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The Public Opinion Myth

Why Japan retains the death penalty

Mai Sato & Paul Bacon

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Foreword

There is a global trend away from the death penalty. As of June 2015, 160 countries have abolished it in law or in practice. In 2014, a UN General Assembly resolution calling for an international moratorium on the death penalty was supported by a record 117 member states. This tendency is explained by increasing empirical evidence concerning wrongful convictions, the growing academic consensus over the difficulty in proving deterrent effects, and data that shows the death penalty being applied disproportionately to marginalised groups. In some societies, however, the death penalty remains deeply entrenched. Many leaders prefer to follow tradition and ‘majority opinion’ rather than challenge opinion and exercise leadership. They often quote results from public opinion polls and use the ‘democracy argument’.

In this report, Mai Sato and Paul Bacon go beyond the simple results of opinion polls conducted recently by the Japanese government, which show very high levels of support for the death penalty. Using a similar methodology and sample, the authors reveal that the majority of the population form their views on the death penalty with limited information and based on often inaccurate perceptions – for example, believing that the crime rate is increasing. Sato and Bacon also demonstrate that people have a relatively low level of ‘psychological ownership’ when it comes to the future of the death penalty: the majority think that the government and experts should decide. Furthermore, discussions about the death penalty among participants increased tolerance towards those with different views – which, in turn, facilitated potential reform and change.

The messages in this report go beyond the death penalty debate in Japan. The keys to moving away from the death penalty in all retentionist states are better information and dialogue. Instead of resorting to the populist politics of ‘killing for votes’, leaders should be challenging stereotypes. Instead of being ‘tough on crime’ by supporting the death penalty, they should be providing for efficient crime control measures, combined with care for victims’ families.

Is this too much to ask? No – not in the 21st century, which is ready for further advances in the protection of human rights. As UN Secretary-General Ban Ki-moon has stated: ‘This cruel punishment has no place in the 21st century.’

Ivan Šimonović

United Nations Assistant Secretary-General for Human Rights

July 2015

Editors' Preface

Countries that retain the death penalty often reject the case for abolition based on the argument that public opinion demands it, and that it ought not to be abolished until a majority of citizens support this. They contend that abolition without public support would undermine confidence in the law and in those within the criminal justice system who enforce it.

This important study by Mai Sato and Paul Bacon – based on re-analysis of government surveys and their own polls – confronts the Japanese government's assertion that the majority in favour of capital punishment in Japan is so large that it simply cannot be ignored by a democratic government. The authors' findings expose the weakness of this position and provide strong evidence for the conclusion that the government's argument is flawed. This report complements previous reports published by The Death Penalty Project analysing public attitudes to the death penalty in Malaysia, Trinidad & Tobago and Japan, where Sato's earlier public opinion research can be found.

The study adds a new dimension and provides further evidence that public support for the death penalty is not as deeply embedded, or as entrenched, as the government maintains. The authors' meticulous and well-conducted research provides rich analysis – both quantitative and qualitative – of the nuance and complexity of public opinion. They are able to provide a true account of all sectors of Japanese society – not only those in favour of abolition, but also those in favour of retaining the death penalty, as well as those who fall in between. Sato and Bacon are able to show that public opinion in Japan is not so hostile to the abolition of the death penalty that it would undermine the legitimacy of the state. On the contrary, they conclude that *'the Japanese public would embrace abolition were the government to change its stance on the death penalty'* (p12).

This report is accompanied by a documentary – *The Wavering Public? The Death Penalty, Justice and Public Opinion* – providing a rare insight into public perceptions of the topic in Japan. The film explores what the death penalty means to ordinary citizens living in a retentionist state – one in which much of the practice surrounding the death penalty remains secretive.

We hope Sato's and Bacon's research will foster a much-needed debate on the death penalty in Japan by providing a greater understanding of the issues. The evidence presented is unique and compelling, and will serve as an indispensable guide – not only to policy-makers, but to all people engaged in the debate about capital punishment in Japan. This is especially so after the wrongful conviction of Iwao Hakamada, who – in March 2014 – became the fifth man to be released from death row in Japan, having spent 47 years in solitary confinement. One cannot underestimate the extent to which such a travesty of justice alters public support for the death penalty.

Saul Lehrfreund and Parvais Jabbar
Executive Directors, The Death Penalty Project
July 2015

Headline Results

This report is about what the Japanese public thinks of the death penalty. Understanding public attitudes to the death penalty is important principally – but not exclusively – because offenders have been, and are being, executed in the name of public opinion, in Japan and elsewhere. The report is intended to examine the ‘public opinion’ argument used by retentionist states from a theoretical and an empirical standpoint, rather than simply dismissing it as ‘unprincipled’. It analyses two government surveys, from 1967 and 2014, and introduces results from two polls conducted by the authors. The main conclusion of this report is that the Japanese public would embrace abolition if the government changed its stance on the death penalty. The conclusion is based on the following headline results:

- **34%** of respondents in the **2014 government survey** were **committed retentionists**, who do not accept the possibility of future abolition and do not agree with replacing the death penalty with life imprisonment without parole (LWOP).

- In the **parallel survey** conducted by the authors, 27 per cent of respondents were committed retentionists.  **27%**

‘Should definitely be kept’

- Asked who should decide the **future of the death penalty**, **40%** of respondents in the parallel survey considered it should be **decided by the public**.

- 71 per cent of **retentionists** said they would **accept abolition** if the government decides to abolish the death penalty. (Parallel survey)



Accept as government policy

- **Abolitionists** do not always support abolition based on human rights concerns. Some abolitionists consider **LWOP to be a harsher punishment** than the death penalty.
(Parallel survey and deliberative poll)
- **Miscarriages of justice** are the No 1 concern for abolitionists. (Parallel survey and deliberative poll)
- **51%** of respondents were aware that the **method of execution in Japan is hanging**.
(Parallel survey)
- The majority of participants in the **deliberative poll** did not change their positions on the death penalty. Those who did **changed their views in both directions** – either towards abolition or towards retention.
- **Deliberation** created a degree of **uncertainty** and hesitation in participants about their views on the death penalty. This, in turn, **increased understanding, acceptance and tolerance** of opposing views.
(Deliberative poll)

Is Public Opinion Relevant?¹

Human rights as a social construct

An eminent legal scholar predicted nearly 20 years ago that abolition of the death penalty may become a customary norm and reach the status of '*jus cogens* [a fundamental principle of international law from which no derogation is permitted]... in the not too distant future'.² Today, while abolitionist states have become the clear majority, retentionist states continue to carry out the death penalty.

Pressure has been applied on retentionist governments – through international treaties and the activities of non-governmental organisations (NGOs) – to join the abolitionist camp. For example, the United Nations Human Rights Committee has repeatedly raised concerns over Japan's failure to fulfil its obligations under the International Covenant on Civil and Political Rights (the Covenant).³ The Council of Europe has made numerous resolutions critical of Japan, and even threatened to take away its observer status.⁴ However, Japan has retained its observer status and, despite condemnation by the UN Human Rights Committee, has openly – and without much (if any) political damage – continued to carry out executions.

This illustrates an important limitation of international human rights law: the implementation of human rights norms is possible only if states choose to be bound by them. Human rights are a socially constructed concept that needs to be embraced and accepted to be effective, rather than a set of self-evident principles that exists independently. They are not a 'truth' that people, one day, will naturally 'come round to', but a concept that requires negotiation and persuasion to become truly *effective* and *operational*. In the case of Japan, until the government *decides* to view the death penalty as an infringement of human rights, it will remain – from the retentionists' perspective – not a human rights violation.

The official reason for retention: majority public support

Public opposition to abolition is a justification cited by many retentionist states. However, they often do this without offering any evidence of such support, or – if they do – they cite a poll that has been conducted on an *ad hoc* basis. The Japanese government, on the other hand, takes the 'public opinion' argument more seriously and carries out its own survey approximately every five years. As attempts to measure public opinion in a systematic way go, it could be argued that the Japanese government has made serious efforts to monitor it in ways that other retentionist countries have not. The results of its

¹ This section is a short summary of Sato, M. (2015, forthcoming) '*Vox populi, vox dei?* A closer look at the "public opinion" argument for retention', in UN Office of the High Commissioner for Human Rights (eds.) *Moving Away from the Death Penalty: Arguments, Trends and Perspectives* (New York, 2015, 2nd edition).

² Schabas, W. A., *The Abolition of the Death Penalty in International Law* (Cambridge, Cambridge University Press, 1997).

³ For example: UN Human Rights Committee, 'Concluding observations of the Human Rights Committee: Japan', 19 November 1998 (CCPR/C/JPN/CO/5); UN Human Rights Committee, 'Concluding observations of the Human Rights Committee: Japan', 18 December 2008 (CCPR/C/JPN/CO/6); UN Human Rights Committee, 'Concluding observations of the Human Rights Committee: Japan', 20 August 2014 (CCPR/C/JPN/CO/6).

⁴ For example: Council of Europe, 'Resolution 1253 (2001): Abolition of the death penalty in Council of Europe in observer status' (Strasbourg, Council of Europe, 2001); Council of Europe, 'Resolution 1349 (2003): Abolition of the death penalty in Council of Europe in observer status' (Strasbourg, Council of Europe, 2003); Council of Europe, 'Doc. 10911: Position of the Parliamentary Assembly as regards the Council of Europe member and observer states which have not abolished the death penalty (Report of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe)' (Strasbourg, Council of Europe, 2006).

surveys are then used as empirical evidence to demonstrate how strongly the public wants to retain the death penalty as a form of punishment.

The government survey has been conducted since 1956, and the latest was carried out at the end of 2014. To give an indication of the commitment of the Japanese government to these surveys, each one – including the latest – has been subcontracted to an independent market research company. Two-stage, stratified, random sampling is used to produce a nationally representative sample of Japanese men and women aged 20 and over. The results have been quoted by the government in every State Party Report submitted to the UN Human Rights Committee, as a justification for why Japan cannot abolish the death penalty. When publishing the results of the 2014 poll – which showed that 80 per cent of the public consider the death penalty to be ‘unavoidable’ – the current Minister of Justice said she interpreted that as evidence of the Japanese public continuing to be in favour of the death penalty.⁵

Legitimacy of the ‘public opinion’ argument

Reference to ‘public opinion’ when legitimising the death penalty is often criticised as *unprincipled*, unlike the human rights argument, which legitimises abolition. It is worth taking a closer look at how retentionist governments justify their position on normative grounds.

The Japanese government’s argument is twofold. First, it makes a theoretical claim that the decision to retain or abolish should depend on public opinion, based on the idea of popular sovereignty and the importance of maintaining the legitimacy of criminal justice agencies and criminal law. Second, it presents its survey evidence to support its theoretical position. It is also a bold statement to dismiss public opinion completely when talking about any penal policy. The interdependence of law and public opinion, and the need for legal systems to command popular support, has long been recognised – not only in Japan, but also in western democracies. People’s perceptions of the legitimacy of governmental policies or laws are key determinants of their acceptance of – and compliance with – such legislation. In other words, the Japanese government is arguing – using its survey as evidence – that the death penalty is so central to maintaining the legitimacy of the criminal justice system that abolition would erode this to an unacceptable degree.

What happens if subjective legitimacy is eroded? What are the consequences of the public losing trust in the criminal justice system? One example is Mexico’s attempt to combat drug trafficking, which has led to clear damage to the rule of law.⁶ A combination of ineffectiveness in policing and extra-legal practices led to a loss of public trust in the criminal justice system, which, in turn, led to the establishment – by activists – of a new grass-roots system operating outside the formal legal structure. Unpaid volunteers have created an alternative police, court and penal system, often using torture and vigilantism. Governments are naturally concerned that their penal policies – including abolition of the death penalty – do not erode public perceptions of the legitimacy of the criminal justice system, which could result in non-compliance with the law, lack of cooperation with the criminal justice system and vigilantism. One country where the death penalty policy was at least claimed to be central

⁵ Minutes of the press conference available from the Ministry of Justice website: www.moj.go.jp/hisho/kouhou/hisho08_00616.html (last accessed on 5 June 2015).

⁶ Tyler, T. R. (ed.), *Legitimacy and Criminal Justice* (New York, Russell Sage, 2007).

to popular trust in the criminal justice system was the Philippines. The government explained to the UN Human Rights Committee in 2002 that the abolition of the death penalty had ‘undermined the people’s faith in the government and the latter’s ability to maintain peace and order in the country’.⁷

Do human rights trump public opinion?

Critics who question the relevance of public opinion to the death penalty argue that, historically, public opinion has never been the driver for abolition; almost all countries that have abolished it did so through judicial or political leadership – despite public support for the death penalty.⁸

It could be argued that in countries where abolition was achieved without resistance from the public, the people were *ready* to accept abolition. In other words, while opinion polls may show strong support for the death penalty, the public may still consider abolition as *legitimate*. If – contrary to expectations based on survey results – countries have abolished the death penalty without eroding the legitimacy of the criminal justice system, we should question the reliability of those survey results and, more importantly, their interpretation, rather than negate the role of public opinion in the death-penalty debate.

As noted earlier, the ‘public opinion’ argument for retention of the death penalty has two elements. It must demonstrate that retention is central to popular trust in the criminal justice system and that abolition would result in the erosion of political and judicial legitimacy. This would establish a theoretical basis for the argument. However, the biggest challenge to this approach is in proving, *empirically*, that legitimacy depends on retention. For example, the Japanese government’s argument for retaining the death penalty is based on the assumption that the survey it conducts has accurately captured public opinion – a claim that is challenged below.

⁷ UN Human Rights Committee, ‘State party report to the Human Rights Committee: Philippines’, 18 September 2012 (CCPR/C/PHL/2002/2), paragraph 494.

⁸ Hood, Roger & Hoyle, Carolyn, *The Death Penalty: A Worldwide Perspective*, (Oxford, Oxford University Press, 2014); Johnson, David & Zimring, Franklin, *The next frontier: national development, political change, and the death penalty in Asia*, (Oxford and New York, Oxford University Press, 2009).

Data

The 1967 government survey

The Japanese government's death penalty survey has been conducted since 1956 and the latest was carried out at the end of 2014. Every government survey – including the most recent – has been subcontracted to an independent market research company, which uses two-stage random sampling to produce a nationally representative sample of Japanese men and women aged 20 and over.

Access to data, however, is restricted to aggregated descriptive statistics set out in government reports. Micro-data are not made public, making secondary analysis impossible. There is a data depository in Japan – the Social Science Japan Data Archive, operated by the Institute of Social Science at the University of Tokyo.⁹ Forty surveys conducted by the Japanese Cabinet Office – on topics such as ageing, food and job opportunities – have been deposited in the data archive, but this openness has not been extended to the government surveys on the death penalty.

The exception is the 1967 government survey: the dataset was deposited with the Roper Center, a data archive located at the University of Connecticut, in the USA.¹⁰ The release of this dataset, however, was a one-off event. The reason why it was deposited is unclear, but what is clear is that it is an exception, given that eight subsequent surveys have not been deposited, despite requests being made.

This report includes the results of secondary analysis of the 1967 government survey.¹¹ The sample is a probability sample of 2,500 respondents with a response rate of 83 per cent. Proportional weights were applied to the original sample, which were calculated using the 1967 population estimates published by the Ministry of Internal Affairs and Communication.¹²

Parallel survey

The aim of the 'parallel survey' was to conduct a poll that could test the interpretation of the most recent government survey results. It was, therefore, important that our survey was comparable and matched the methodology used in the 2014 government survey.

The parallel survey was carried out between February and March 2015. There is roughly a three-month gap between the most recent government survey and the parallel survey, and no executions were carried out in that time. The Shin Joho Center – one of a limited number of companies that the Cabinet Office subcontracts to carry out the government survey – was appointed to do the sampling

⁹ Social Science Japan Data Archive: <https://ssjda.iss.u-tokyo.ac.jp/cgi1/namazu.cgi?lang=ja> (last accessed on 5 June 2015).

¹⁰ The Roper Center can be accessed from: www.ropercenter.uconn.edu/about-the-center/ (last accessed on 5 June 2015).

¹¹ The data for this secondary analysis, 'Opinion Poll on the Death Penalty, 1967, Miyake Ichiro' was provided by the Social Science Japan Data Archive, Center for Social Research and Data Archives, Institute of Social Science, the University of Tokyo.

¹² Ministry of Internal Affairs and Communication. See: www.stat.go.jp/english/index.htm. (Last accessed on 5 June 2015).

and the fieldwork. Because of its familiarity with government surveys, it was not a complicated task for the Shin Joho Center to mirror the methodology as much as possible.

Both the parallel survey and the government survey used a probability sample of the Japanese public aged 20 and above (see Table 1). The only difference in the sampling method of the two surveys was the interview method. While a face-to-face survey would have been better in terms of matching the government survey, because of the declining response rates in face-to-face surveys, the decision was made to go with the postal method, combined with collection in person.¹³

Table 1: Comparison of methodology: 2014 government survey and parallel survey

	Parallel survey	2014 government survey
Fieldwork	February-March 2015	November 2014
Sampling	2-stage random probability sample	2-stage random probability sample
Sampling framework	Resident registry	Resident registry
Interview method	Postal and collection in person	Face-to-face
Response rate	52%	61%
Resulting sample size	1,551	1,826
Target Age	20 and over	20 and over
Target area	National	National

Deliberative poll

The deliberative poll measured attitudes to the death penalty, and to the criminal justice system more generally, by gathering quantitative and qualitative data. A quota sample of 135 participants living in Tokyo was assembled for two days, to learn about the Japanese criminal justice system, including the death penalty, discuss and exchange opinions on the issue, answer pre- and post-consultation surveys, and take part in a follow-up interview. The Nippon Research Center was subcontracted to sample participants from a registered panel.

The 135 participants comprised 68 males and 67 females, aged between 20 and 68, living in the Tokyo metropolitan area. The selection of participants by death penalty attitudes was roughly based on the results of the preliminary survey, where retentionists comprised the majority and abolitionists the minority. A gratuity fee of ¥20,000 was provided to participants to attract a wide range of people – not only those who are interested in the topic. Throughout the two days of deliberation, participants were exposed to information about the death penalty and the criminal justice system. Six experts¹⁴ were invited to the event and three of them contributed to the session on the death penalty. Particular attention was paid to ensure there were abolitionists and retentionists, as well as a victim's family,

¹³ The government survey response rate has also been declining, from 85 per cent in 1956 to 61 per cent in the 2014 survey. See Sato, M. *The Death Penalty in Japan: Will the Public Tolerate Abolition?* (Berlin, Springer, 2014).

¹⁴ The experts were: Itaru Fukushima (Ryukoku University), Koichi Hamai (Ryukoku University), Maiko Tagusari (Center for Prisoners' Rights), Masaharu Harada (victim's family member, and founder of OCEAN), Masato Takahashi (National Association of Crime Victims and Surviving Families), and Yuji Ogawara (Japan Federation of Bar Associations).

a practitioner working for victims' families, and a representative from the Japan Federation of Bar Associations.

Experts on the death penalty session:

- **Masabaru Harada** (*Victim's family member; founder of OCEAN, an NGO, which facilitates meetings between offenders and victims; a retentionist who became an abolitionist after meeting the offender on death row*)
- **Masato Takahashi** (*Lawyer; representative of the National Association of Crime Victims and Surviving Families; a retentionist*)
- **Yuji Ogawara** (*Lawyer, Japan Federation of Bar Associations; an abolitionist*)

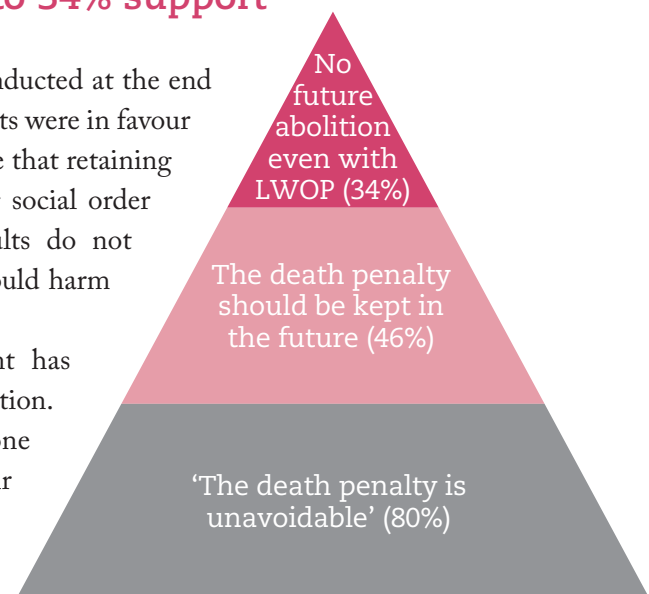
All participants had the opportunity to listen to the experts and ask questions. The expert session on the death penalty was followed by group discussions for participants. The 135 participants were divided into 12 small discussion groups, each consisting of approximately 11 people.¹⁵ The deliberative polling was not only a social experiment, it was also filmed as a documentary.¹⁶ Cameras were, therefore, present throughout the two days and – in four of the 12 groups – the discussions were closely followed and filmed.

Government Surveys

The 2014 survey: from 80% to 34% support

The most recent government survey was conducted at the end of 2014; reportedly, 80 per cent of respondents were in favour of retention. But does the result demonstrate that retaining the death penalty is critical to maintaining social order and legitimacy? Arguably, the survey results do not prove that abolition of the death penalty would harm the criminal justice system's legitimacy.

For the past five surveys, the government has used the same measure of support for retention. Respondents are invited to choose one statement, from two, that reflects their viewpoint. The retentionist position is phrased in broad terms: 'The death penalty is unavoidable.' By contrast, the abolitionist option states: 'The death penalty should be abolished.'¹⁷ The 80 per cent response reported



**Figure 1: Degrees of support for retention:
2014 government survey**

Note: Not all rows sum to 100% due to rounding. N=1,826.

¹⁵ There were three small group discussions, lasting an hour each, held over the course of two days. One of the discussions was specifically on the death penalty.

¹⁶ The documentary, *The Wavering Public? The Death Penalty, Justice, and Public Opinion*, is available in English and in Japanese.

¹⁷ The question also has an option for 'don't know/cannot say'.

as supporting the death penalty refers to respondents who considered that the death penalty is unavoidable, rather than enthusiastically embracing retention.¹⁸

The retention option also includes a choice to support future abolition. Of the 80 per cent of respondents who considered the death penalty to be unavoidable, 41 per cent (a third of the total sample) supported future abolition. When respondents who support future abolition are not included, less than half (46%) of the total sample can be considered to support retention wholeheartedly (see Figure 1, page 19).

In addition to the question concerning future abolition, a new question was added to the 2014 government survey. It concerned the introduction of life imprisonment without parole as an alternative to the death penalty. This question further qualifies public commitment to retention. Of the respondents, 38 per cent said the death penalty should be abolished if life imprisonment without parole was introduced, 52 per cent said it should be kept, and 11 per cent said they didn't know.¹⁹

Based on the 2014 survey results, it is possible to argue that those who (1) consider the death penalty to be unavoidable in some cases, (2) do not accept the possibility of future abolition, and (3) do not agree with replacing the death penalty with life imprisonment without parole amount to only 34 per cent of all respondents. In other words, behind the 80 per cent support reported in headlines, the majority of the public do, in fact, accept the possibility of future abolition – especially if alternative punishments are available. If hard-core retentionists make up only 34 per cent of the public, it does not seem persuasive to argue that abolition would erode trust in the criminal justice system.

From measuring abolition to measuring retention²⁰

The Japanese government's commitment to measuring attitudes to the death penalty started in 1956, and the continuing nature of these surveys allows us to look back and examine the changes, if any. Here, we compare the 1967 government survey with the 2014 one.

In 1967, there were more than 30 questions directly about, or relating to, the death penalty, whereas in the recent surveys, six questions concerned the death penalty. The nature of the questions also changed between 1967 and 2014, from measuring attitudes to *abolition* to measuring attitudes to *retention*. For example, in the 1967 government survey, there were three questions that asked, in general terms, about the participant's levels of support for abolition and retention. These – and many other questions in the 1967 government survey – were framed in a way that tests the public's appetite for embracing abolition.

The 1967 government survey asked:

- *Do you think it is best not to execute, including those who have committed heinous crimes? (Options: Best not to execute; do not agree; not sure.)*

¹⁸ Even with this wording, the percentage of people who chose this option dropped by six percentage points from the 2009 survey.

¹⁹ Figures may not sum to 100 per cent due to rounding.

²⁰ This section is a short summary of Sato, M. (forthcoming) 'From measuring support for abolition to justifying retention: Japanese government surveys', *Asian Journal of Criminology*.

- *Do you agree with the view that the death penalty should be abolished in all circumstances? (Options: Yes; no; not sure.)*
- *Some countries have introduced a moratorium on the death penalty to test if heinous crimes increase, and use the outcome as a basis for deciding whether to retain or abolish the death penalty. Do you agree with Japan abolishing the death penalty after such a measure has been introduced? (Options: Yes; no; not sure.)*

By contrast, the following question (as discussed in the previous section) is the only one asked about the death penalty in the 2014 survey:

- *I would like to ask you about Japan's punishment system. Which of the following opinions concerning the death penalty do you agree with? (Options: The death penalty should be abolished; the death penalty is unavoidable; not sure).*

The enthusiasm for testing the public's attitude to abolition continues in other parts of the 1967 government survey. It asks people about their awareness of the movement towards abolition ('are you aware of the idea of abolishing the death penalty?'). The survey also has 13 scenario-based questions, all referring to specific offences that are punishable by death and asking whether each should remain as a capital offence.²¹ The survey is particularly concerned with political offences that do not involve loss of life, such as insurrection (penal code, article 77), inducement of foreign aggression (penal code, article 81), and participation in foreign military aggression against Japan (penal code, article 82). For these political offences, sub-questions are available *only* for those who answered that they should no longer be punishable by death, prompting them to give reasons – again, highlighting the government's interest in attitudes to abolition. The comparison between the earlier and more recent government surveys demonstrates their shift in focus, the number of questions dedicated to the death penalty, and the nature of questions asked – and, in turn, highlights the loss of enthusiasm in understanding public attitudes to the death penalty, and, in particular, in measuring support for *abolition*.

Was 1967 a missed opportunity for abolition?²²

As noted in the previous section, the 1967 government survey devoted nearly half of its questions to asking about the respondents' support for retention and abolition from various perspectives. Table 2 (on page 23) summarises the results of all 16 questions, which are divided into general ones about the respondents' position on the death penalty and offence-specific questions. Support for retention varies enormously depending on the question asked. For the general questions – when people are asked about their position on the death penalty with regards to the introduction of a moratorium, leading to future abolition – only 26 per cent of respondents support retention. Levels of support are much higher if the question is about immediate abolition in all circumstances (70%). Similarly, for scenario-based questions, views on the suitability of death sentences vary; the highest support for retention was for 'homicide of a hostage' (77%) and the lowest for a 'fight resulting in death' (25%). It is interesting that both of these crimes are homicide offences, and yet they yield very different results. Comparing the results for homicide offences (questions 1-12 in Table 2) and non-homicide offences

²¹ In Japan, 19 crimes are eligible for the death penalty. In relation to murder (as with all other offences on the list), the death penalty is discretionary rather than mandatory, and is normally passed only where the defendant is convicted of multiple killings.

²² This section is a short summary of Sato, M. (forthcoming) 'From measuring support for abolition to justifying retention: Japanese government surveys', *Asian Journal of Criminology*.

(questions 13-16 in Table 2) demonstrates that a loss of life does not necessarily equate to higher support for the death penalty. In other words, the retributive eye-for-an-eye notion is not strictly at play.

The scenario-based questions are tightly linked to crimes punishable by death under the Japanese penal code, which has not changed throughout the government surveys. The penal code prescribes a discretionary death penalty for offences involving loss of life, and for some that do not. Its use in practice, however, is limited only to homicide offences, and almost always for murder, robbery resulting in death, or rape on occasion of robbery resulting in death. The whole range of scenario-based questions offered in the 1967 survey could be interpreted as the government testing the public's moral alignment to the criminal law for offences punishable by death. While it is difficult to establish a clear cut-off point for when a punishment no longer matches the crime, it is probably safe to say that offences such as 'fight resulting in death' (25% support), 'homicide of a politician' (39% support), 'insurrection' (39% support), and arson (43% support) are not in tune with public understanding of crimes deserving death.

Many things have changed between the 1960s and the present day. Japan has gone through rapid economic growth and a recession. The country's recorded murder figures per year have halved and continue to decrease, reaching below 1,000 in 2013.²³ Execution rates, which averaged in double-digits per year in the 1960s, have decreased to an average of five per year in the past 10 years. Japan ratified the Covenant, but also experienced the Tokyo subway sarin attack in 1995 that shocked the whole nation. Victims rights groups have gained enormous power, and the public are more involved in the criminal justice process with the introduction of the *saiban-in* (lay-judge) system in 2009. The government survey on the death penalty has also changed – from one that appears to be a genuine exploration of public acceptance of abolition to one that is used to justify retention. This is apparent from the number and, more importantly, the nature of the questions asked.

Despite the differences between the 1967 and 2014 government surveys, when the results are analysed in more detail, there are also similarities. One is that the public is not as committed to retention as is often reported. Support appears higher on some questions, and these are no less valid than other questions that show much lower support. The variation is simply a demonstration of how flexible and qualified the public's support is. The 1967 survey showed that respondents considered some capital offences to be out of date and embraced the prospect of a moratorium. In the 2014 survey, the public is also accepting of the possibility of future abolition, combined with the introduction of life imprisonment without parole. If it really was up to the public, the death penalty could have been abolished in 1967, had the government also been ready to do it.

²³ Recorded murder rates have shown a steady decline since World War II. In 1967, the rate stood at 2,111 and by 2013 it was at 938 people (Ministry of Justice 2014).

Table 2: Varying degrees of support

Question items	Retentionist	Abolitionist	Don't know
<i>General questions on the death penalty (%)</i>	No	Yes	Don't know
1. Should be abolished in all circumstances?	70	17	14
2. Abolish even for heinous crimes?	40	42	18
3. Introduce moratorium and then abolish?	26	50	25
<i>Specific scenario-based questions (%)</i>	Retain	Abolish	Don't know
4. Homicide of hostage	77	18	5
5. Homicide (in general)	69	17	14
6. Overturn of a railroad train etc. resulting in death	68	22	9
7. Rape resulting in death	66	23	10
8. Robbery resulting in death	66	22	12
9. Homicide of a police officer	60	25	16
10. Homicide of a parent	52	25	23
11. Homicide of a politician	39	33	27
12. Fight resulting in death	25	45	29
13. Destruction by explosives	70	17	13
14. Participation in foreign military aggression against Japan	60	13	27
15. Arson	43	34	23
16. Insurrection	39	25	36

Source: 1967 Government Survey.

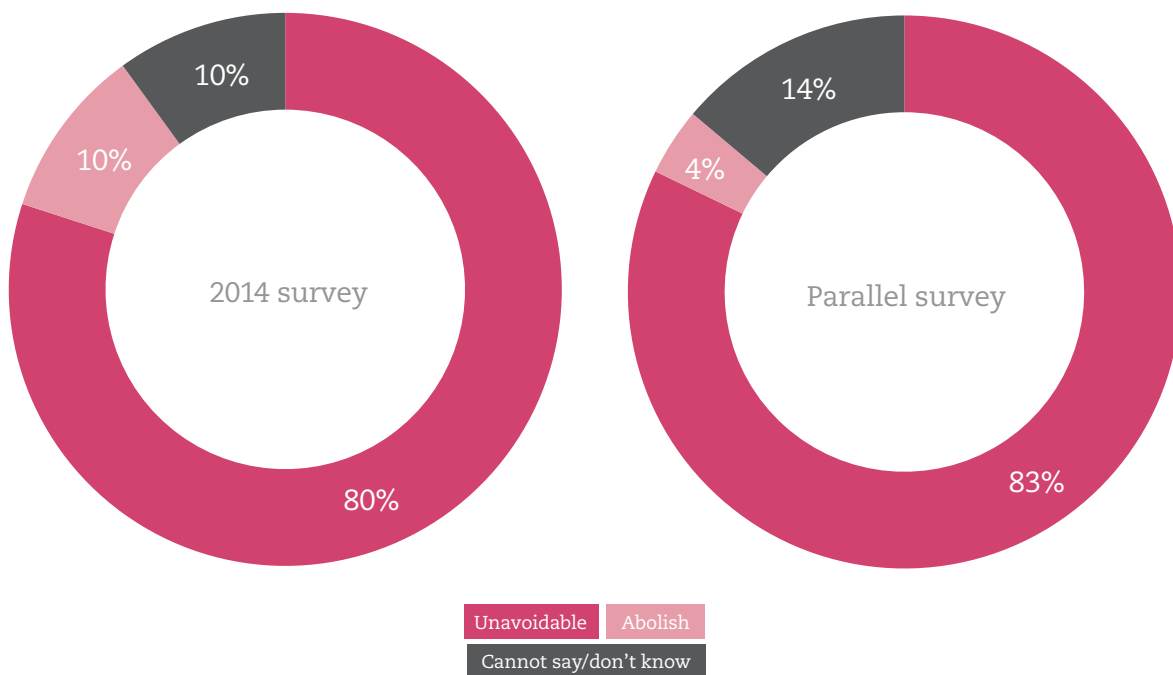
Note: Not all rows sum to 100% due to rounding.

How You Ask Really Matters

Comparability of 'parallel survey' and 2014 government survey

The parallel survey was intended to be comparable with the 2014 government survey. The care taken in methodology to achieve comparability was explained in the Data section; here, the results are compared by asking the same question as the government survey (Figure 2, page 24). The results are very close for the proportion of 'retentionists', as defined by the government survey: those who consider the death penalty 'to be unavoidable' amounted to 83 per cent in the parallel survey and, as indicated earlier, 80 per cent in the 2014 government survey. When it comes to the proportion of 'abolitionists' – defined as those who believe 'the death penalty should be abolished' – the rate is slightly (6 percentage points) higher in the 2014 survey than the parallel survey. It could be argued that the two surveys yielded similar results, with the parallel survey showing stronger support for retention by a very narrow margin.

Figure 2: Asking the same question: 2014 government survey and parallel survey



Notes:

- Figures may not sum to 100% due to rounding.
- Question: 'Which of the following opinions concerning the death penalty do you agree with?' Options: 'The death penalty should be abolished'; 'The death penalty is unavoidable'; and 'Don't know/difficult to stay'.
- 2014 government survey: N=1,826. Parallel survey: N=1,545.

Proportion of 'committed' retentionists

It is not clear from the question above how committed the Japanese public is to retention – other than the fact that the majority of respondents considered the death penalty to be 'unavoidable'. The passiveness of the option makes it hard to judge how central the death penalty is, or whether abolition would have any serious consequences. Taking into consideration the comparability of the two polls, the parallel survey asked further questions on the death penalty. It enquired about respondents' level of commitment to retention on a five-point scale, including retentionists divided into those who think the death penalty should 'definitely be kept' and those who think the death penalty 'should probably be kept' (see notes under Figure 3 for all the options). According to the parallel survey, 27 per cent of the respondents showed strong attachment to retention by choosing the option 'the death penalty should *definitely* be kept'.

Figure 3: Proportion of committed retentionists

Source: Parallel survey.

Notes:

- Figures may not sum to 100% due to rounding.
- Question: 'People have various opinions about the death penalty. Do you think that it should be kept as a form of criminal penalty or do you think it should be abolished?' Options: 'Should definitely be kept' (27%); 'Should probably be kept' (46%); 'Cannot say' (20%); 'Should probably be abolished' (6%); and 'Should definitely be abolished' (2%).
- Parallel survey: N=1,548.

What makes this finding significant is that these are the *same* respondents who answered the government survey question – the same 83 per cent majority who considered the death penalty to be unavoidable. This is evidence that the current government-survey question does not adequately capture the degree of support for the death penalty. Behind the supposed majority support lies a minority of respondents who are really committed to keeping the death penalty. This calls into question what the government is actually measuring, and on what basis the execution of prisoners is being justified.

Would Abolition Erode Legitimacy?

Who lives, who dies, who decides?²⁴

In recent years, changes have been made to incorporate public opinion further into Japan's penal decision-making, with the aim of increasing confidence in the criminal justice system. Examples include the victim participation system at trials and the *saiban-in* system, whereby members of the public act as decision-makers on criminal trials, including death-penalty cases. The reliance on public opinion to legitimise its death-penalty policy has been a long-standing position of the Japanese government, the Ministry of Justice and the judiciary. To our knowledge, how the public feels about shouldering this responsibility has not been tested.

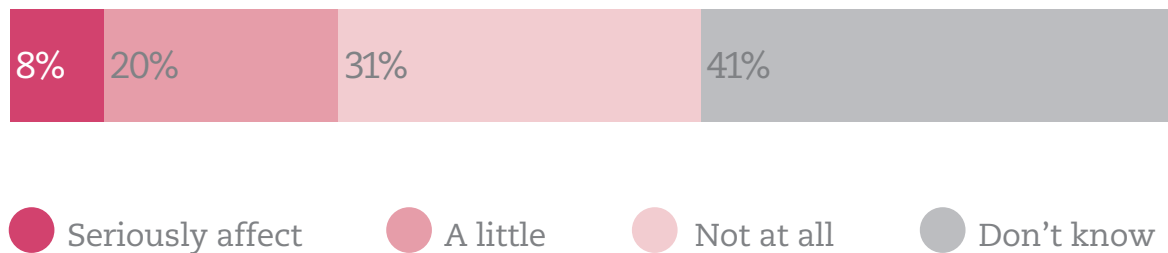
When asked who should decide the future of the death penalty, less than half (40%) of the respondents thought the decision should be based on the results of public opinion surveys conducted by the government. The rest were divided between those who wanted to delegate the responsibility to 'experts and state bodies' (40%) and those who 'didn't know' (20%).²⁵ In a country that has made

²⁴ The title of this section is taken from the book: Ekland-Olson, S., *Who Lives, Who Dies, Who Decides? Abortion, Neonatal Care, Assisted Dying, and Capital Punishment* (New York, Routledge, 2015, 2nd ed.).

²⁵ Within 'experts and state bodies', 'experts in law and crime' scored 21%, followed by state bodies: the courts (12%), the government (5%) and the Ministry of Justice (2%).

serious efforts to incorporate public opinion into its penal policy, the enthusiasm for input does not appear to be reciprocated by the general population.

Figure 4: How abolition may affect the respondents' everyday lives



Source: Parallel survey.

Note: Question: 'The Japanese government is a signatory to an international treaty, which expresses desirability towards abolition. If the Japanese government decides to abolish the death penalty, do you think your everyday life would be affected?' N=1,542.

The parallel survey also asked if respondents' everyday lives would be affected if the government took the initiative to abolish the death penalty (Figure 4). The largest proportion was for those who 'didn't know' (41%), indicating that abolition is not something they have seriously contemplated or needed to consider in the past. For the rest of the respondents who did have a view (59%), half (31%) considered abolition would 'not at all' affect their everyday life. The next section will explore the hypothetical question of abolition – often phrased as 'leadership from the front' – in more detail.

What would happen if the death penalty was abolished?

A series of questions was asked to test how vital the death penalty is in maintaining the legitimacy of the criminal justice system in the eyes of the Japanese public. In other words, to explore if serious damage to political or judicial legitimacy would result from abolition.

An example of potential erosion of the legitimacy of the criminal justice system – as exemplified in the Mexican policing case mentioned earlier – is a lack of cooperation with the police, such as refusing to provide witness statements or not reporting a crime. In extreme cases, victims or victims' families may take justice into their own hands if they know there is to be no punishment that will take away the offenders' life. A less severe – but nonetheless serious – expression of public dissatisfaction and anger may be people coming together to campaign for the death penalty to be brought back. All of these actions – with varying degrees of consequential damage – are hypothetical scenarios that governments need to take into account if they wish to defend the 'public opinion' argument theoretically and empirically.

So what reactions would the public have if the death penalty was to be abolished? The results in Figure 5: Retentionists' views on abolition are the views of all retentionists (83 per cent of respondents in the parallel survey who considered the death penalty should 'definitely' or 'probably' be kept). It is the retentionists' views that should be of concern when assessing a potential backlash against

abolition. First, out of all retentionists, 71 per cent answered that they would ‘simply accept abolition as government policy’ if the government decided to exercise its leadership. Second, when prompted with possible scenarios, the absolute necessity of keeping the death penalty did not stack up: 21 per cent of retentionists considered abolition would lead to the erosion of trust in the police; 46 per cent considered abolition would lead victims’ families to attempt to take revenge; and 52 per cent considered abolition may prompt them to sign a petition to bring back the death penalty.

These figures, combined with the 71 per cent of retentionists expressing their acceptance for abolition, puts into context what – or how little – the ‘headline figure’ of death penalty support (83 per cent of all respondents) reveals about their commitment to retention. One participant in the deliberative poll expressed an opinion in the post-deliberation survey, and perhaps speaks to why such a high proportion of respondents were happy to accept abolition:

‘I didn’t change my position. I didn’t think the abolitionist arguments were serious enough to require things to change in Japan. (I personally don’t mind whether there is a death penalty or not).’ (A participant who remained a retentionist. Emphasis added.)

In summary, the results suggest a rather smooth road to abolition if government-level leadership was to be initiated.



Accept as government policy



Sign a petition



Victims will take revenge



Will not ask for police help

Figure 5: Retentionists’ views on abolition

Note: Total number of retentionists: N=1,122.

Which is Harsher? LWOP or Death?

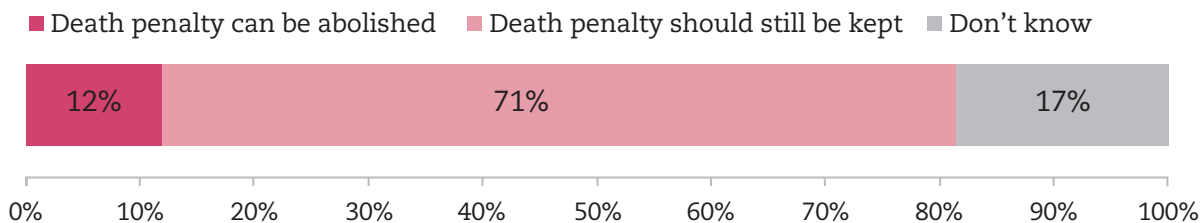
Is LWOP a game changer?

Life imprisonment without parole (LWOP) is often proposed, and in some cases adopted, as an alternative to the death penalty.²⁶ For some retentionists – though not all – the availability of LWOP can serve as a replacement for the death penalty. LWOP, as an alternative punishment, can certainly qualify support for the death penalty, as seen in the analysis of the 2014 government survey, but it does not convert the retentionists into a majority of abolitionists. In the parallel survey, too, only

²⁶ It should be noted that life imprisonment with no possibility of release offends the European Convention on Human Rights.

12 per cent of retentionists considered abolition to be acceptable if LWOP was introduced (see Figure 6). The majority of retentionists (71%) did not think abolition was desirable even with the introduction of LWOP.

Figure 6: Retentionists' views on LWOP and abolition



Source: Parallel survey. Note: Total number of retentionists: N=1,124.

When respondents were asked – through a multiple-choice question – to state their reasons for wanting to retain the death penalty, ‘the lack of LWOP’ was the least popular option (Figure 7). Retribution was the most popular reason given by retentionists, followed by ‘feelings of victims’ families’. This finding is consistent with the 2014 government survey, in which respondents also raised the issue of victim-family sentiment, as well as the idea that people who commit serious crimes should forfeit their life in return (Appendix).

The notion that retentionists *passively* support the death penalty because of a lack of an alternative is probably naïve, according to the 2014 government survey and the parallel survey. The majority of retentionists consider the death penalty to be irreplaceable by LWOP, and support the death penalty for the very reason that it is an ultimate form of atonement.

Abolitionists are not always ‘humane’

Another misconception is the idea that abolitionists embrace the notion of human rights and see the death penalty as an inhumane form of punishment. It is implied that they are somehow more ‘enlightened’ than the retentionists. Here, we turn to the reasons given by abolitionists in the parallel survey for why they think the death penalty should ‘definitely’ or ‘probably’ be abolished (Figure 7). Seven possible reasons were presented to them in a multiple-choice format. The options included *practical* problems with the death penalty, such as the possibility of miscarriages of justice and the lack of evidence concerning its deterrent effect. Others challenged the legitimacy of the death penalty in terms of it being immoral, inhumane or against human rights – for example, the death penalty is ‘against my morals/religion’, ‘against human rights’, and ‘even states do not have the right to take away life’.

The most popular reason given by the abolitionists for doing away with the death penalty had nothing to do with either practical problems or human rights; they thought it ‘better to keep prisoners alive and make them repent for their crimes’ (see Figure 7). Similar patterns are found in the government surveys, although there has been a shift in reasons for supporting abolition over the years. In the 1967 government survey, concern that the death penalty is inhumane (‘killing another human is inhumane’) was the most popular reason, but this drops to fourth place in the rankings in the 2014

(Continued on page 30)

Figure 7: Reasons for retention and abolition: parallel survey



Notes:

- Retentionists are made up of those who consider the death penalty should 'definitely' or 'probably' be kept.
- Abolitionists are made up of those who consider the death penalty should 'definitely' or 'probably' be abolished.
- Multiple-choice questions. Therefore, the figures exceed 100%.
- Retentionists: N=1,121; Abolitionists: N=113.

government survey. Concern over miscarriages of justice ranked first in 2014, but is followed closely in second place by ‘better to keep prisoners alive and make them repent for their crimes’.

Qualitative data provided by participants during the deliberative poll shed light on this idea that LWOP ranks above the death penalty in terms of punitiveness and harshness:

*‘I now think the death penalty should be replaced by life imprisonment without parole or any sort of pardon. I used to support the death penalty. **I think prisoners should spend all their life in compulsory labour without any pay.**’ (Participant who changed from a retentionist to an abolitionist.)*

*‘I think how I see the death penalty has changed a little. Listening to various experts – especially listening to Mr Harada’s story – **I learned the sacredness of life, but also understood that it is much harder and more painful to live and repent than to die.**’ (Participant who remained an abolitionist.)*

There seems to be a belief among abolitionists that having your life taken away is ‘easier’ than being made to live a life of hardship and remorse. The next section looks at the concept of remorse in more detail.

Importance of remorse, not rehabilitation

‘Prisons should keep prisoners locked up until they really regret what they have done, regardless of how long their sentence is. Once they have shown proper remorse, they can be allowed out.’ (A participant in the deliberative poll.)

The 1967 government survey examined the importance of remorse using a hypothetical policy proposal: it asked whether those who are sentenced to death should be executed as soon as the sentence is finalised, or whether there should be an observation period for death-row inmates, to see if they show remorse – and, if they do, should their sentence be commuted to a lesser one, such as life imprisonment? A multiple linear regression was used to measure if remorse, along with other variables, explained people’s attitudes to the death penalty (full model omitted from this report).

Two out of nine variables predicted attitudes to the death penalty: beliefs about the effect of the death penalty as a deterrent and about the importance of remorse. Respondents who considered that levels of heinous crimes are unlikely to be influenced by the existence of the death penalty were more likely to support abolition. Respondents who considered remorse to be an important factor – important enough to commute a death sentence – were more likely to support abolition. On the other hand, those who supported retention were more likely to consider remorse an irrelevant factor.

Among the other variables that did not explain attitudes to the death penalty, one concerned belief in rehabilitation. It was measured by asking respondents whether those who had committed heinous crimes have the potential to be rehabilitated. In other words, whether or not respondents consider it possible to rehabilitate such offenders has little to do with their position on the death penalty. Arguably, remorse and rehabilitation are intertwined concepts: regret for a wrongful act could be a precondition for better and reformed actions in the future. What is perhaps surprising, therefore – following on from the finding of remorse being a significant factor – is the fact that the concept of rehabilitation is not. Those who are more likely to place importance on the offender showing remorse are more likely to support abolition; however, an offender's prospect of rehabilitation does not explain the respondents' tendency to support abolition.

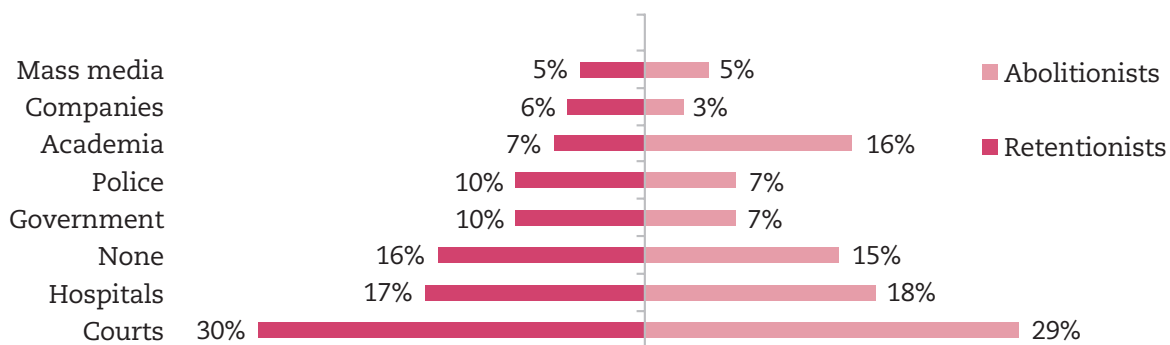
A similar disconnect between remorse and rehabilitation can be found in the parallel survey. Among the abolitionists who considered remorse to be important (ie, those who selected that it is better to keep prisoners alive and repenting than to punish them by death), only 18 per cent believed in rehabilitation.

Miscarriages of Justice and Trust

Courts are highly trusted

Abolitionist respondents' reasons for wanting to do away with the death penalty also changed between the 1967 and 2014 government surveys. The most substantial variation was in the importance placed on the possibility of miscarriages of justice. In 1967, 'miscarriages of justice for death penalty cases are irreversible' was the least popular option (see Appendix); in 2014, this was ranked first. This shift may have been influenced by the recent case of Hakamada, in which a retrial was ordered in March 2014 after a series of faulty police investigations. This section examines whether increased awareness of miscarriages of justice have had any knock-on effect on trust in the criminal justice agencies. While it is not possible to compare the change in level of trust pre- and post-March 2014 because of the unavailability of data, the following analysis uses data from the parallel survey, which was conducted a year on from the release of Hakamada.

According to the parallel survey, the courts rated much higher on trust than other Japanese institutions (Figure 8, page 32). The distribution of institutions that abolitionists and retentionists trust are very similar, except for higher levels of trust in academia by abolitionists. The courts remain the most trusted institution for both retentionists (30%) and abolitionists (29%). The police, along with the government, are around the 10 per cent mark. The very high trust shown in the courts, compared to other organisations, is unique when comparing levels of trust internationally. Often, the police are among the most trusted state organisations, according to surveys such as the International Crime Victimization Survey.

Figure 8: Trust in institutions: retentionists and abolitionists

Source: Parallel survey.

Notes:

- Respondents were asked to select an institution that they trust the most.
- Retentionists are made up of those who consider that the death penalty should 'definitely' or 'probably' be kept. Abolitionists are made up of those who consider the death penalty should 'definitely' or 'probably' be abolished.
- Figures may not sum to 100% due to rounding.

Miscarriages of justice: a real possibility?

Both retentionists and abolitionists seem to have a lot of faith in the courts. Does this mean the Japanese public believes miscarriages of justice can be prevented at court level, even if mistakes are made during the police investigation and prosecution stages? The parallel survey provided a range of statements to the respondents – all concerning miscarriages of justice – and asked to what extent they agreed or disagreed with each (Table 3, page 33). Statements were divided into two types: the first was concerned with *objective* assessment of the possibility of miscarriages of justice, and the second with *subjective* assessment – whether the respondents thought *they* could be a victim of wrongful conviction.

In terms of objective assessment of the possibility of miscarriages of justice, respondents place more trust in judges (ie courts) than they do in the police. They have more faith in judges being careful in their deliberations than they do in the police conducting an ethical, but thorough, investigation. However, science outdoes the trust in courts and the police; respondents considered that miscarriages of justice are likely to be prevented because of the advancements in science, such as DNA tests.

Table 3: Perception of miscarriages of justice: retentionists and abolitionists

Question: to what extent do you agree with the following statements?	Retentionists	Abolitionists
	Min 1 (disagree)	
	Max 10 (agree)	
● ‘Miscarriages of justice can be prevented due to <i>the advancement of science</i> such as DNA tests.’	7.1	6.3
● ‘Miscarriages of justice can be prevented <i>because judges deliberate carefully</i> .’	5.4	4.5
● ‘Arresting the wrong offender rarely happens because the police gather evidence and <i>interrogate suspects properly and with care</i> .’	4.7	3.9
	Proportion (%)	
● ‘If I were to be <i>wrongfully</i> arrested, I would be found <i>not guilty</i> at trial.’	50%	39%

Source: Parallel survey.

Notes:

- Retentionists are made up of those who consider the death penalty should ‘definitely’ or ‘probably’ be kept.
- Abolitionists are made up of those who consider the death penalty should ‘definitely’ or ‘probably’ be abolished.

The same is true when comparing retentionists and abolitionists (Table 3). Both place more trust in judges to prevent miscarriages of justice than in the police, and place even higher faith in the advancement of science. What differs between the retentionists and the abolitionists are the *degrees* to which they trust the courts, the police and science. Retentionists are consistently more trusting and underestimate the occurrence of miscarriages of justice in comparison with abolitionists. When it comes to the subjective assessment of the possibility of miscarriages of justice, again, the retentionists were more optimistic; 50 per cent believed they would be found not guilty at trial if they were wrongfully arrested, compared to 39 per cent of abolitionists.

Having faith in science...

The previous section touched on the finding that respondents considered advancements in science to have helped unveil and also prevent miscarriages of justice. It is true that the developments in DNA tests have exonerated death-row inmates in the US, and raised awareness of concerns surrounding the application of the death penalty. In Japan, what led to the release of Hakamada was a forensic test, which showed that DNA found on clothing allegedly worn by the killer matched neither Hakamada’s nor the victim’s. In this sense, science helped to reveal the injustice done to Hakamada after 47 years of solitary confinement. The Japanese press, too, was horrified by the error made, and celebrated the modern scientific techniques.

If, however, we pay close attention to the Hakamada case – as well as other wrongful-conviction cases – we soon find that he was wrongfully convicted because of the lack of procedural guarantees during police investigation, trial and appeal. Forced confessions and non-disclosure are key factors in the production of unsafe convictions. Was it the lack of scientific techniques that led to the erroneous

conviction of Hakamada? In our view, it was the lack of procedural guarantees. With or without science, he would not have been wrongfully convicted had there been no forced confessions and proper disclosure. The celebration of modern scientific techniques conveniently shifts the focus from examining what is inadequate in the current criminal justice system – and perhaps we should be wary of ‘too much’ trust in science.

Knowledge, Secrecy & Deliberation

Implication of secrecy and decision-making

In December 2007 – after eight surveys had been conducted to examine public opinion – the Japanese government, for the first time, announced the names of prisoners and the crimes they had committed after each execution. The execution room was not made public until 2010, when the then-Minister of Justice – as a one-off event – allowed camera crews to document what it looks like when it is not being used. There is still no official information regarding the process by which prisoners – and how many of them – are chosen to be executed, the treatment of prisoners on death row, or the cost of executions. Secrecy is one of the salient features of the Japanese death-penalty system.²⁷ The government has so far failed to reconcile the paradox of, on the one hand, surrounding the death penalty with secrecy and, on the other, delegating responsibility for deciding its future use to the general public.

Correcting misconceptions?

The question of whether people believe the death penalty is a deterrent has been consistently asked in the government surveys. Comparing the 1967 and 2014 polls, those who consider that serious crimes would increase if the death penalty was abolished increased slightly, from 51 per cent to 58 per cent. As for the empirical validity of such a claim, the increasing consensus within academia is that it is virtually impossible to prove or disapprove any deterrent effect.²⁸ In addition, whether or not there is a deterrent effect is a matter of evidence and not of opinion open to public judgment. Hence, it is puzzling as to why all the surveys over a 50-year period have asked this question.

The government, so far, has done nothing to address public misconceptions concerning deterrence – nor has any analysis been done to take into account those respondents who express support for the death penalty based on inaccurate beliefs. In addition to being silent about public misconception, the Japanese government raises the deterrent effect as one of the reasons for retaining the death penalty. In the latest State Party Report to the UN Human Rights Committee, for example, the Japanese government explained that – in addition to public opinion – abolition is not possible because ‘there is no end to atrocious crimes in Japan’.²⁹

²⁷ Johnson, D. T., ‘When the state kills in secret: capital punishment in Japan’, *Punishment & Society*, 8(3), 251-285 (2006). Dando, S. (1996), ‘Toward the abolition of the death penalty’, *Indiana Law Journal*, (72), 7-19 (1996).

²⁸ See, for example, Nagin, Daniel S., and Pepper, John V., (eds.), *Deterrence and the Death Penalty*, (Washington, DC, National Academies Press, 2012) – a review done by the American National Research Council,

²⁹ UN Human Rights Committee, State Party Report submitted by the Japanese government, (2012), para. 104.

Table 4: Ranking of policies to prevent and reduce heinous crimes

● 1 st : Focus on family discipline and education	63%
● 2 nd : More work by probation officers	43%
● 3 rd : Community needs to offer support for ex-offenders	32%
● 4 th : Keep the death penalty	27%
● 5 th : More policing	26%
● 6 th : Make offenders understand victims' feelings	24%
● 7 th : Companies to employ ex-offenders	23%

Source: Parallel survey.

Notes:

- Proportions indicate those who consider the policy to be effective (multiple-choice question).
- Figures do not add up to 100% as they were part of a multiple-choice question.
- N=1,551.

Even though the general public seems to believe the death penalty is a deterrent – and even though the government justifies keeping it on the basis of atrocious crimes being committed in Japan – the parallel survey shows that the public does not see the death penalty as *the* policy to tackle heinous crimes in the context of other policy initiatives (Table 4). When asked about effective policies in ‘preventing and reducing heinous crimes’ in a multiple-choice question, the death penalty came fourth out of seven possible solutions and policies.

Who are misinformed about what?

The parallel survey asked five information items to test the respondents' level of knowledge concerning, and relating to, the death penalty. The overall finding is that respondents were either misinformed or ignorant (Table 5, page 36). Out of 1,542 respondents, only nine correctly answered all the information items. The item with the highest proportion of correct responses was the method of execution used in Japan; 51 per cent of respondents selected the correct method – hanging – from a list of other possible methods, such as lethal injection, gas, and electric chair. One of the participants stated after the deliberative poll:

I decided to take part in the workshop because I was interested in the death penalty. Now I realise I didn't really know anything about it. I'm a bit shocked how little I knew.' (Participant who remained an abolitionist.)

Considering Japan has not changed its execution method since 1873, and hanging is the only execution method available to prisoners, the proportion of correct responses could have been much higher. The fact that only half of the respondents knew about the execution method highlights the secrecy surrounding the death penalty and, perhaps, the Japanese public's lack of interest in it. The finding adds to a series of social experiments that showed the vast majority of the Japanese public did

not possess basic knowledge about the death penalty, and that receiving additional information had an effect in changing people's views on it.³⁰

Table 5: Knowledge items

Knowledge items	Correct	Incorrect	Don't know	Total (N)
Method of execution	51%	19%	30%	1,544
Whether the death penalty works as a deterrent*	29%	71%	N/A	1,542
How many executions in 2014? **	27%	35%	38%	1,547
Change in murder rate between 2013-2014 ***	19%	81%	N/A	1,543
	Yes		No	
Whether the respondent knew about the release of Hakamada	50%	N/A	50%	1,547

Source: Parallel survey.

Notes:

- * Respondents were asked to select from: abolition 'does deter murders'; 'does not deter murders'; and 'cannot say'.
- ** Respondents were asked to select the correct 'range' of executions: 0, 1-3, 4-9, 10-14 and 15+.
- *** Respondents were asked to select from: 'increased significantly'; 'increased a little'; 'about the same'; 'decreased a little'; and 'decreased significantly'.

Having established that knowledge concerning the death penalty was poor among the respondents, we examined whether more knowledgeable respondents and less knowledgeable ones were clustered in some way. Their level of knowledge and their position on the death penalty – whether they were abolitionists or retentionists – were associated, but not in a linear way. For some information items, retentionists were more knowledgeable, and vice versa. What we found was evidence of *confirmation bias* – that is, the tendency to interpret and remember, but also to search for, information that fits with the individual's belief. For example, the knowledge of Hakamada's release – which exposed a flaw in the administration of death-penalty cases – was higher among abolitionists (61%) than retentionists (51%). Retentionists, meanwhile, tended to overestimate the increase in the murder rate – 54 per cent believed it had 'increased a lot', compared with 21 per cent of abolitionists. As for deterrence, retentionists tended to believe the death penalty deterred crime, whereas abolitionists tended to believe there was no deterrent effect. Both answers are incorrect³¹ – which, again, demonstrates confirmation bias in action, with both sides interpreting the information to suit their position.

Attitudinal change after two days: deliberative poll

This section focuses on the findings from the deliberative poll. The experimental nature of the poll makes it possible to track participants' attitudinal changes using the survey they took before and after the two-day workshop. Figure 9 (page 37) summarises the changes that occurred as a result of the deliberative poll. The circles represent three different positions on the death penalty – retentionists,

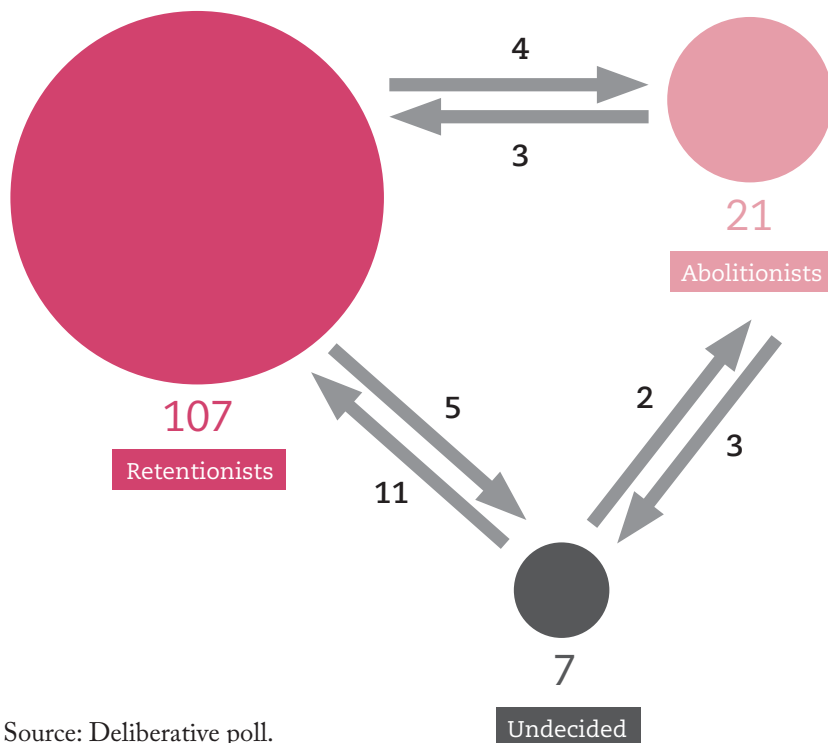
³⁰ See Sato, M., *The Death Penalty in Japan: Will the Public Tolerate Abolition?* (Berlin, Springer, 2014).

³¹ See previous section 'Correcting misconceptions?'

abolitionists and undecided – and the associated figures show the number of participants at the end of the workshop. The arrows on the figure indicate the number of people who moved from one position to another. For example, looking at the movements between abolitionists and retentionists, four participants moved from being a retentionist to an abolitionist, and three moved from being an abolitionist to a retentionist.

Overall, the majority of participants (108 out of 135) did not change their views on the death penalty. The remaining 28 did change their positions, but did not move in only one direction. If we position the ‘undecided’ group between ‘retentionist’ and ‘abolitionist’ on a continuum, 17 moved towards retention and 11 moved towards abolition.³² The finding that information and deliberation resulted in attitudinal shift in both directions is probably a result of our selection of experts, which included retentionists and abolitionists. The deliberative poll demonstrates that more information and more deliberation does not equate to a uni-directional move towards abolition. It is probably naïve to expect that a two-day event would turn everyone into an abolitionist or a retentionist. What is significant, however, is that simply participating in a two-day event resulted in an attitudinal shift for some participants. The following section examines further the impact of deliberation – paying particular attention to those whose attitude seemed *unchanged* in the post-deliberation survey – and the broader impact of communicating with others.

Figure 9: Deliberative poll: attitudinal change



Source: Deliberative poll.

Notes:

- Arrows refer to the number of participants switching between positions.
- The figures next to the circles represent the participants' positions at the end of the deliberative poll.
- N=135.

³² This change, statistically speaking, is not significant.

Differences of opinion: understanding, tolerance and acceptance

The previous section highlighted that the majority of participants in the deliberative poll did not change their position on the death penalty. Here, we turn to what retentionists and abolitionists thought of each other post-deliberation. A series of statements was put before the participants, who were asked to rate how much they agree with each one. The statements attempted to measure the participants' assessment of people *whose views were different from their own*, and to what extent they showed understanding towards those with different views.

The results in Table 6 show a remarkable similarity in levels of understanding and acceptance between those in the three positions on the death penalty. Comparing retentionists and abolitionists – between whom we might have expected to see differences of opinion – there is mostly less than a one-point variance on a 10-point scale. The largest difference between the positions, albeit of only one point, is for the statement on logical thinking, with abolitionists feeling that retentionists were less logical.

Table 6: Attitudes to differences in opinion: post-deliberation poll

Question Items	Retentionists	Abolitionists	Undecided
	1 (Disagree) – 10 (Agree)		
● ‘They (people with different views to mine) don’t understand the main issue.’	3.2	3.9	2.7
● ‘They (people with different views to mine) believe factually inaccurate things.’	3.5	3.7	3
● ‘They (people with different views to mine) cannot process issues logically.’	3.4	4.4	3
● ‘Their views (people with different views to mine) are understandable and in some parts valid.’	7.1	7.2	8.4
● ‘They (those with different views to mine) only listen to information most convenient to them.’	3.7	4.4	3.4
● ‘I can respect others who hold different views to mine.’	7.2	7.4	7.3
● ‘It is important to reach a consensus with people with different views.’	6.9	7.1	6
● ‘I can compromise if it means we can reach a solution that everyone can agree on.’	5.6	6.2	6

Source: Deliberative poll.

Note: N=135.

It may, perhaps, be surprising that retentionists and abolitionists – who hold opposing positions – can be so accepting of each other’s views. Looking at the qualitative data from the deliberative poll, however, shows how nuanced and multifaceted retentionists and abolitionists are, and how much variability there is in what it means to be a ‘retentionist’ and what it means to be an ‘abolitionist’. Below are quotes from participants after they had decided on their post-deliberation positions on the death penalty. The quotes all have one thing in common: no matter the person’s position, there is always a degree of uncertainty and hesitation, which translates into increased acceptance and tolerance for the opposing views.

Retentionists who remained retentionists (emphasis added in quotes)

*'No change in my position, but so many **unresolved issues**. Need more discussion to really decide.'*

*'No particular change in my position. I think we need the death penalty as there is no life imprisonment without parole, but just because we have the death penalty, **I don't feel so strongly about actually applying it.**'*

*'I haven't changed my views that we need the death penalty, but if we can introduce a better support system for the victims' families, **I might change my views on retention.**'*

*'I am for the death penalty, but having listened to Mr Ogawara I was able to understand the views of an abolitionist, and I think I will be able **to think more rationally** about the death penalty in the future.'*

*'I always thought the death penalty was a good thing. But if people who are innocent could be executed... when I think about this, **I'm not really sure about my position.**'*

*'I always felt we should keep the death penalty, and that feeling hasn't changed. But when I learned about the possibility of miscarriages of justice, **I did think about swapping sides.**'*

*'I'm still a retentionist. But listening to Mr Harada's story, it made me realise that there may be death-row inmates who have the potential to rehabilitate, or victims' families who don't want the criminal to be executed. Until we actually look at all the various cases, **we don't know for sure if the death penalty really is necessary or if it's even right to have it.**'*

*'I didn't change. I noticed that I'm in the majority. **I do get why some participants wanted the death penalty to be abolished** (risk of miscarriages of justice, and there are victims who don't want the perpetrator to be executed), but I still hope that the death penalty will be kept.'*

*'I did change. I thought it was normal to have the death penalty at the beginning, but since we have cases of miscarriages of justice, **I can't really say I'm 100% for it.**'*

Abolitionists who remained abolitionists (emphasis added in quotes)

*'I was against the death penalty before participating in the workshop because the death penalty is another form of murder by the state. Now I realise that my views were just an objective third-party opinion. **My feelings were a little swayed when I thought about my family being a victim of crime.**'*

*'I haven't changed my views, but **I sort of understand the feelings of retentionists** who want to keep the death penalty.'*

Conclusion: Why Does Japan Retain the Death Penalty?

The death penalty has been justified on the basis of government surveys carried out since the 1950s. The government has argued that the time has not yet come to abolish the death penalty because the Japanese public is strongly in favour of retention. It is obviously a question of judgement to assess the point at which legitimate responsiveness becomes unacceptable populism. However, it would be a reasonable concern of any state if abolition could, foreseeably, lead to the erosion of the legitimacy of – and public trust in – the criminal justice system.

In order to answer how central the death penalty is to the Japanese public, this report examined various data, including the government surveys from 1967 and 2014. A parallel survey was also carried out, which used comparable sampling methodology to the 2014 government survey and presented results that helped to put into context the headline results of that survey. A deliberative poll further provided quantitative and qualitative data, which tested the malleability of attitudes, as well as people's capacity to understand and accept different views.

The analysis of the 2014 government survey showed that just over one-third of respondents was committed to retaining the death penalty at all costs. The 1967 government survey presented a missed opportunity for abolition based on a lack of firm commitment to retention. The parallel survey highlighted that, behind the majority public support, the same majority would be happy to accept abolition if the government decided to abolish the death penalty. The deliberative poll further confirmed the understanding and respect between retentionists and abolitionists.

Does this mean the government survey results are not credible? No; we believe that our surveys and the government surveys are complementary, and help us to understand what it means to be a 'retentionist' in modern-day Japan – or, perhaps, in other retentionists states too. What we would argue is that – for the majority of the public – the death penalty is a distant topic that has little to do with their everyday life, and is not something they spend time contemplating. When they are asked in a survey whether to keep or abolish the death penalty, retention is a default position to fall back on, living in a retentionist state with a low crime rate. The majority of the public is in favour of the death penalty if asked in general, but how strongly or how unconditionally they want to retain it is a different matter. This is where our parallel survey and deliberative poll – and even the government's own surveys, when analysed more fully – demonstrate that the legitimacy of the Japanese criminal justice system does not hinge on retention.

All the findings point to the conclusion that the Japanese public possesses the capacity and flexibility to embrace abolition. These findings hardly describe a society that expects the strict application of the death penalty and whose trust in justice depends significantly on the government's commitment to retaining it. Japan has the death penalty not because the general public is clamouring for its retention, but rather because the government has not yet taken steps to understand fully the nature of public opinion on the subject. Were the government to change its stance on the death penalty, there is reliable evidence that its citizens would follow suit.

Appendix

Reasons for retention and abolition: 1967 and 2014 government surveys

	1967 survey	2014 survey
Belief in the death penalty as a deterrent	51%	58%
Reasons for retention	Rank	Rank
● Serious crimes will increase if the death penalty is abolished	1 st	4 th
● Those who commit serious crimes should forfeit their life	2 nd	2 nd
● Necessary to deter offenders from committing further crimes	3 rd	3 rd
● Necessary when taking into consideration the feelings of victims' families	4 th	1 st
Reasons for abolition	Rank	Rank
● Killing another human being is inhumane	1 st	4 th
● Even offenders who commit serious crimes have the potential to be rehabilitated	2 nd	6 th
● Better to keep prisoners alive and make them repent for their crimes	3 rd	2 nd
● Serious crimes will not increase even if the death penalty is abolished	4 th	5 th
● Miscarriages of justice for death penalty cases are irreversible	5 th	1 st
● Not even the state has the right to kill	N/A	3 rd
Response rate	83%	61%
Sample size	N=2,500	N=1,826

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About The Death Penalty Project

The Death Penalty Project works to protect the human rights of those facing the death penalty. It operates in all countries by providing free legal representation, advice and assistance. For more than 20 years, its work has played a critical role in identifying a significant number of miscarriages of justice, in promoting minimum fair trial guarantees in capital cases, and in establishing violations of domestic and international law.

Through its legal work, the application of the death penalty has been restricted in many countries, in line with international human rights standards. Its training programmes and research projects create awareness of the issues surrounding the death penalty, encourage greater dialogue and provide a platform to engage with experts and key stakeholders.

Since 2000, The Death Penalty Project has been involved in a broad range of activities in Asia, in terms of capacity building, legal advice and direct legal assistance to prisoners under sentence of death.

Between 2013 and 2015, The Death Penalty Project has published a number of reports focusing on capital punishment in Asia:

- *The Death Penalty in Malaysia: Public Opinion on the Mandatory Death Penalty for Drug Trafficking, Murder and Firearms Offences* by Professor Roger Hood;
- *The Death Penalty in Japan: A Report on Japan's legal obligations under the International Covenant on Civil and Political Rights and an Assessment of Public Attitudes to Capital Punishment*, co-authored with Maiko Tagusari, Professor David Johnson and Dr Mai Sato;
- *The Inevitability of Error: the Administration of Justice in Death Penalty Cases*, co-authored with Professor Roger Hood, Professor Brandon Garrett, Dr Mai Sato, and Maiko Tagusari; and
- *The Death Penalty in Taiwan: A Report on Taiwan's legal obligations under the International Covenant on Civil and Political Rights*, co-authored with Professor Wen-Chen Chang and Professor David Johnson.

These reports and other publications by The Death Penalty Project are available to view or download at **www.deathpenaltyproject.org**

The Public Opinion Myth

Why Japan retains the death penalty

Although a signatory to the International Covenant on Civil and Political Rights, Japan – unbeknown to many – retains the death penalty, and still executes to this day. In this report, Sato and Bacon take a close look at the past and present underlying currents in public opinion towards – and justifications of – retention of the death penalty. Analysis of the Japanese government's data from 1967 and 2014, and of new polls conducted by the authors, reveal that – contrary to the government's claim that abolition is not possible because of the '80% majority support' for the death penalty – the Japanese public is more discerning in its attitude and is, in fact, largely ready for abolition.

A dialogue between the film director and a participant in the deliberative poll:

Film director 'What do you think about the latest government survey results?'

Participant 'I think it is a little scary. They're saying that it is OK to kill people.'

Film director 'But you would've belonged to that 80 per cent majority before.'

Participant 'I don't think I would be able to tick the 'in favour' box in the government survey any more. If I do, that would mean I'm involved.'

Film director 'In killing a death-row inmate?'

Participant 'That's right.'

Source: Documentary based on the deliberative poll: *The Wavering Public? The Death Penalty, Justice and Public Opinion*

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