have been constraining anti-death penalty activists from getting involved in Japanese policymaking; and the extent to which cultural factors have been hindering their activities from gaining roots in Japan. Critical assessment of which specific approaches can help EU institutions and other European activist groups influence Japan more effectively concludes this paper.

Keywords

Japan, EU, capital punishment, death penalty, anti-death penalty norm

There is a worldwide declining trend in the number of countries that continue to retain capital punishment today, and more than two thirds of the countries in the world have abolished this system in law or practice (Amnesty International, 2010: 1). However, Japan does not try to match it up and is rather running backward the international trend retaining inhuman and degrading practices. Whilst studies have shown that democracies are less likely to violate human rights compared to autocracies (Kirkpatrick, 1979; Howard and Donnelly, 1986; Henderson, 1991), capital punishment has been declared constitutional by the Supreme Court of Japan since 1948. Article 31 of the Constitution of Japan stipulates that 'No person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, *except according to procedure established by law*', which refers to capital punishment. The execution method is also specified as hanging in Article 11 (1) of the Criminal Code of Japan. However, human rights NGOs have been criticising the Japanese government that the exact hanging method infringes Article 36 of the Constitution of Japan which forbids cruel punishments.¹ Once a noose is placed around the inmate's neck, a button is pressed. A 90 centimetre square plate where the inmate stands opens; and he falls for approximately four metres until the rope is fully extended at approximately 15 centimetres from the ground (Sakamoto, 2010: 36). Highlighting this inhuman and degrading execution method, Matsushita Kesatoshi, the then death row inmate in the Tokyo Detention Centre, took a legal step claiming that capital punishment is unconstitutional in 1958. Nevertheless, the case was rejected in 1960, and the execution method has not changed from hanging up to the present day.

On the other hand, there is a significant anti-death penalty movement in Europe. EU Member States have all abolished capital punishment since the abandonment of which is one of the key criteria in the *acquis communautaire* that States must conform to before they can be admitted into the EU. The European Commission has also been promoting the abolition of capital punishment; and the European Council raises the issue in the bilateral summit with Japan. Moreover, the Council of Europe, an independent organization from the EU, is committed to this movement as well. Japan obtained an observer status in the Council of Europe in 1996, and is entitled to participate in the Committee of Ministers and all intergovernmental committees. However, Japan has not met the requirement declared in the Statutory Resolution (93) that those who acquire observer status should be 'willing to accept principles of democracy, the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental

freedoms' (Council of Europe ,1993: 1). In 2001, the Parliamentary Assembly of the Council of Europe warned both Japan and the US that the possession of the observer status would be threatened if any significant progress in the implementation of the resolution cannot be made by 1st January 2003 (Council of Europe, 2001: 3). Nevertheless, the Japanese government did not respond to this. Instead, at a seminar 'Judiciary and Human Rights in Countries that Hold Observer Status with the Council of Europe', which was held on 28th to 29th May 2002, the then Minister of Justice, Mayumi Moriyama, even made a bold statement: wide public support for capital punishment stems from a specific Japanese view on guilt represented by a phrase '*shinde wabiru*', or to atone for one's crime by killing oneself (Japan Times, 2002: 4).

Besides Europe, the UN has also been taking an initiative in the anti-death penalty campaign. Japan ratified the International Covenant on Civil and Political Rights (ICCPR) on 30th May in 1978, and Article 40 of which specifies that every Member State is obliged to submit periodic reports to the UN Human Rights Committee (UN Human Rights Committee, 1966: 12). For example, in response to a fifth periodic report that the Japanese government submitted in December 2006, the UN Human Rights Committee presented Concluding Observations on 18th December in 2008, though it is legally non-binding. Raising several positive aspects on the improvement of the human rights record in Japan, the Committee voiced the concern that many of the recommendations made towards the fourth periodic report have not been implemented (UN Human Rights Committee, 2008: 2). In particular, the Committee advised the government to ease the rules on the treatment of death row inmates, but the Japanese government made a further comment and tried to justify the extant policy. Thus, whilst communication between the UN and the Japanese government takes place formally and frequently at times, Japan has not committed to improving the situation.

This paper will examine: (1) why Japan resists the anti-death penalty norm; and (2) in what way the EU institutions and other anti-death penalty bodies can approach the Japanese government more effectively. Firstly, it will briefly review a normative theory which tries to offer a way to observe the international norm diffusion mechanism. The role of culture in norm transplantation process may appear to account for the Japanese government's rejection of the anti-death penalty norm at first sight. However, this part will argue that it is more important to examine institutional constraints in Japan. Secondly, it will investigate the institutional framework within which policy elites operate, and highlight the elite-driven nature of the capital punishment policy. It will first introduce a Japanese decision-making system, which restricts leading actors to bureaucrats, business community, and the ruling party; and explain why it is challenging for actors in Europe to influence the Japanese policies in Japan. It will then demonstrate that the Japanese government has not been dealing with the capital punishment policy as the issue of criminal justice, which has been hindering the EU institutions and other activist groups from approaching the government from human rights perspectives.

Thirdly, it will shift my focus to a civil society level and examine the extent to which capital punishment is embedded in Japanese culture. Although human rights violations should not be permitted over domestic cultural manifestation, the Japanese government tends to proclaim that the issue of capital punishment is domestically and culturally determined. It will first present Moriyama's claim that a social norm of *shinde wabiru* has still been appreciated by the contemporary Japanese public. Secondly, it will investigate whether or not other aspects of Japanese culture have been keeping the Japanese public 'indifferent' to the issue of capital punishment; or hindering anti-death penalty activists from raising sympathy amongst the public. Finally, after examining the institutional and cultural background to explain the Japanese government's resistance, the article will critically assess which approaches can be more successful across the EU institutions and other European anti-death penalty activist groups in influencing Japan more effectively.

NORMATIVE THEORY AND CAPITAL PUNISHMENT

First of all, it is a normative theory that tries to offer a way to examine the State's reluctance to adhere to international norms. Regarding the way in which international norms are transmitted to the domestic arena, Thomas Risse and Kathryn Sikkink (1999: 11) present step-by-step procedures of norm socialisation: (1) processes of adaptation and strategic bargaining; (2) processes of moral consciousness-raising, shaming², argumentation, dialogue, and persuasion; and (3) processes of institutionalisation and habitualisation. Similarly, Finnemore and Sikkink (1998: 895) present a 'life cycle' of norm transplantation as follows: norm emergence; norm cascades; and norm internalisation. In the first stage, norm entrepreneurs/leaders – international organizations, transnational advocacy networks or NGOs, and domestic elites – attempt to socialise other States to become norm followers/takers. This is based on the assumption that the State's compliance to a norm depends on the domestic mobilization of actors that socialise States to adhere to new norms and values (Moravcsik, 1997; Hafner-Burton and Tsutsui, 2005: 1380). Norms then cascade in the second stage with 'a combination of pressure for conformity, a desire to enhance international legitimation, and the desire of State leaders to enhance their self-esteem' (Finnemore and Sikkink, 1998: 895). Despite the fact that 'international society is a smaller group than the total number of States in the international system' (Risse and Sikkink, 1999: 11), the embarrassment of not belonging to it; and their desire to obtain a 'social proof' as a legitimate member of it are supposed to make States consider the acceptance of norms (Axelrod, 1986). Finally, norm internalisation occurs when norms acquire taken-for-granted quality that does not require a broad domestic debate such as women's voting rights and the slavery system (Finnemore and Sikkink, 1998: 895; Hafner-Burton and Tsutsui, 2005: 1385).

Secondly, with regard to the denial of international norms in domestic arena, a national attachment to a competing norm and cultural factors are raised as principal reasons. For example, Risse and Sikkink point out 'that denial of the norm almost never takes place in the form of open rejection of human rights, but is mostly expressed in terms of reference to an allegedly more valid international norm, in this case national sovereignty' (Risse and Sikkink, 1999: 23-24). Moreover, Jeffery Checkel argues that diffusion is more rapid and smooth when a 'cultural match' exists to a great extent, which varies from positive (+), null (0) to negative (-) indicating a degree of a congruence between international and domestic norms (Checkel, 1999: 6). Under this assumption, '[i]nternational norms are more likely to have an impact if they resonate with established cultural understandings, historical experience, and the dominant views of domestic groups' (Hawkins, 2001: 11).

Checkel's cultural approach can be useful to examine Japan's approach on some international norms. The anti-nuclear proliferation norm is an example of a positive cultural match. Japan has been 'nuclear-allergic' after the end of the World War II and preserving three main non-nuclear principles: not to make such weapons, not to possess them, and not to bring them into Japan³. Also, the anti-whaling norm is a typical example of a negative cultural match between meat-eating and fish-eating countries (Hirata, 2004: 188). Similarly, Japan's non-compliance of the anti-death penalty norm may appear to stem from a negative cultural match. Instead of accounting for why Japan retains capital punishment leaving human rights concerns, the government tends to claim that this issue should be left to the national criminal justice system, public climate, and a Japanese culture on death and guilt.

Therefore, the theoretical framework on international norm transplantation may appear to be accountable for Japan's rejection of certain norms at first glance. Having said that, the 'life cycle' of norm transplantation does not appear to fit in the actual domestic dynamics in Japan. For example, regarding the argument that international norms are contested by national attachment to domestic norms, it is worth noting that public support for capital punishment tends to result from strategically structured public

surveys conducted by the Prime Minister's Office (Sato, 2008). Furthermore, the Japanese distinct view on death or guilt does not necessarily account for public support for capital punishment since it is not a sentiment that is appreciated by the contemporary Japanese public. It is more accurate to state that the Japanese government has been trying to make the issue look domestically and culturally determined so that it can point to external pressures as an illegitimate intervention in the internal affair. In order to investigate these issues in detail, this paper will examine what institutional and cultural factors have been hindering EU institutions and other European anti-death penalty activists from transplanting the anti-death penalty norm to Japan.

NON-COMPLIANCE OF THE ANTI-DEATH PENALTY NORM AT GOVERNMENTAL LEVEL

EU institutions and other anti-death penalty advocates tend to pressure Prime Ministers or governmental officials in the Ministry of Foreign Affairs (MOFA) in order to urge Japan to abolish the capital punishment system. This is because Prime Ministers possess the executive power in the Japanese government; and the MOFA is responsible for the diplomatic policy and functions as Japan's window upon the world. However, in reality, the Prime Minister has practically 'no explicit legal authority enabling him to insist on policy innovation outside his Office, force a Cabinet colleague to take a particular course of action or even divulge a particular piece of information' (Neary, 2004: 675). Moreover, the MOFA is not in a position to express any independent opinion on capital punishment, and it only reproduces the policy of the Ministry of Justice as a dominant voice of the Japanese government⁴. In order to explore more effective campaigns in Japan for the anti-death penalty lobby, the first part of this paper will explore: (1) who gets involved in the actual decision making process in the capital punishment policy; and (2) why the Japanese government has been resisting pressures from the EU and other anti-death penalty advocates.

Pro-Death Penalty Norm Entrepreneurs in the Japanese Government

Capital punishment has been dealt within the Ministry of Justice, and it may appear effective for the anti-death penalty lobby to approach Ministers of Justice at first sight. Indeed, Ministers of Justice are theoretically the top authority on this policy, and Article 475 of the Code of Criminal Procedure stipulates that capital punishment shall be executed under their order within six months of the final verdict; and Article 476 also provides that execution shall be carried out within five days upon authorisation. However, it is not appropriate to over-represent their roles in the running of this policy. Ministers of Justice rarely stay in office for more than one year on average, and they cannot get involved in the capital punishment policy thoroughly. Rather, it is employed-for-life bureaucrats in the Ministry of Justice who wield tremendous power in this policy. This can be explained by how decisions are made in the Japanese government in general. What has been widely used to account for the power dynamics in Japan is the Iron Triangle model, which consists of bureaucrats, party politicians, and the business community. Of the three, it is the bureaucrats who play a significant role in both policymaking and policy implementation in Japan. Approximately 80 per cent of all legislation passed is drafted by bureaucrats, and Diet members merely rubber-stamp the documents (Van Wolferen, 1989: 33, 145). As Karel van Wolferen (1989: 145) argues, 'The law-making process is usually over by the time a bill is submitted to the Diet'. This holds true to the capital punishment policy, and it is bureaucrats in the Ministry of Justice who play a prominent role in this policy, not Ministers of Justice who tend to be short-lived because of the frequent cabinet shuffle.

Moreover, it is important to acknowledge the role that the bureaucrats in the Public Prosecutor's Office play in the capital punishment policy. Despite that the Public Prosecutor's Office is a subordinate institution of the Ministry of Justice, they tend to influence the policy of the Ministry of Justice since important positions in the Ministry of Justice have been monopolised by prosecutors and a few judges (Van Wolferen, 1989: 222). Indeed, public prosecutors practically get involved in the crucial part of this policy from generating confessions from suspects to preparing execution documents for Ministers of Justice (Johnson, 2008: 54). Consequently, it is not Prime Ministers, MOFA officials, or Ministers of Justice who exert tremendous power in the decision making process of the capital punishment policy. Prime Ministers or MOFA officials are not in a position to present an independent opinion in response to external pressures; and the role that short-lived Ministers of Justice can play is also small. Important decisions are made by selected elites in the Ministry of Justice and the Public Prosecutor's Office; and this strict governmental control to restrict leading actors from a decision making process does not allow external anti-death penalty bodies to influence its policy.

Capital Punishment as a Criminal Justice Issue in the Japanese Government

Secondly, the prime reason that the Japanese government resists the EU's and other anti-death penalty lobby's campaigns appears that capital punishment has been dealt with as a criminal justice issue in Japan, not as a human rights issue. There are two governmental agencies concerned with human rights protection in Japan: the Human Rights Bureau in the Ministry of Justice and the Human Rights and Humanitarian Affairs Division in MOFA. I approached both of these bodies to see if they would agree to an interview. In January 2011, the Human Rights Bureau declined my request, stating that they are not in charge of capital punishment. I was urged to contact the Criminal Affairs Bureau. In the meantime, two senior ministers in the MOFA division, one of which was previously in the Ministry of Justice, agreed to be interviewed in June 2011. However, they also denied any responsibility for dealing with the issue of capital punishment, now or in the future. According to them, 'there is no such issue on earth that is not related to human rights. However, it is impossible to deal with every single issue in the human rights divisions in governmental agencies, and we had better prioritise major issues and tackle them efficiently'⁵. Both groups thus maintained that capital punishment is not a human rights concern but an issue of legal punishment under the aegis of the Criminal Affairs Bureau in the Ministry of Justice. Therefore, the governmental retention of capital punishment does not appear to stem from a resistance to an international human rights norm itself. Rather, it is a governmental resistance to foreign pressures from human rights perspectives since the capital punishment policy has been dealt within the closed institutional framework as a criminal justice issue in Japan.

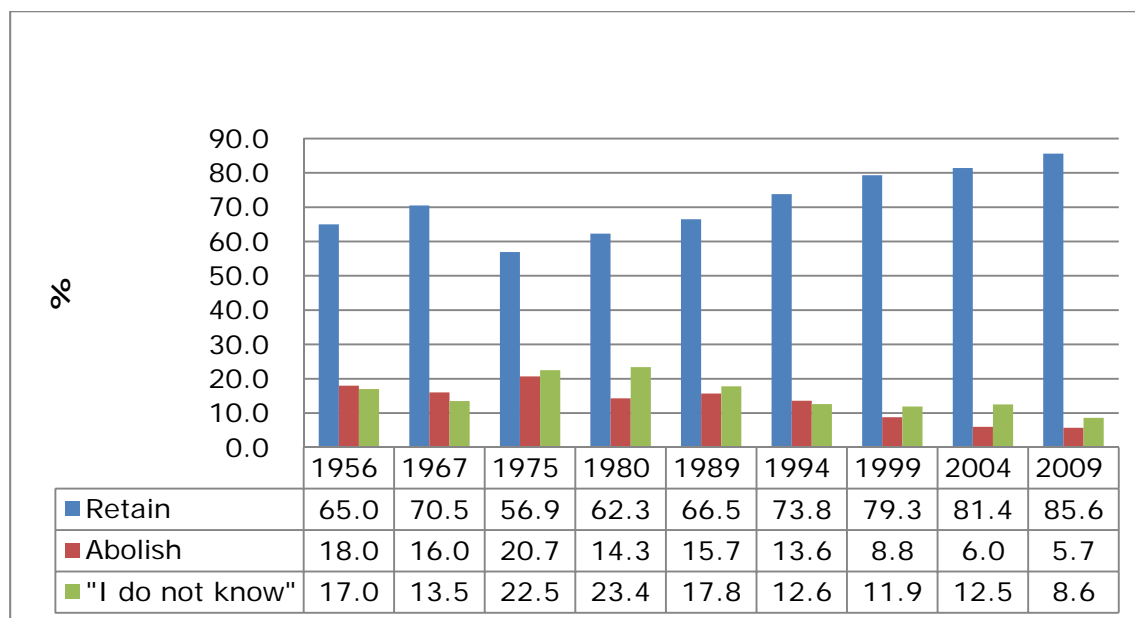
NON-COMPLIANCE OF THE ANTI-DEATH PENALTY NORM AT CIVIL SOCIETY LEVEL

Despite that the capital punishment policy is thus primarily elite-driven, the Japanese government tends to justify the system using public opinion and Japanese culture. Firstly, the Japanese government frequently cites the results of the governmental opinion poll on capital punishment, and proclaims that the majority of the Japanese public supports the system. Secondly, the government tends to argue that the issue of capital punishment is culturally determined. As already mentioned, a former Minister of Justice, Moriyama Mayumi, has claimed that capital punishment is deeply embedded in the Japanese view on guilt, and other Ministers of Justice such as Okuno Seisuke (1980: 8) and Goto Masao (1989: 3) also have shared the similar views. In order to critically examine the limits of domestic and cultural factors in the elite-driven nature of the capital punishment policy, this part will explore: (1) a methodological problem of the

governmental opinion polls, and (2) a validity of using a cultural value to a justification of the governmental policy.

Since 1956, the Prime Minister’s Office has been conducting Opinion Poll on Basic Legal System irregularly; and every five years since 1994, surveying 3,000 men and women aged 20 or older nationwide. The result in 2009 revealed that public support for capital punishment reached 85.6 per cent, the highest percentage ever compared to 81.4 per cent in 2004; 79.3 per cent in 1999; and 73.8 per cent in 1994 (The Prime Minister’s Office, 1994; 1999; 2004; 2009). Whilst these results appear to demonstrate strong public support for capital punishment, an examination of the questions posed leaves room for doubt. In seeking public opinion regarding capital punishment, the poll required participants to choose between three choices: (1) ‘it is unavoidable *in certain circumstances*,’ (2) ‘it should be abolished *in all circumstances*,’ and (3) ‘I do not know.’ The results in 2009 were 85.6 per cent, 5.7 per cent and 8.6 per cent, respectively (see Table 1). As Sato Mai (2008) analyses, the first two answers appear to have been framed strategically in order to produce results that would justify the governmental policy.

Figure 1: Opinion Poll on Basic Legal System by the Prime Minister’s Office



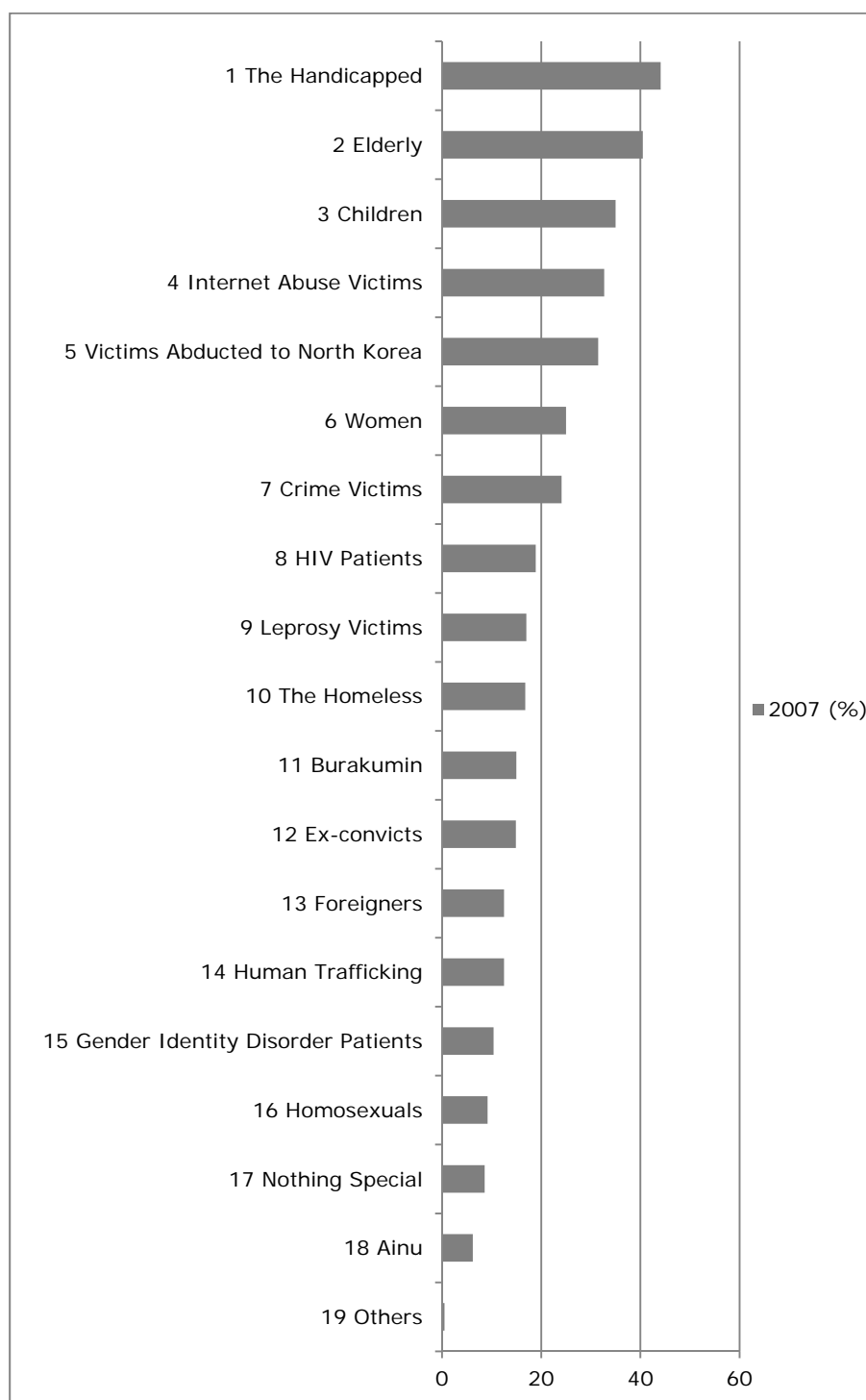
Source: The Prime Minister’s Office, 1956; 1967; 1975; 1980; 1989; 1994; 1999; 2004; 2009. Question: Out of these opinions on the issue of capital punishment, which one do you agree with?

Furthermore, the Japanese government tends to claim that a cultural value, *shinde wabiru*, has been widely accepted as a social norm in Japan, and it supports the retention of capital punishment. In order to test this claim, it is important to investigate the actual event that an act of *shinde wabiru* was conducted in Japan. It was General Nogi Maresuke and his wife who committed *seppuku*, or ritual disembowelment, following the State funeral of Emperor Meiji in 1912. His suicide note revealed that it was *junshi* – to commit *seppuku* upon the death of the lord – in order to expiate his disgrace in two main events: the Satsuma Rebellion in 1877 where he lost the imperial banner to the enemy; and the devastating result in Russo-Japanese War from 1904 to 1905 where 56,000 lives were lost, including his two sons. In the latter event in particular, although General Nogi was first stationed at Port Arthur with approximately 90,000 soldiers, Commander in Chief, Oyama Iwao, sensed that defeat was imminent under Nogi’s

leadership. Therefore, Oyama appointed Kodama Gentaro as the Chief of General Staff of the Manchuria Army at the end of November 1904 instead (Lifton, 1977: 65). Since this decision was not announced to the public, Nogi was celebrated as a national hero following Japan's victory, though he took this as an undeserved honour (Lifton, 1977: 66). A sense of shame made Nogi plead capital punishment on each occasion that he was granted an audience with the emperor and in his meetings with the major. However, it was not permitted since they both knew that Nogi genuinely meant to atone for his disgrace, and Emperor Meiji told him to live at least until Emperor's death (Lifton, 1977: 53). For this reason, Nogi committed *seppuku* with his wife in order to atone for his disgrace on the day of the State funeral of Emperor Meiji in 1912. Nogi's case received a great deal of worldwide scholarly attention into the study of seppuku ritual. This cultural value, *shinde wabiru*, may appear to have been contributing to the current public support for capital punishment. However, it merits some attention that *seppuku* ritual is a particular historical and political event with a particular set of sociological phenomena, and Nogi's case was also a symbolic suicide, which aimed at appealing to the public in a traditional *samurai* spirit. This is a sentiment not common amongst the contemporary Japanese public, and cannot be a prime reason to justify capital punishment with.

In the meantime, other Japanese cultures may appear to be associated to the capital punishment system at first sight: legal and human rights consciousness. Firstly, retention of capital punishment in Japan may imply that the Japanese public has 'lower' human rights consciousness than those in Western countries. However, in reality, since the Japanese government has been treating the issue of capital punishment from the perspective of a criminal justice, Japanese public do not appear to have been given opportunities to discuss it from a human rights perspective in the first place. The Public Survey on Defence of Human Rights (*Jinken Yogo ni Kansuru Yoron Chosa*) is conducted by the Prime Minister's Office every five years; and 1,776 out of 3,000 people aged 20 or older responded in 2007. With regard to the question: 'Which of the following human rights issues are you concerned with?', 19 issues are listed as possible choices (see Table 2). However, what merits some attention is that domestic human rights issues raised by the Prime Minister's Office are mostly different from what the international society has been mainly concerned with in Japan such as: (1) treatment of prisoners; (2) lack of independent national human rights institution; (3) historical responsibility concerning *ianfu* (comfort women) system during the wartime; and (4) the rights of minorities and foreigners (Amnesty International, 2008; UN Human Rights Committee, 2008). Of course, it is natural that domestic concerns raised by the government tend to be daily or local issues whilst those by the international society tend to be more internationally critical issues for a global comparison. Having said that, since treatment of prisoners are not listed in the survey, there is a little chance that the public would treat related issues such as the detention condition and execution methods for death row inmates as human rights issues in Japan. Opting out these issues from the governmental opinion polls appears to be preventing the public from engaging in a domestic debate on capital punishment indeed. Therefore, it is challenging to statistically observe the Japanese public's attitude towards human rights of prisoners or death row inmates in particular, or to claim that retention of capital punishment stems from the low human rights consciousness of the Japanese public.

Figure 2: Public Survey on Defence of Human Rights by the Prime Minister's Office: 'Which of the following human rights issues are you concerned with?'



Source: Prime Minister's Office 2007

Secondly, Japanese legal consciousness may appear to explain the mechanism that the general public does not show much sympathy towards domestic anti-death penalty activities. For example, a low litigation rate in Japan compared to other industrialised countries (Kawashima, 1967; Cole, 2007) may make it look that the Japanese public has

'low' legal consciousness, and it does not support the anti-death penalty lobby who tries to challenge the extant legal provisions. Generally speaking, the Japanese public tends to 'regard law like an heirloom samurai sword, something to be treasured but not used' (Dean, 2002: 4), and prefer to settle disputes informally through mediation. According to a legal sociologist, Kawashima Takeyoshi, this relates to the fact that the Japanese do not appear to assert their legal rights. Whilst duty or norms are emphasised in Japanese society, terms such as 'rights' (*kenri*) did not exist when Japan imported a Western legal system, making the translation work challenging (Kawashima, 1967: 15). Kawashima also claims that once a contract is made in any profession, a master-servant relationship arises: when troubles occur in this power dynamic, mediation is preferred and any hard feeling is expected to be 'washed away' (*mizu ni nagasu*) through apology or small compensation. If someone still tries to bring a law suit, this behaviour is seen as morally wrong, subversive, and rebellious, which appears to have been contributing to the low litigation rates in Japan (Kawashima, 1963: 45). This also relates to Wagatsuma Hiroshi and Arthur Rosett's work on apologetic culture in Japan. According to them, the Japanese public tends to apologise even when it is not entirely their fault, and this derives from their wish to maintain community harmony and stability (Wagatsuma and Rosett, 1986). Such cultural preference might not motivate the Japanese public to support the anti-death penalty lobby's vocal campaigns, which try to urge the government to repeal or amend the legal provisions.

However, as is the case of Japanese human rights consciousness, it is not easy to evaluate Japanese legal consciousness from low to high in the first place. Regarding the reason that the informal way is preferred for solving problems, it is worth noting the conciliation methods employed in Japan. For example, companies usually provide employees with a mediating service in the case of traffic accidents, and there is no need for the individual to bring a law suit. Legal procedures come in only after exhausting all the available conciliation methods, and by the time people do so, the problem is normally being solved peacefully by mediators' efforts. Therefore, low litigation rate in Japan does not necessarily stem from 'low' legal consciousness of the Japanese public, but from what is prepared as an alternative conciliation method. More precisely, the legal consciousness of the Japanese public cannot be examined through the lens of culture or institutions, but rather encompasses both study areas (Feldman, 2007: 63). Secondly, although the Japanese public may appear loyal to the judicial authority and do not show much interests in the anti-death penalty campaigns, it is not appropriate to link this to their 'low' legal consciousness directly. It is not unnatural that the Japanese public considers that the issue of capital punishment should be left to the judiciary, since it has been dealt with by the government as the issue of criminal justice or law and order, not as the issue of human rights.

THE FUTURE OF ANTI-DEATH PENALTY CAMPAIGNS IN JAPAN

Finally, this article will investigate if there is some room for improvement in the anti-death penalty activities by EU institutions and other activist groups. Firstly, it is required for them to acknowledge Japan's institutional framework since the government tends to conceive their campaigns as a single-sided imposition of the European or international ideology. As the Iron Triangle model indicates, Japanese policies are made and implemented by a cluster of elites, party politicians, and the business community. Such closed institutional framework does not allow any external actors to get involved in its decision making process. Moreover, the capital punishment policy has been run by the bureaucrats in the Ministry of Justice and the Public Prosecutor's Office as the issue of criminal justice, and the government tends to resist external pressures, which try to transplant human rights norms.

Relating to this, it is also important for the European and international anti-death penalty lobby to recognise that the capital punishment policy is not necessarily embedded in the

Japanese view on death and guilt, or legal and human rights consciousness. The Japanese government often justifies capital punishment on cultural grounds so that third parties should have no say. However, it is essential for these bodies to acknowledge the elite-driven nature of the capital punishment policy in Japan and proclaim that human rights violations should not be permitted over domestic cultural manifestation. Without understanding the actual interplay or divergence between domestic culture and international consensus, it is most likely that the anti-death penalty lobby keeps pressuring the Japanese government from human rights perspectives; or misjudges that the governmental retention stems from cultural differences. In order to conduct a more effective way to approach Japan to help alter its policy, it is required for the EU institutions and other anti-death penalty groups to develop specific strategies towards Japan.

CONCLUSION

This paper has examined Japanese institutional and cultural contexts in order to investigate where the governmental resistance to the anti-death penalty norm stems from, and in what way the EU institutions and other anti-death penalty lobby can approach the Japanese government more effectively. Although a normative approach may suggest that a national attachment to the pro-death penalty norm is a great obstacle to abolish capital punishment in Japan, the first part of this analysis clarified that the pro-death penalty norm entrepreneurs in Japan are selected elites in the Ministry of Justice and the Public Prosecutor's Office. In other words, decisions are made within the closed institutional framework irrespective of the public sentiment or Japanese culture. This part also discussed that the governmental retention of capital punishment does not necessarily stem from its strong disagreement to the international human rights norm. Rather, the capital punishment policy has been dealt with as a criminal justice issue in the Ministry of Justice, and the Japanese government does not simply invite opinions or suggestions from external actors from human rights perspectives.

The second part of this article critically investigated the governmental justification of capital punishment on cultural grounds. Although Ministers of Justice tend to cite public opinion and Japanese culture in order to legitimise capital punishment, this part contended that the capital punishment policy is not domestically and culturally determined. Firstly, although the governmental opinion polls indicate a wide public support, there lies a methodological and conceptual problem. Questions regarding the public support on capital punishment appear to have been strategically phrased in order to draw answers, which is in favour of the governmental view. Secondly, an act of *shinde wabiru* is a particular historical and political event with a particular set of sociological phenomena, and not a sentiment appreciated amongst the contemporary Japanese public. Thirdly, it argued that lack of public interest in human rights concerns of the capital punishment system does not necessarily stem from a weak human rights consciousness. Rather, it heavily links to the governmental approach on capital punishment as the issue of criminal justice. Fourthly, whilst Japanese legal consciousness may partially account for the public resistance to the anti-death penalty lobby, it illuminated the fact that capital punishment issue is primarily elite-driven, and domestic or cultural factors do not influence its decision making directly.

Finally, this study discussed that it is required for the EU institutions and other activists to alter their anti-death penalty campaigns to have their voices heard by the Japanese government. If the anti-death penalty body continues to try to urge the government to abolish capital punishment from human rights perspectives, the Japanese government will consider it as an intervention in the internal affair, and resist it using domestic and cultural factors as a shield. As a better approach for European and international anti-death penalty lobby to deal with the capital punishment policy in Japan, this paper discussed that it is significant for them to try to understand what kind of institutional

framework has been affecting the government's resistance to their pressure; and how strategically the Japanese government uses domestic and cultural factors for the justification of capital punishment.

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¹ Article 36 of the Constitution of Japan provides that '[t]he infliction of torture by any public officer and cruel punishments are absolutely forbidden'.

² Shaming here means creating a tension between norm-abiding and norm-violating countries to make the latter realise that international norm compliance has now become one of the crucial constitutive elements of modern statehood or a member of international society (Risse and Sikink, 1999: 8, 15; Risse and Ropp, 1999: 234).

³ However, it merits some attention that this can also be construed as a socialised norm as a product of American security guarantee, given that the renunciation of war was included in the US occupation policy (Johnson and Zimring, 2009: 60–61).

⁴ Interview with a MOFA minister, Tokyo, 9 May 2011.

⁵ Interview with two MOFA ministers, Tokyo, 17 June 2011.

REFERENCES

- Amnesty International (2008). 'Japan: Amnesty International Submission to the UN Human Rights Committee', 92nd session of the UN Human Rights Committee, 17 March – 4 April 2008. Pre-sessional meeting of the Country Report Task Force on Japan, February 2008. Available at: <http://www2.ohchr.org/english/bodies/hrc/docs/ngos/AIJapan92.pdf>. Last accessed 18 January 2013.
- Amnesty International (2010). 'Abolish the Death Penalty'. Available at: <http://www.amnesty.org/en/death-penalty>. Last accessed 18 January 2013.
- Axelrod, R. (1986). 'An Evolutionary Approach to Norms', *The American Political Science Review*, 80 (4), pp. 1095–1111.
- Checkel, J.T. (1999). 'Norms, Institutions, and National Identity in Contemporary Europe', *International Studies Quarterly*, 43 (1), pp. 84–114.
- Cole, T. (2007). 'Commercial Arbitration in Japan: Contributions to the Debate on Japanese "Non-Litigiousness"', *New York University Journal of International Law and Politics (JILP)*, 40(1), pp.29–114.
- Council of Europe (1993). 'Statutory Resolution (93) 26 on Observer Status'. Available at: <http://conventions.coe.int/Treaty/en/Treaties/Html/Resol9326.htm>. Last accessed 18 January 2013.
- Council of Europe (2001). 'Resolution 1253: Abolition of the Death Penalty in Council of Europe Observer States'. Available at: <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta01/ERES1253.htm>. Last accessed 18 January 2013.
- Dean, M. (2002). *Japanese Legal System*, London: Routledge, 2nd ed.
- Feldman, E. (2007). 'Law, Culture, and Conflict: Dispute Resolution in Postwar Japan', *Scholarship at Penn Law*, pp. 50-79.
- Finnemore, M. and Sikkink, K. (1998). 'International Norm Dynamics and Political Change', *International Organization*, 52 (4), pp. 887-917.
- Goto, M. (1989). The 116th Legal Committee of the House of Councillors, 5 December 1989.
- Hafner-Burton, E. M and Tsutsui K. (2005). 'Human Rights in a Globalizing World: The Paradox of Empty Promises', *American Journal of Sociology*, 110 (5), pp. 1373–1411.
- Hawkins, D.G. (2001). 'The Domestic Impact of International Norms and Transnational Networks', Paper presented to the Annual Meeting of the American Political Science Association, San Francisco, 30 August - 2 September.
- Henderson, C. W. (1991). 'Conditions Affecting the Use of Political Repression', *Journal of Conflict Resolution*, 35 (1), pp. 120-142.
- Hirata, K. (2004). 'Beached Whales: Examining Japan's Rejection of An International Norm', *Social Science Japan Journal*, 7 (2), pp. 177-197. Available at: <http://ssjj.oxfordjournals.org/cgi/reprint/7/2/177>. Last accessed 18 January 2013.
- Howard, R. E. and Donnelly, J. (1986). 'Human Dignity, Human Rights, and Political Regimes', *The American Political Science Review*, 80 (3), pp. 801–817.
- Japan Times (2002). 'Diet group against Death Penalty to Make Its Move, 4 October 2002'. Available at: <http://search.japantimes.co.jp/cgi-bin/nn20021004b1.html>. Last accessed 18 January 2013.
- Johnson, D. (2008). 'Japanese Punishment in Comparative Perspective', *Japanese Journal of Sociological Criminology*, 33 (1), pp.46–66.
- Johnson, D. and Zimring, F. E. (2009). *The Next Frontier: National Development, Political Change, and the Death Penalty in Asia*, New York: Oxford University Press.
- Kawashima, T. (1963). 'Dispute Resolution in Contemporary Japan', in A. T. von Mehren (ed) *Law in Japan: The Legal Order in a Changing Society*. Cambridge, Mass.: Harvard University Press, pp. 41-72.

- Kawashima, T. (1967). *Nihonjin no Hoishiki (The Legal Consciousness of the Japanese)*, Tokyo: Iwanami Shoten.
- Kirkpatrick, J. (1979). 'Dictatorships and Double Standards', *Commentary*, 68 (5), pp. 34–45.
- Lifton, R.J. (1977). *Nihonjin no Shiseikan Jo (Japanese View on Life and Death A)*. Tokyo: Iwanami Shoten.
- Moravcsik, A. (1997). 'Taking Preferences Seriously: A Liberal Theory of International Politics', *International Organization*, 51 (4), pp. 513–553.
- Neary, I. (2004). 'Parliamentary Democracy in Japan', *Parliamentary Affairs*, 57 (3), pp. 666–681.
- Okuno, S. (1980). The 93th Legal Affairs Committee of the House of Councillors, 18 December 1980.
- Prime Minister's Office, (1956). Opinion Poll on Basic Legal System. Available at: <http://www8.cao.go.jp/survey/s31/S31-04-31-01.html>. Last accessed 18 January 2013.
- Prime Minister's Office, (1967). Opinion Poll on Basic Legal System. Available at: <http://www8.cao.go.jp/survey/s42/S42-06-42-04.html>. Last accessed 18 January 2013.
- Prime Minister's Office, (1975). Opinion Poll on Basic Legal System. Available at: <http://www8.cao.go.jp/survey/s50/S50-05-50-03.html>. Last accessed 18 January 2013.
- Prime Minister's Office, (1980). Opinion Poll on Basic Legal System. Available at: <http://www8.cao.go.jp/survey/s55/S55-06-55-05.html>. Last accessed 18 January 2013.
- Prime Minister's Office, (1989). Opinion Poll on Basic Legal System. Available at: <http://www8.cao.go.jp/survey/h01/H01-06-01-06.html>. Last accessed 18 January 2013.
- Prime Minister's Office, (1994). Opinion Poll on Basic Legal System. Available at: <http://www8.cao.go.jp/survey/h06/H06-09-06-04.html>. Last accessed 18 January 2013.
- Prime Minister's Office, (1999). Opinion Poll on Basic Legal System. Available at: <http://www8.cao.go.jp/survey/h11/houseido/index.html>. Last accessed 18 January 2013.
- Prime Minister's Office, (2004). Opinion Poll on Basic Legal System. Available at: <http://www8.cao.go.jp/survey/h16/h16-houseido/index.html>. Last accessed 18 January 2013.
- Prime Minister's Office, (2009). Opinion Poll on Basic Legal System. Available at: <http://www8.cao.go.jp/survey/h21/h21-houseido/index.html>. Last accessed 18 January 2013.
- Prime Minister's Office (2007). 'Public Survey on Defence of Human Rights (Jinken Yogo ni Kansuru Yoron Chosa)'. Available at: <http://www8.cao.go.jp/survey/h19/h19-jinken/index.html>. Last accessed 18 January 2013.
- Risse, T. and Ropp, S.C. (1999). 'International Human Rights Norms and Domestic Change: Conclusions', in T. Risse, S. C. Ropp, & K. Sikkink (eds) *The Power of Human Rights, International Norms and Domestic Change*, Cambridge: Cambridge University Press, pp. 234–278.
- Risse, T. S. and Sikkink K. (1999). 'The Socialisation of International Human Rights Norms into Domestic Practices: Introduction' in T. Risse, S. C. Ropp and K. Sikkink (eds.) *The Power of Human Rights, International Norms and Domestic Change*, Cambridge: Cambridge University Press, pp. 1-38.
- Sakamoto, T. (2010). *Shikei to Muki Choeki (Capital Punishment and Lifetime Imprisonment)*, Tokyo: Chikuma Shinsho.
- Sato, M. (2008). 'Public Opinion and the Death Penalty in Japan'. Centre for Capital Punishment Studies, 4 (1), pp.1–39.
- UN Human Rights Committee (1966). 'Optional Protocol to the International Covenant on Civil and Political Rights'. Available at: <http://www2.ohchr.org/english/law/ccpr-one.htm>. Last accessed 18 January 2013.
- UN Human Rights Committee (2008). 'Concluding Observations of the Human Rights Committee: Japan, 18 December 2008, CCPR/C/JPN/CO/5'. Available at: http://www.adh-geneva.ch/RULAC/pdf_state/states-reports-2008-civil-ccpr2.pdf. Last accessed 18 January 2013.

Van Wolferen, K. (1989). *The Enigma of Japanese Power: People and Politics in a Stateless Nation*, Michigan: Macmillan.

Wagatsuma, H. and Rosett A. (1986). 'The Implications of Apology: Law and Culture in Japan and the United States', *Law and Society Review*, 20 (4), pp. 461-498.