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DEATH PENALTY SENTENCING IN JAPAN UNDER THE LAY ASSESSOR SYSTEM: AVOIDING THE AVOIDABLE THROUGH UNANIMITY

Elizabeth M. Sher[†]

Abstract: The Lay Assessor Act of 2004 mandated the creation of a mixed lay judge system, called the *saibanin seido*. Under this new system, jurors, or lay judges, sit with professional judges to decide the fate of criminal defendants. The Lay Assessor Act requires lay judges to decide both the verdict and sentencing of defendants in the same sitting. The verdict and sentence require support from a majority of the jurors and must include one professional judge on the panel. For certain crimes in Japan, the death penalty is one possible sentence. Under the *saibanin seido* system, for the first time ever in Japan, lay judges determine whether to hand down a death sentence. Examining psychological research on jury deliberations in the United States, as well as the norms of international law, this comment suggests that Japan adopt a unanimous requirement for a death sentence. Implementing unanimity for capital punishments would allow Japan to adhere to its Constitution and comply with international law standards. The unanimity requirement would foster essential deliberations that do not occur otherwise and is necessary to increase citizen confidence, understanding, and involvement in the criminal justice system. Further, increased deliberation will override emotional influences from trial, such as victim impact statements.

I. INTRODUCTION

“The death penalty is a severe and extreme punishment that forever deprives a person of the very basis of their human existence, their life, and must be seen as an extreme penalty for situations where there is truly no other remedy”¹

—Supreme Court of Japan, 1983

With a death sentence comes a finality that is simply not present with other sentences: the end of life. Because of the unique finality that comes with capital punishment, the procedures involved should be considered even more carefully than other sentence types and probably structured differently than they are for other crimes. In 2009, Japan implemented a mixed jury

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¹ Author’s translation of Saikō Saibansho [Sup. Ct.] July 8, 1983, Showa 56 (a) no. 1505, 37(6) SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 609 (Japan) [hereinafter SAIKŌ SAIBANSHO] (“死刑が人間存在の根元である生命そのものを永遠に奪い去る冷厳な極刑であり、誠にやむをえない場合における窮極の刑罰であることにかんがみると、その適用が慎重に行われなければならないことは原判決の判示するとおりである. . .”).

system created by the Lay Assessor Act of 2004 (“Lay Assessor Act”).² Under this new system, jurors, or lay assessors, sit alongside professional judges to determine the fate of criminal defendants for serious crimes.³ The mixed jury decides both the defendant’s verdict and sentence in the same sitting.⁴ Because Japan implements the death penalty for certain crimes, lay judges are now given a responsibility unknown to them previously: most notably, the power to hand a criminal defendant a sentence of death. In a country with an incredibly high public support rate of capital punishment,⁵ the new jury system forces citizens to consider the true implications of a death sentence in a new light. Currently, for all criminal jury cases, a majority (which must include one professional judge) is sufficient to implement a sentence, including a sentence of capital punishment.⁶

This comment explores the majority requirement for a sentence of death in Japan under the Lay Assessor Act, arguing that this system should be changed to require unanimity in capital punishment cases. Part II discusses the history of criminal justice reforms in Japan in the 1990s, largely focusing on the Lay Assessor Act, which imposed the mixed lay judge system (*saibanin seido*) that went into effect in May 2009. Part III briefly touches on the death penalty in Japan, and looks at how the new sentencing system affects death penalty decisions. It examines why death is perceived in international law as a unique punishment and why safeguards are necessary to prevent arbitrariness. In particular, it examines the majority requirement for verdicts and sentences and discusses the various concerns with this system. Finally, Part IV argues that Japan should adopt a unanimity requirement to impose capital punishment in order to increase citizen confidence in the criminal justice system, decrease the emotional effect of trials, and decrease the psychological burden on lay judges. Part IV examines psychological research in the United States on jury deliberations under unanimity and majority requirements. Additionally, it argues that the Japanese Constitution further supports unanimity. Lastly, Part IV argues that requiring unanimity is necessary to conform to international norms.

² Saibanin no sanku suru keiji saiban ni kansuru hōritsu [Act Concerning Participation of Lay Assessors in Criminal Trials], Law No. 63 of 2004 (Japan), translated in Kent Anderson & Emma Saint, *Japan’s Quasi-Jury (Saibanin) Law: An Annotated Translation of the Act Concerning Participation of Lay Assessors in Criminal Trials*, 6 ASIAN-PAC. L & POL’Y J. 9, 9 (2005) [hereinafter Lay Assessor Act]; Matthew J. Wilson, *Japan’s New Criminal Jury Trial System: In Need of More Transparency, More Access, and More Time*, 33 FORDHAM INT’L L.J. 487, 488 (2009).

³ Lay Assessor Act, *supra* note 2, at art. 2 (subject cases and composition of a judicial panel).

⁴ *Id.* at art. 6.

⁵ Natsuko Fukue & Mariko Katō, *Determining Sentences Seen as Lay Judges’ Hardest Task*, JAPAN TIMES ONLINE (May 14, 2009), <http://search.japantimes.co.jp/cgi-bin/nn20090514f1.html>.

⁶ Lay Assessor Act, *supra* note 2, at art. 67 (verdict).

II. JAPAN'S HISTORY OF CRIMINAL SENTENCING PROVIDES A BACKGROUND FOR UNDERSTANDING THE COUNTRY'S DEATH PENALTY SENTENCING

A series of wrongful convictions led to discussions in the 1990s on how to reform the criminal justice system in Japan.⁷ As part of the reforms, the Lay Assessor Act of 2004 created a mixed jury system comprised of professional and lay judges (or jurors).⁸ The mixed juries decide the verdict and sentence for serious criminal cases.⁹ The Justice System Reform Council ("JSRC") explained that the goals of the new lay judge system were to increase citizen involvement and confidence in the criminal justice system.¹⁰ After sitting on a jury, lay judges are sworn to a lifetime of secrecy about the deliberations.¹¹

A. *The Criminal Reforms of the 1990s Focused on Increasing Citizen Involvement and Confidence in the Criminal Justice System*

In the mid-1990s, the Japanese government made a strong effort to reform the legal system in Japan.¹² Before the reforms, Japan's legal system was heavily criticized as an "insular bureaucracy that is detached from the needs of the people."¹³ Overall, the country has a conviction rate of over 99%, largely due to defendant confessions.¹⁴ After a series of high-profile death-row acquittals in the 1970s and 1980s—in which it was discovered that individuals who had been wrongly convicted suffered through decades of imprisonment—criticisms of the criminal justice system began to increase.¹⁵ After these exonerations, Japanese citizens became concerned about the problem of wrongful convictions and involuntary confessions, and their confidence in the criminal justice system waned.¹⁶

⁷ Stephan Landsman & Jing Zhang, *A Tale of Two Juries: Lay Participation Comes to Japanese and Chinese Courts*, 25 UCLA PAC. BASIN L. J. 179, 186 (2008).

⁸ Lay Assessor Act, *supra* note 2, at art. 2.

⁹ *Id.*

¹⁰ Arne F. Soldwedel, *Testing Japan's Convictions: The Lay Judge System and the Rights of Criminal Defendants*, 41 VAND. J. TRANSNAT'L L. 1417, 1421 (2008).

¹¹ Lay Assessor Act, *supra* note 2, at art. 79.

¹² Landsman & Zhang, *supra* note 7, at 186. There was an economic decline in the 1990s that caused the country to focus on ways to revive the economy, including a large-scale program of government reform to streamline bureaucracy and to cut excessive costs. Soldwedel, *supra* note 10, at 1419. Reforming the legal system was part of that program. *Id.*

¹³ Soldwedel, *supra* note 10, at 1419.

¹⁴ Landsman & Zhang, *supra* note 7, at 184; *see also* Wilson, *supra* note 2, at 508. The rate hovered around 99% and above before the implementation of the lay judge system. *Id.* at 506. Even with the new system, the conviction rate is still around 99%. *Id.* at 508.

¹⁵ Ingram Weber, *The New Japanese Jury System: Empowering the Public, Preserving Continental Justice*, 4 E. ASIA L. REV. 125, 149 (2009).

¹⁶ *Id.*

In 1999, the late Prime Minister Keizo Obuchi created the JSRC to lead the legal reforms throughout the country.¹⁷ In an effort to remedy confidence in the justice system, the JSRC proposed that “[a] new system shall be introduced for a portion of criminal cases. Under this new system, the general public can work in cooperation with judges, sharing responsibility for and becoming involved in deciding the cases autonomously and meaningfully.”¹⁸

After two years of deliberations, the JSRC gave its reform recommendations to the Cabinet in 2001.¹⁹ The stated goals were to facilitate a more accessible and user-friendly justice system, to ensure public participation in the system, to redefine the legal profession, and to reinforce the profession’s function.²⁰ The JSRC suggested creating a jury system in Japan for criminal trials.²¹ They theorized that deregulation would reduce government intervention in many different aspects of life; thus, to ensure its protection, the public had to be given better access to the judicial system and the legal profession.²²

B. The Lay Assessor Act Created a Mixed Jury System Designed to Increase Citizen Participation and Confidence in the Criminal Justice System

As part of the reforms, the JSRC proposed implementing the lay judge system,²³ which the JSRC hoped would work toward increasing the level of citizen participation in government and creating citizen trust in the criminal justice system in Japan.²⁴ Under the Lay Assessor Act, defendants charged with serious crimes have their verdicts and sentences determined by a combination of lay judges (citizens) and professional judges.²⁵ Citizens participate in juries on the following types of serious criminal cases: homicide, robbery resulting in bodily injury or death, bodily injury resulting in death, unsafe driving resulting in death, arson of an inhabited building, kidnapping for ransom, abandonment of parental responsibilities resulting in the death of a child, and other serious cases involving rape, drugs, and

¹⁷ Hiroshi Fukurai, *People’s Panels vs. Imperial Hegemony: Japan’s Twin Lay Justice Systems and the Future of American Military Bases in Japan*, 12 *ASIAN-PAC. L. & POL’Y J.* 95, 107 (2010).

¹⁸ Landsman & Zhang, *supra* note 7, at 188.

¹⁹ Wilson, *supra* note 2, at 510.

²⁰ *Id.* at 510-11.

²¹ Soldwedel, *supra* note 10, at 1421.

²² Wilson, *supra* note 2, at 510-11.

²³ Soldwedel, *supra* note 10, at 1421.

²⁴ *Id.*

²⁵ Lay Assessor Act, *supra* note 2, at art. 2.

counterfeit charges.²⁶ The Ministry of Justice has explained that the rationale for using a mixed lay and professional judge system for serious crimes is that these are the offenses in which the public is most invested and impacted by.²⁷

The Supreme Court of Japan (“Supreme Court”) strongly opposed jury trial proposals in any form and lobbied leading political parties to make sure the National Diet, the country’s bicameral legislature, did not adopt legislation calling for a pure citizen jury.²⁸ The Supreme Court did not think that lay citizens would help administer justice.²⁹ Rather than thinking that the judicial system needed to be drastically reformed, the Supreme Court thought that professional judges should be arbitrators of justice, and that changes, if any, should focus on educating the public about the justice system.³⁰ In creating their new jury system, the JRSC studied different jury models around the world before deciding on the mixed lay system common in continental Europe.³¹ The lay judge system was a compromise: without relinquishing full control to jurors, the courts could monitor deliberations and make adjustments to reduce possible negative consequences.³²

In 2004, the Japanese Diet enacted the Lay Assessor Act, titled in full the “Act Concerning Participation of Lay Assessors in Criminal Trials.” The Lay Assessor Act mandated the creation of a mixed-court system, or quasi-jury, that was implemented on May 21, 2009.³³ This was the second time that a jury system was created in Japan; the first system was established in 1928 and lasted through 1943, at which point it was suspended indefinitely.³⁴ In line with the overarching goals of legal reform, the stated purpose of the Lay Assessor Act is to “contribute to the promotion of the public’s understanding of the judicial system and thereby raise their confidence in it.”³⁵ Despite its initial opposition, the Supreme Court has reaffirmed the importance of these goals in the actual practice of lay judge trials; in 2009,

²⁶ Matthew Wilson, *The Dawn of Criminal Jury Trials in Japan: Success on the Horizon?*, 24 WIS. INT’L L. J. 835, 844 (2007).

²⁷ Wilson, *supra* note 2, at 515.

²⁸ *Id.* at 851-52.

²⁹ *Id.* at 497.

³⁰ *Id.*

³¹ *Id.* at 852.

³² *Id.* at 851-52.

³³ Kent Anderson & Emma Saint, *Japan’s Quasi-Jury (Saibanin) Law: An Annotated Translation of the Act Concerning Participation of Lay Assessors in Criminal Trials*, 6 ASIAN-PAC. L & POL’Y J. 9, 9 (2005).

³⁴ Kent Anderson & Mark Nolan, *Lay Participation in the Japanese Justice System: A Few Preliminary Thoughts Regarding the Lay Assessor System (Saibanin Seido) from Domestic Historical and International Psychological Perspectives*, 37 VAND. J. TRANSNAT’L L. 935, 962 (2004).

³⁵ Lay Assessor Act, *supra* note 2, at art. 1 (purpose).

the Supreme Court issued a statement that lay judge decisions should be respected “as much as possible.”³⁶

Lay judges are selected randomly by lottery from voter rolls in each municipal jurisdictional division.³⁷ In order to serve on a jury, the individual must be a citizen and must be eligible to vote in the Diet elections, which require that citizens be twenty years of age or older.³⁸

The Lay Assessor Act outlines two different structures that will be used for lay judge trials.³⁹ Six lay judges (*saibanin*) and three professional judges will decide both the verdict and the sentence in contested cases.⁴⁰ In contrast, for uncontested cases, where the facts and issues established during the pre-trial proceedings are undisputed, three lay judges and one professional judge determine the verdict and sentence.⁴¹ Article 67 of the Lay Assessor Act explains that the Supreme Court’s decision requires a modified simple majority, meaning that the composition of the majority must include at least one judge.⁴² During the deliberation process, the chief judge (who is always a professional judge) is responsible for explaining the applicable laws and ordinances to the lay judges, working to make the deliberations comprehensible for them, and giving them sufficient opportunity for their opinions to be heard.⁴³

The lay judges are Japanese citizens and sit for one trial.⁴⁴ Unlike the longer (particularly for capital cases) and more complicated jury selection process in the United States, the selection of lay judges in Japan is quick and mechanical.⁴⁵ This practice serves to expedite criminal trials, which is a

³⁶ David T. Johnson, *Capital Punishment Without Capital Trials in Japan’s Lay Judge System*, 8 ASIA-PACIFIC J. (2010), available at <http://www.japanfocus.org/articles/view/3461>.

³⁷ Lay Assessor Act, *supra* note 2, at art. 13 (qualifications for appointment as lay assessor).

³⁸ *Id.* In addition to listing lay judge requirements the Lay Assessor Act also sets out reasons for which an individual could be prohibited from serving as a lay judge: members of the National Diet, Ministers of State, and employees of a lengthy list of national administrative institutions, including past and present judges, prosecutors, and lawyers as well as present professors. *Id.* at art. 15. The Lay Assessor Act also lists numerous individuals who are excluded from serving as lay judges based on their relationship to the defendant, victim, or the case. The Lay Assessor Act excludes the following individuals from serving as lay judges: 1) the defendant or victim, 2) relatives of the defendant or victim, 3) employees or cohabitants of the defendant or victim, 4) individuals who made complaints or claims in the case, 5) representatives, counsel, or assistants of the defendant, 6) prosecutors or judicial police officers in the case, 7) individuals working as either members or assistants for a Prosecutorial Review Commission in the case (or reserve members of the PRC who heard the case). *Id.* at art. 17.

³⁹ *Id.* at art. 2.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Lay Assessor Act, *supra* note 2, at art. 67 (verdict).

⁴³ *Id.* at art. 66 (deliberations).

⁴⁴ *Id.* at art. 9.

⁴⁵ Johnson, *supra* note 36.

goal of the new lay judge system.⁴⁶ Previously, trials lasted months, largely because the prosecution and defense submitted volumes of written evidence that covered vast amounts of minor details that did not pertain to the crime, and the judge had to review all of it before reaching a verdict.⁴⁷ Rather than reconvening daily, the trials were stretched out over weeks based on the schedules of the legal professionals.⁴⁸ As of 2005, the criminal procedure law was amended to require pretrial meetings for all cases that will be heard by the lay judge system.⁴⁹ At the meetings, the prosecution and defense submit their arguments and evidence, ultimately elucidating issues and reducing the evidence and witnesses for the main trial.⁵⁰ At the end of the pretrial conference, judges estimate how long the lay judge trial will last and schedule sessions accordingly.⁵¹

C. *Sentencing Under the Lay Assessor Act May Be Affected By the Majority Rule As Well As Emotional and Psychological Components*

Under the Lay Assessor Act, jurors determine both the verdict and the sentence.⁵² Each lay assessor is required to express an opinion at verdict and sentencing deliberations.⁵³ The chief judge sitting on the mixed panel is responsible for facilitating the different opinions;⁵⁴ it is his or her duty to explain necessary laws or ordinances for the lay judges and give the lay judges a sufficient opportunity to express their opinions.⁵⁵

Moreover, instead of a bifurcated process, as is common in the United States and Europe, Japanese verdict deliberations and sentencing occur in a single sitting.⁵⁶ Interestingly, the Lay Assessor Act does not specify that verdict deliberations should even take place before sentencing determinations.⁵⁷ The only specifications on deliberation are that a verdict must be determined on the basis of a simple majority and that it shall include both “an empanelled judge and a lay assessor holding that opinion.”⁵⁸ When

⁴⁶ Setsuko Kamiya, *Preparation for Quicker Criminal Trials Enhances Focus*, JAPAN TIMES ONLINE (May 13, 2009), <http://search.japantimes.co.jp/cgi-bin/nn20090513f1.html>; Weber, *supra* note 15, at 160.

⁴⁷ Kamiya, *supra* note 46.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² Lay Assessor Act, *supra* note 2, at art. 6.

⁵³ Leah Ambler, *The People Decide: The Effect of the Introduction of the Quasi-Jury System (Saibanin Seido) on the Death Penalty in Japan*, 6 NW. U. J. INT'L HUM. RTS. 1, 55 (2007).

⁵⁴ *Id.*

⁵⁵ Lay Assessor Act, *supra* note 2, at art. 66 (deliberations).

⁵⁶ Ambler, *supra* note 53, at 52.

⁵⁷ *Id.*

⁵⁸ Lay Assessor Act, *supra* note 2, at art. 67; Ambler, *supra* note 53, at 52.

the lay assessors and professional judges are not able to reach a majority for sentencing, the number of votes for the harshest sentence will be added to the number of opinions for the next harshest option, until a majority opinion of the members of the judicial panel (which includes both a professional judge and lay assessor holding that opinion) is achieved.⁵⁹ For example, if three jurors vote for the death penalty and three jurors vote for life imprisonment, the defendant would receive life imprisonment because six votes reaches the requisite majority.

Neither the Lay Assessor Act nor the Penal Code of Japan (“Penal Code”) provides sentencing guidelines for lay assessors or judges.⁶⁰ The Penal Code stipulates possible sentences for different crimes, but it permits a wide range of choices.⁶¹ For example, murder can be punished by execution, life imprisonment with the possibility of parole, or more than five years imprisonment, both with hard labor.⁶² The length of a sentence can vary considerably; for example, a defendant found guilty of robbery could be sentenced anywhere from six years to life.⁶³

In May 2008, the Supreme Court started a database to give lay judges and professional judges a set of standards to determine appropriate punishments.⁶⁴ The Supreme Court presents graphs of previous cases drawn from the database to serve as reference points for the lay judges to determine sentences.⁶⁵ This database is not open to the public and is continuously being expanded, consisting of over 3,000 cases.⁶⁶ Lay judges can search the database for comparative cases using keywords (for example motive of offender, type of weapon, number of victims, etc.).⁶⁷ The database is connected to terminals at sixty district courts and their branches across the nation.⁶⁸ Along with lay judges, prosecutors and defense attorneys can access the system as well.⁶⁹ However, Supreme Court officials have emphasized that this information is just for reference and is not binding.⁷⁰

⁵⁹ Lay Assessor Act, *supra* note 2, at art. 67.

⁶⁰ Ambler, *supra* note 53, at 16.

⁶¹ Fukue & Katō, *supra* note 5.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ Yūji Shiroshita, *Current Trends and Issues in Japanese Sentencing*, 22 FED. SENT’G REP. 243, 246 (2010).

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ Fukue & Katō, *supra* note 5.

The victim participation system is another important influence on sentencing.⁷¹ Around the same time that the lay judge system started, a system of victim participation was implemented.⁷² This new system expanded the rights and protections of victims and survivors, and gave them the right to make sentencing requests at trial.⁷³ Thus, because courts hand down the sentence directly after the trial, victims and their family members have the opportunity to testify at the actual trial and make their sentencing requests at that time.⁷⁴ Therefore, jurors' perceptions may become biased toward victims and their family members from the beginning of the trial because the jurors' emotions are overriding their objective thinking.

D. The Silence Requirement Places a Lifelong Psychological Burden on the Lay Assessors

Chapter 7, Article 79 of the Lay Assessor Act (entitled "Crimes of Lay Assessors Leaking Secrets") makes it a crime for lay assessors to disclose any deliberation secrets or other secrets learned while serving as a lay juror.⁷⁵ Such disclosure can result in a fine of up to 500,000 yen and/or imprisonment for up to six months.⁷⁶ Lay judges are sworn to a life of secrecy and cannot discuss the closed-door conversations.⁷⁷ Because of this, it is very difficult to determine whether the deliberations are living out the goals of the reform.

III. CAPITAL PUNISHMENT UNDER THE LAY JUDGE SYSTEM IS CURRENTLY PROBLEMATIC BECAUSE OF THE MAJORITY REQUIREMENT

The Penal Code allows the death penalty as a criminal sentence for certain crimes.⁷⁸ Under the lay judge system, citizens are faced with

⁷¹ Johnson, *supra* note 36.

⁷² In 2007, the Diet amended the Code of Criminal Procedure to allow victims the ability to participate in criminal trials. See Law No. 95, June 27, 2007 (effective April 1, 2008) (amending the KEIJI SOSHOHŌ [KEISOHŌ] [C. CRIM. PRO.], art. 292-2, available at http://www.adh-geneva.ch/RULAC/pdf_state/Code-Criminal-Procedure.pdf).

⁷³ *Id.* The trial court also has the discretion to allow the family members of the victim to sit near the prosecution during the trial, question witnesses to raise issues of credibility regarding mitigating circumstances testimony, question the defendant and render opinions after the prosecutor's closing argument. Wilson, *supra* note 2, at 524-26.

⁷⁴ Wilson, *supra* note 2, at 524-26.

⁷⁵ Lay Assessor Act, *supra* note 2, at art. 79.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ KEIHŌ [Penal Code], 1907 Law No. 45 of 1907, art. 9, translated at <http://www.japaneselawtranslation.go.jp/law/detail/?ft=1&re=02&dn=1&x=35&y=15&co=01&ky=penal+code&page=23> [hereinafter KEIHŌ [Penal Code]].

seriously considering their views on the death penalty as judges.⁷⁹ As of March 2011, lay judges have heard seven cases where the prosecution requested the death penalty, and have implemented a death sentence in five of those seven cases.⁸⁰ With these decisions in mind, this comment argues that the majority rule is inappropriate for capital punishment cases because it goes against the goals of the criminal justice reforms and has emotional and psychological effects that will render it less effective.

A. *Capital Punishment in Japan Should Only Be Imposed When It Is Unavoidable*

Japan is one of the few developed democracies in the world that continues to implement the death penalty regularly.⁸¹ Roughly 85% of the Japanese population is reported to be in favor of the practice.⁸² Many supporters of capital punishment believe that death sentences and executions give victims closure (*kugiri ga tsuku*).⁸³

The Penal Code lists the death penalty as one of the six possible types of criminal punishment.⁸⁴ The Penal Code and other special laws outline eighteen crimes that are punishable by death.⁸⁵ However, in practice, death sentences have been used only for convictions of murder, robbery-murder and rape-murder.⁸⁶

Under the new lay judge system, prosecutors do not have to announce that they are seeking the death penalty until the end of the trial.⁸⁷ Thus, the jury selection is not affected by the possibility of a death sentence.⁸⁸ Arguably, if the jurors knew before the trial started that they would have to decide not only whether the defendant was guilty, but whether he or she should live or die, they would more closely scrutinize the evidence and witness testimony.⁸⁹

⁷⁹ See generally Johnson, *supra* note 36.

⁸⁰ *Id.*; see also *Man Who Kept Silent Given Death Sentence in Lay Judge Trial*, KYODO NEWS (Mar. 16, 2011), available at <http://www.japantoday.com/category/crime/view/man-who-kept-silent-given-death-sentence-in-lay-judge-trial>; Hiroshi Odanaka, *Nagano 3 nin Satsugai: Matsumoto Hikoku ni Shikei Hanketsu Nagano Chisai no Saibanin Saiban*, MAINICHI SHIMBUN (2011).

⁸¹ David T. Johnson, *Crime and Punishment in Contemporary Japan*, 36 CRIME & JUST. 371, 381 (2007).

⁸² Johnson, *supra* note 36.

⁸³ *Id.*

⁸⁴ KEIHŌ [Penal Code], *supra* note 78.

⁸⁵ *Id.*; see also Ambler, *supra* note 53, at 13.

⁸⁶ Ambler, *supra* note 53, at 13.

⁸⁷ Johnson, *supra* note 36.

⁸⁸ *Id.*

⁸⁹ *Id.*

The Supreme Court has stated that a death sentence “should be imposed only if, all factors considered, ‘it is unavoidable’ and ‘cannot be helped’ (*yamu o enai*).”⁹⁰ Courts consider the proportionality of the crime to the sentence, as well as deterrent effects,⁹¹ and in 1983, the Supreme Court articulated what are known as the *Nagayama* standards as guidelines for deciding who deserves death.⁹² These “standards” instruct jurors to consider: 1) the severity of the crime; 2) the defendant’s motive; 3) the cruelty and heinousness of the murder technique; 4) the number of victims; 5) the feelings of the victims and survivors; 6) the societal impact of the crime; 7) the age of the defendant; 8) whether the defendant has prior convictions; and 9) what happened after the crime was committed (such as whether the defendant repented and apologized).⁹³ These standards come from the 1983 case of Norio Nagayama, a serial killer, who was eventually hung in 1997 for killing four people in 1968 as a teenager.⁹⁴ Courts have used the *Nagayama* standards for years to determine whether to apply the death penalty in murder cases in Japan.⁹⁵

B. The First Case Under the Lay Assessor System Where the Defendant Received the Death Penalty Suggests that the Decision was Not Unanimous

To date, there have been seven trials in which the prosecution has requested the death penalty.⁹⁶ In five of those cases, the lay judges have given the defendant a sentence of capital punishment.⁹⁷ This Section examines the first case under the lay assessor system where the defendant received the death penalty.⁹⁸

The aftermath of the first case in which the lay judge system handed down a death sentence suggests that the decision may not have been

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² SAIKŌ SAIBANSHO, *supra* note 1.

⁹³ *Id.*; see also Johnson, *supra* note 36 (providing a translation of the factors and further elaboration on how the factors have impacted the capital trials thus far under the lay assessor system).

⁹⁴ Keiji Hirano, *10 Years After Hanging, Killer Still Offers Lessons to be Learned*, JAPAN TIMES ONLINE (Aug. 1, 2007), <http://search.japantimes.co.jp/cgi-bin/nn20070801f1.html>.

⁹⁵ *First Death Penalty Handed Down By Lay Judges*, JAPAN TIMES ONLINE (Nov. 17, 2010), <http://search.japantimes.co.jp/cgi-bin/nn20101117a1.html>.

⁹⁶ Johnson, *supra* note 36; *Man Who Kept Silent Given Death Sentence in Lay Judge Trial*, *supra* note 80; Hiroshi Odanaka, *supra* note 80.

⁹⁷ *Id.*

⁹⁸ In the first case under the lay judge system where the prosecution asked for the death penalty, the lay judges sentenced the defendant, Hayashi Koji, to life imprisonment. *Lay Judges Weigh Death Penalty*, JAPAN TIMES (Oct. 28, 2010), <http://search.japantimes.co.jp/cgi-bin/ed20101028a2.html>.

unanimous.⁹⁹ Hiroyuki Ikeda, age thirty-two, was charged with murdering two men in a hotel in 2009.¹⁰⁰ Hiroyuki did not contest the charges.¹⁰¹ Consequently, the main focus at the trial, which took place in Yokohoma District Court, was on whether the lay judges would give him life in prison or the death penalty.¹⁰² Based on the method in which he killed one of the victims, whose head he cut off with an electric saw while the victim was still alive, the prosecution argued that the act of the defendant was “cruel and heinous in the highest level and deserved maximum condemnation” and so brutal that it was hard to believe a human carried out such an act.¹⁰³

In November 2010, six lay judges and three professional judges gave Hiroyuki the first death sentence ever delivered by the new jury system.¹⁰⁴ After he announced the sentence, Chief Judge Asayama Yoshifumi stated, “this is a conclusion of consequence, so as a court, we recommend that you file an appeal.”¹⁰⁵ Curiously, a lay judge said the same thing when briefly questioned afterward.¹⁰⁶ Because of these statements, critics have argued that this case was not unanimous, and perhaps even a five to four decision, and thus an extremely divided court.¹⁰⁷ The court, while handing down the death penalty, recommended the defendant appeal that very sentence; this indicates that, perhaps, multiple jurors did not support the harsh sentence.¹⁰⁸

C. *The Majority Rule in Japan to Impose the Death Penalty Is Inadequate Because Death Is Different than Other Forms of Punishment*

Under the new jury system, only a majority of the lay and professional judges (so long as the majority includes one professional judge) must agree in order to impose a death sentence.¹⁰⁹ As with other lay judge trials, the verdict and sentencing take place in one sitting, without separate bifurcated processes.¹¹⁰ However, death is universally regarded in international law as a unique form of punishment that, when imposed, requires safeguards that

⁹⁹ See *First Death Penalty Handed Down By Lay Judges*, *supra* note 95.

¹⁰⁰ *Gallows Sought for Second Time in Lay Judge Trial*, JAPAN TIMES ONLINE (Nov. 11, 2010), <http://search.japantimes.co.jp/cgi-bin/nn20101111a5.html>.

¹⁰¹ See *First Death Penalty Handed Down By Lay Judges*, *supra* note 95.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ Johnson, *supra* note 36.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ Lay Assessor Act, *supra* note 2, at art. 67.

¹¹⁰ *Id.* at art. 66.

the current majority rule may not adequately address.¹¹¹ The majority rule may also be problematic because it undermines the core premise that the death penalty only be imposed when it is unavoidable; it leaves the potential for the imposition of capital punishment even when four lay judges think it is avoidable.¹¹² Further, the emotional components present during the trial have the potential to drastically impact the jurors' decisions.¹¹³ Finally, the current system produces an extreme psychological burden on lay judges that, because of the secrecy requirement, may last a lifetime.¹¹⁴

1. *International Law Suggests that the Death Penalty is a Different Form of Punishment that Requires Additional Procedural Safeguards*

Analyzing international criminal law practices regarding the death penalty illustrates that capital punishment should not be viewed the same as other punishments, nor are criminal procedures surrounding other forms of punishment always appropriate.

International law generally disfavors capital punishment.¹¹⁵ The International Criminal Court for Yugoslavia, the Rwanda Tribunal, and the International Criminal Court do not allow the imposition of death sentences.¹¹⁶ The maximum sentence in the aforementioned tribunals is life imprisonment.¹¹⁷ The International Covenant on Civil and Political Rights ("ICCPR") and its Second Optional Protocol (aiming at the abolition of the death penalty) provide the generally accepted international denunciation of capital punishment:

(1) Every human being has the inherent right to life. This right shall be protected by law. *No one shall be arbitrarily deprived of his life.* (2) In countries that have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime . . . (5) Sentence of death shall not

¹¹¹ WILLIAM A. SCHABAS, *THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW* 168 (3d ed. 2002).

¹¹² Johnson, *supra* note 36.

¹¹³ Fukue & Katō, *supra* note 5.

¹¹⁴ See Wilson, *supra* note 2, at 531-37.

¹¹⁵ Russel G. Murphy & Eric J. Carlson, "Like Snow [Falling] on a Branch . . .": *International Law Influences on Death Penalty Decisions and Debates in the United States*, 38 *DENV. J. INT'L L. & POL'Y* 115, 125 (2009).

¹¹⁶ Nora V. Demleitner, *The Death Penalty in the United States: Following the European Lead?* 81 *OR. L. REV.* 131, 143-44 (2002).

¹¹⁷ *Id.*

be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women. Article 10 (1) All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.¹¹⁸

(1) No one within the jurisdiction of a State Party to the present Protocol shall be executed. (2) Each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction.¹¹⁹

The ICCPR and its Second Optional Protocol state that if a country does utilize the death penalty, it must only be imposed for serious crimes, and must not arbitrarily deprive a defendant of his or her life.¹²⁰

Additionally, around the same time as the creation of the Second Optional Protocol in 1982, the Committee on Crime Prevention and Control created a set of eight safeguards to be followed when imposing the death penalty.¹²¹ These different international sources either specifically state that the death penalty should be abolished, or that if a country does implement it, additional procedural safeguards are necessary to avoid injustice.¹²² Compliance with utilizing additional safeguards is a norm of customary law.¹²³ The majority rule in Japan may not be a strong enough procedural safeguard to ensure that Japan's imposition of capital punishment complies with international standards.

2. *The Majority Requirement Contravenes Core Japanese Values Regarding Capital Punishment*

Under the lay judge system, the conditional majority requirement means that five votes are enough to sentence a defendant to death as long as one of those five votes is from a professional judge.¹²⁴ Thus, four out of the

¹¹⁸ The International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty ("ICCPR") (1976) Part III, Article 6, Office of the United Nations High Commissioner for Human Rights, available at <http://www2.ohchr.org/english/law/pdf/ccpr.pdf> (emphasis added).

¹¹⁹ Second Optional Protocol to International Covenant on Civil and Political Rights (1991) Article 1, Office of the United Nations High Commissioner for Human Rights, available at <http://www2.ohchr.org/english/law/pdf/ccpr-death.pdf>.

¹²⁰ *Id.*

¹²¹ SCHABAS, *supra* note 111, at 168.

¹²² *Id.* at 369.

¹²³ *Id.*

¹²⁴ Lay Assessor Act, *supra* note 2, at art. 67 (verdict).

nine people sitting in judgment can conclude that the defendant should not be sentenced to death. Critics have argued that this contradicts the core premise of the *Nagayama* standards, which is that a death sentence is permitted only if there is no other option.¹²⁵ If four out of nine judges think that there is another option than death, it seems that this core premise has not been satisfied.¹²⁶

Furthermore, under the majority requirement, if five jury members initially agree that the defendant should receive the death penalty, then the four other jurors may not have their opinions effectuated because the threshold has already been met. As a consequence, the deliberation process could suffer if individuals feel they lack a meaningful voice in the sentencing decision. This directly conflicts with the reform goal of increased citizen confidence in the jury system,¹²⁷ because those citizens whose opinions were not effectuated would experience this problem firsthand.

3. *The Emotional and Psychological Components of the Lay Judge System May Undermine the Effectiveness of a Majority Rule*

In two separate surveys, more than 60% of Japanese citizen respondents stated that their biggest concern about their new role in the criminal justice system was determining a convicted defendant's fate.¹²⁸ After trials, especially where the death penalty was at issue, lay judges have repeatedly emphasized the burden on them.¹²⁹ The responsibilities of Japanese citizens in the criminal justice system have drastically shifted from having no power or responsibility to having the utmost power one can have over another: the ability to determine if someone should live or die. Along with these increased responsibilities comes an immense psychological impact and weight on Japanese citizens.¹³⁰ Moreover, under the majority rule, this burden is even more extreme because individuals who remain vehemently opposed to handing a defendant a sentence of death will have to live for the rest of their lives, sworn to secrecy regarding the jury deliberation process and how they individually voted.

The psychological weight created by the use of the majority rule for death penalty cases, especially for individual lay judges who do not support

¹²⁵ SAIKŌ SAIBANSHO, *supra* note 1; *see also* Johnson, *supra* note 36.

¹²⁶ *See* Johnson, *supra* note 36.

¹²⁷ *See* Lay Assessor Act, *supra* note 2, at art. 1 (purpose); Soldwedel, *supra* note 10, at 1421.

¹²⁸ Fukue & Katō, *supra* note 5.

¹²⁹ *See* Johnson, *supra* note 36.

¹³⁰ *Id.*

a death sentence given by the court, is evidenced by previous judges' experiences.¹³¹ Before the lay judge system, Japan employed a majority rule such that two out of three professional judges had to vote in favor of giving a defendant a death sentence.¹³² In 1968, a professional boxer, Hakamada Iwao, was given the death penalty for killing four people in 1966.¹³³ Many people believed, and still believe, that Hakamada—who has been on death row for forty-two years—is actually innocent.¹³⁴ One individual who believes he is innocent is Kumamoto Norimichi, one of the three judges who tried his case.¹³⁵ Kumamoto voted to acquit him and wrote a 360-page document arguing why Hakamada was innocent. Yet, under the majority rule, Hakamada was sentenced to death by the other two judges' votes.¹³⁶ Kumamoto was the most junior judge on the panel and as such, the senior judge commanded him to write the death penalty opinion, notwithstanding his personal belief that Hakamada was innocent.¹³⁷

A year after writing the opinion, Kumamoto left the judiciary, and was unable to mentally recover from the experience; he attempted suicide three times.¹³⁸ In 2007, Kumamoto finally spoke at a press conference, explaining that the pieces of evidence used against Hakamada did not make sense (for example, a pair of bloodstained pants reported to be the defendant's were not his size) and the verdict was solely based on the defendant's confession, which he later retracted, that was extracted after 20 days of being tortured in a confined room.¹³⁹ Continuing to maintain his position that Hakamada is innocent, in 2007, Kumamoto filed a petition for a retrial with the Supreme Court.¹⁴⁰ As of May 2011, Hakamada remains on death row.¹⁴¹

Kumamoto's experience serving on a majority judge panel for a capital case illustrates that the majority rule can have alarming psychological consequences for professional judges, let alone citizens who have previously never had to contemplate handling any punishments. One of the lay judges who served on the jury that handed a death sentence to a juvenile remarked

¹³¹ Catherine Makino, *Dissenting Judge Breaks 40-Year Silence*, INTER PRESS SERVICE NEWS AGENCY (Nov. 11, 2007), <http://ipsnews.net/news.asp?idnews=40010>.

¹³² Johnson, *supra* note 36, at n.86.

¹³³ *Id.*

¹³⁴ Carlos Hernandez & Dina Meza, *Hakamada Iwao*, AMNESTY INTERNATIONAL, <http://www.amnestyusa.org/individuals-at-risk/global-write-a-thon/hakamada-iwao/page.do?id=1011524>.

¹³⁵ *Id.*

¹³⁶ Makino, *supra* note 129.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ Hernandez & Meza, *supra* note 134.

afterward, “I was scared of handing down the sentence. I will continue to be tormented throughout my life.”¹⁴² The burden created by the majority rule suggests that Japan should consider a system that does not have these adverse psychological effects. Requiring unanimity, instead of a majority, would ease the burden on the holdouts because they would not feel like they had been complicit in a proceeding that contradicted their deep sense of right and wrong.

The majority rule may also fail to adequately address the problematic effects of the emotional components of trials under the lay judge system. Under the new system, victims and their family members are able to observe the actual trial and encourage or even plead with the jury to give the defendant the death penalty.¹⁴³ Inevitably, this adds an increased emotional element to the trial. Observers have witnessed survivors, observers, a prosecutor, a defense attorney, the defendant, and lay judges all crying in the courtroom during the trials thus far.¹⁴⁴ These emotional components, especially early on in the trial, weigh heavily on jurors’ emotions.¹⁴⁵ This can alter their approach as judges and can affect their ability to remain objective during the trial.¹⁴⁶

A twenty-five-year-old Japanese citizen has stated, “I’m worried that lay judges may determine the verdict and sentence based more on emotion than objective fact.”¹⁴⁷ This opinion raises a legitimate concern shared by many Japanese citizens.¹⁴⁸ Moreover, research in the United States shows that victim impact evidence in capital cases may lead to arbitrary jury sentencing because the jurors’ perceptions of the victim’s admirability and the seriousness of the crime will be heightened.¹⁴⁹ In the wake of emotion-driven testimony from the victim’s family, the defense’s evidence is less effective.¹⁵⁰

In Japan, since there is no bifurcation and the jury decides defendants’ verdicts and sentences in the same sitting, this emotional testimony has the potential to influence the jurors’ decisions both on guilt and sentencing. Arguably, depending on the quality of compelling family testimony, jurors

¹⁴² *Death Sentence for a Minor*, JAPAN TIMES ONLINE (Nov. 28, 2010), <http://search.japantimes.co.jp/cgi-bin/ed20101128a1.html>.

¹⁴³ Wilson, *supra* note 2, at 525.

¹⁴⁴ Johnson, *supra* note 36.

¹⁴⁵ *Id.*

¹⁴⁶ Fukue & Katō, *supra* note 5.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ Nancy King, *How Different is Death? Jury Sentencing in Capital and Non-Capital Cases Compared*, 2 OHIO ST. J. CRIM. L. 195, 198 (2004).

¹⁵⁰ *Id.*

could be convinced that defendants are guilty, or even that they deserve the death penalty for the crime, based solely on emotion. Individuals that are more influenced by emotions are likely to be more affected by this testimony.¹⁵¹ In spite of these emotional components, it is crucial that the jurors carefully deliberate over the evidence, and not simply vote their emotions in the heat of the moment.¹⁵²

In the end, as long as five members of the jury support giving the defendant the death penalty, there is no requirement for them to discuss the issue further.¹⁵³ Thus, if five jurors feel passionate about the death penalty or are easily influenced by emotional stories, the deliberations based on evidence could quickly cease, undermining justice based on facts and evidence. A unanimity requirement can serve as a check against emotion-driven group decision-making.

IV. JAPAN SHOULD ADOPT A UNANIMITY REQUIREMENT FOR CAPITAL PUNISHMENT

The first seven death penalty cases in 2010 and 2011 forced citizens to critically consider the implications of the death penalty.¹⁵⁴ By having the power to sentence someone to death, lay judges are confronted with the question of death penalty justice. Because of this, the Diet should consider the merits of the majority rule, as opposed to unanimity, for such a serious punishment that is widely considered different from other punishments.¹⁵⁵ Murakoshi Hirotami, a Member of Parliament and Secretary General of the Diet Members' League for the Abolition of Capital Punishment, has stated that changing the majority requirement to a unanimity requirement will be his first objective in 2011 for reforms.¹⁵⁶ In February 2011, a nonpartisan group of lawmakers, chaired by People's New Party leader Shizuka Kamei, proposed both revising the capital punishment laws and requiring unanimity for death sentences.¹⁵⁷

¹⁵¹ Wilson, *supra* note 2, at 568-69.

¹⁵² *Id.*

¹⁵³ Lay Assessor Act, *supra* note 2, at art. 67.

¹⁵⁴ Johnson, *supra* note 16; *Man Who Kept Silent Given Death Sentence in Lay Judge Trial*, *supra* note 80; Hiroshi Odanaka, *supra* note 80.

¹⁵⁵ See Johnson, *supra* note 36.

¹⁵⁶ *Id.*

¹⁵⁷ *Non-partisan Japanese Lawmakers to Propose Only Unanimous Death Sentences*, THE YOMIURI SHIMBUN/ASIAN NEWS NETWORK (Feb. 16, 2011), <http://www.asiaone.com/News/Latest%2BNews/Asia/Story/A1Story20110216-263775.html>. In addition to requiring the lay judges and professional judges to unanimously agree to impose a death sentence, the proposal also would mandate that higher courts adhere to the same rule in appeals. *Id.* The group who proposed the changes supports the abolition of the death penalty. *Id.*

The Diet should consider the proposal and consequently amend the Act to require unanimity for capital punishment cases.¹⁵⁸ Empirical evidence suggests that under the majority rule, juries vote and render verdicts too quickly.¹⁵⁹ Furthermore, adopting a unanimity requirement will help Japan align with its Constitution and with international legal norms.

A. *Empirical Research Shows that Unanimity is Necessary to Encourage Deliberation That Takes into Account Diverse Viewpoints*

Unlike the majority rule, “[t]he unanimous verdict rule gives concrete expression to a different set of democratic aspirations—keyed to deliberation rather than voting and to consensus rather than division.”¹⁶⁰ Unanimity gives significance to an individual voter’s voice, because it prevents the majority from ignoring an individual juror when imposing a death sentence.¹⁶¹ Empirical evidence in the United States suggests that majority juries vote too quickly and finalize verdicts without adequate consideration.¹⁶² Under a majority system, the deliberation style tends to be verdict-driven, meaning that jurors vote early and have more argumentative dialogue, rather than an evidence-driven style, where the jurors analyze the evidence first and then vote after group discussion.¹⁶³ As such, in 2005 the American Jury Project created the American Bar Association Principles for Juries and Jury Trials, which conclude in Principle 4B: “A unanimous decision should be required in all criminal cases heard by a jury.”¹⁶⁴

Research in the United States suggests that the quality of jury deliberations suffers when non-unanimous verdict requirements are utilized in criminal trials.¹⁶⁵ When jurors must unanimously agree on the outcome of the trial, they more thoroughly discuss the evidence and interact with other jurors with different viewpoints.¹⁶⁶ Studies show that if unanimity is

¹⁵⁸ This is not to argue against the amendment of the Lay Assessor Act to require unanimity for all cases. Instead, at the very least, the Lay Assessor Act should be amended to mandate unanimity for death penalty cases. The topic of unanimity generally in jury decisions is much broader than the one covered by this author, and is one to further examine at another time.

¹⁵⁹ REID HASTIE ET AL., *INSIDE THE JURY* 173 (1st ed. 1983, reprinted 2004).

¹⁶⁰ Raoul G. Cantero & Robert M. Kline, *Death is Different: The Need for Jury Unanimity in Death Penalty Cases*, 22 ST. THOMAS L. REV. 4, 31 (2009) (citing JEFFREY ABRAMSON, *WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY* 183 (1994)).

¹⁶¹ *Id.*

¹⁶² *Id.* at 32.

¹⁶³ *Id.*

¹⁶⁴ *Principle 4B*, THE ABA PRINCIPLES FOR JURIES AND JURY TRIALS, <http://www.americanbar.org/content/dam/aba/migrated/juryprojectstandards/principles.authcheckdam.pdf>.

¹⁶⁵ Lisa Caucci, Note, *Evaluating the Constitutionality of Proposals to Allow Non-Unanimous Juries to Impose the Death Penalty in Georgia*, 26 GA. ST. U. L. REV. 1003, 1010 (2010).

¹⁶⁶ *Id.*

required, jurors more thoroughly evaluate the evidence and spend more time deliberating.¹⁶⁷ In contrast, if only a majority is required, juries often end deliberations when the quorum is reached.¹⁶⁸

B. Adopting the Unanimity Requirement Will Foster Discussion that Can Lead to the Changes at the Heart of the Reforms

Adopting a unanimity requirement for death penalty cases will increase the effectiveness of jury deliberations by truly increasing citizen involvement and also increasing citizens' feelings of investment in the legal system. The research in the United States, discussed previously, shows that unanimity increases deliberation and the amount of discussion involved.¹⁶⁹ Further studies show that people consider unanimous juries to be more accurate and more thorough.¹⁷⁰ If Japan mandates a unanimous vote for a sentence of death, five voters will not be enough to impose the sentence; thus, more likely than not, the jurors will be pushed to take adequate time to hear the other jurors' viewpoints and arguments. Moreover, these citizens' confidence in their decision is likely to be increased, in line with the goals of the reform.¹⁷¹

Additionally, a unanimity requirement for capital punishment will help Japan live out the principle that this ultimate sentence should only be given when it is unavoidable.¹⁷² A 2010 United States study utilizing data from the Capital Jury Project's interviews with jurors who served on capital trials examined how sets of jurors work toward unanimity during the deliberation process.¹⁷³ Part of the study focused on how jurors' votes change throughout the deliberation process.¹⁷⁴ In a mere 8% of the examined cases, the jurors were unanimous on their first ballot.¹⁷⁵ The results of the study showed a marked difference in the outcome of trial—life imprisonment or death—based on the jury's first vote.¹⁷⁶ This difference

¹⁶⁷ See Dennis J. Devine et al., *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 PSYCHOL. PUB. POL'Y & L. 622, 669 (2001).

¹⁶⁸ *Id.*

¹⁶⁹ See *supra* Part IV.A.

¹⁷⁰ Robert J. MacCoun & Tom R. Tyler, *The Basis of Citizens' Perceptions of the Criminal Jury: Procedural Fairness, Accuracy, and Efficiency*, 12 LAW. & HUM. BEHAV. 333, 337-38 (1988); see also Brief for American Bar Association as Amici Curiae Supporting Petitioner, *Barbour v. State of Louisiana*, On Petition for a Writ of Certiorari, No. 10-689 (2010).

¹⁷¹ Lay Assessor Act, *supra* note 2, at art. 1 (purpose).

¹⁷² SAIKŌ SAIBANSHO, *supra* note 1; see also Johnson, *supra* note 36.

¹⁷³ Scott E. Sundby, *War and Peace in the Jury Room: How Capital Juries Reach Unanimity*, 62 HASTINGS L. J. 103, 103 (2010).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 107-09.

¹⁷⁶ *Id.*

drastically depended on whether the initial vote was a simple or super-majority, or greater than a supermajority.¹⁷⁷ A first ballot majority vote for life generally guaranteed that the defendant would receive a life sentence.¹⁷⁸ However, a simple majority vote for death on the first ballot usually resulted in a final sentence of life imprisonment.¹⁷⁹ In contrast, a super-majority or greater vote for death on the first ballot would more likely result in a death sentence.¹⁸⁰

These results show how much a unanimous versus a majority sentencing decision can affect whether an individual receives the death penalty. The results from the study also show that when a simple majority voted for the death penalty on the first ballot, after continuing deliberation to reach a unanimous verdict, the final verdict was actually almost always a life sentence.¹⁸¹ By fostering increased discussion, voters changed their mind through the deliberation process.¹⁸² This means that in bare simple majority cases in Japan, a defendant currently receives the death penalty, while the research suggests that under a unanimity requirement, the same defendant would ultimately receive a life sentence at the end of deliberation. This suggests that unanimity best serves the core premise in Japan that the death penalty should be imposed only when it is unavoidable.¹⁸³ Importantly, the research does not lend itself to the conclusion that unanimity would mean that no cases would result in a death sentence. Rather, it simply provides further support for having a requirement that is higher than a simple majority for such a unique sentence with ultimate finality.

In the Ikeda Hiroyuji decision, the presiding judge specifically encouraged the defendant to appeal his death sentence.¹⁸⁴ This statement alluded to the possibility that it was not a unanimous decision.¹⁸⁵ Thus, had the lay and professional judges been operating under a system of unanimity, Hiroyuji may not have been handed the death penalty. Furthermore, unanimity would require the lay and professional judges to firmly support the panel's decision rather than being in the position of having to yield to the majority decision, while suggesting the defendant appeal the sentence at the same time. Unanimity may increase citizen confidence in the criminal

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ Sundby, *supra* note 173, at 107-09.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ SAIKŌ SAIBANSHO, *supra* note 1; *see also* Johnson, *supra* note 36.

¹⁸⁴ Johnson, *supra* note 36.

¹⁸⁵ *Id.*

justice system by increasing transparency and ownership of the courts' decisions, such that the court can confidently stand behind a unanimous decision that the defendant should receive the death penalty.

C. *A Unanimity Requirement Will Decrease the Effect of the Emotional Components of Trial on the Outcome and Decrease the Psychological Burden on Lay Judges*

Implementing a unanimity system will help curb the effect of having the victim's family testify at trial (and other aspects of the trial that may unfairly sway jurors' emotions). According to the previously discussed research from the United States, victim impact evidence has the potential to lead to arbitrary sentencing.¹⁸⁶ By requiring a unanimous verdict to impose a death sentence, Japan can curb the effects of the emotional elements of the trial so that jurors are required to actually deliberate to reach consensus.

A unanimity requirement will additionally help with the transition to citizens' new role as lay judges. In the context of death penalty cases, this transition is extreme and the heightened psychological burden is inescapable.¹⁸⁷ As lay judges continue to hear more death penalty cases, the media and community have grown increasingly concerned about lay judges' burden.¹⁸⁸ Members from all sides of the criminal justice system, including prosecutors, Justice Ministry officials, judges, and defense attorneys are concerned with decreasing this burden as much as possible.¹⁸⁹

Currently, jurors are sworn to a lifetime of secrecy regarding the deliberations, and may face fines and imprisonment for failing to comply with this requirement.¹⁹⁰ Accordingly, citizens serving on juries faced with imposing the death penalty must undergo the after-effects of this deliberation process and ultimate decision alone.¹⁹¹ As illustrated by Judge Kumamoto's

¹⁸⁶ King, *supra* note 148, at 198. There is active debate over whether Japan should also have a bifurcated jury system (with separate verdict and sentencing stages), and there is a strong argument to be made for requiring bifurcation for capital punishment cases. See generally Johnson, *supra* note 36; Wilson, *supra* note 2, at 566-70 (arguing for bifurcation and for subjective victim testimony to not be part of the verdict determination stage). In the United States, for example, thirty-five states, the federal government, and the United States military employ the death penalty. *Abolitionist and Retentionist Countries*, DEATH PENALTY INFORMATION CENTER (Dec. 31, 2010), <http://www.deathpenaltyinfo.org/abolitionist-and-retentionist-countries>. All states that have retained the death penalty bifurcate proceedings into distinct trial and sentencing stages. Cantero & Kline, *supra* note 160, at 6. Almost all of these states require unanimity to impose a death sentence. *Id.* at 7.

¹⁸⁷ Johnson, *supra* note 36.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ Lay Assessor Act, *supra* note 2, at art. 79 (crimes of lay assessors).

¹⁹¹ *Id.*; see also Wilson, *supra* note 2, at 532-33 (explaining the potential detrimental psychological effects of the secrecy requirement on the lay judges and arguing that although the Supreme Court did

experience, these effects could be psychologically devastating.¹⁹² Under the majority vote requirement, an individual could serve on a jury where five jurors vote to implement the death penalty, without being able to voice his or her dissenting opinion. However, if the Lay Assessor Act is amended to require a unanimous vote to impose a death sentence, there is no longer an increased burden for individuals who do not personally vote for, but are forced to live with, the majority's decision to impose a death sentence.

D. A Unanimity Requirement Is Supported By the Japanese Constitution

Article 36 of the Japanese Constitution ("Constitution") states that "[t]he infliction of torture by any public officer and cruel punishments are absolutely forbidden."¹⁹³ In expansive terms, the Constitution also protects the fundamental human rights of the Japanese people.¹⁹⁴ Therefore, without adequate safeguards, arbitrary imposition of the death penalty can arguably constitute cruel punishment and/or violations of human rights.¹⁹⁵ In order to avoid making death penalty sentencing arbitrary, Japan should amend the Lay Assessor Act to require capital punishment cases to be decided unanimously.

E. By Adopting a Unanimity Requirement for Death Penalty Cases, Japan Can Conform to International Law Standards

Japan has the opportunity to comply with international norms by instituting safeguards for imposing the death penalty without abolishing it entirely. On September 21, 1979, Japan adopted the International

implement subsidized counseling and a counseling hotline, these measures are not a sufficient solution). See *id.* generally for an argument that Japan should lift the secrecy requirement or decrease penalties on lay jurors.

¹⁹² See Makino, *supra* note 129.

¹⁹³ NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 36 (Japan), translated at <http://www.japaneselawtranslation.go.jp/law/detail?id=174&vm=04&re=01>.

¹⁹⁴ *Id.* at art. 11; Simon H. Fisherow, Comment, *Follow the Leader?: Japan Should Formally Abolish the Execution of the Mentally Retarded in the Wake of Atkins v. Virginia*, 14 PAC. RIM. L. & POL'Y J. 455, 470 (2005).

¹⁹⁵ In the United States, for example, the Supreme Court has explained that because the death penalty is unique in its severity and irrevocability, every potential safeguard should be utilized. *Gregg v. Georgia*, 428 U.S. 153, 187 (1976). Four years prior to *Gregg*, the Supreme Court held that, "the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." *Furman v. Georgia*, 308 U.S. 238, 239-240 (1972). In *Gregg*, the Court explained that, "Furman mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." 428 U.S. at 189 (1976).

Convention on Civil and Political Rights.¹⁹⁶ Although it has not adopted the Second Optional Protocol,¹⁹⁷ the ICCPR's prohibition against taking an individual's life arbitrarily does apply to Japan. To follow these international norms, it is critical that the country implement safeguards against the arbitrary implementation of capital punishment. By adopting a unanimity requirement, Japan will decrease the arbitrary implementation of the death penalty by curbing the emotional effects of a single unbifurcated process, maximizing robust deliberations, and ensuring that the death penalty is truly unavoidable.

V. CONCLUSION

Death is drastically different from any other type of punishment because it is irrevocable. Consequently, all countries, including Japan, are obligated under international human rights standards to put strong safeguards in place so that if the death penalty is imposed, it is done with careful deliberation and intention.¹⁹⁸ The Lay Assessor Act should be amended to require a unanimous, rather than majority, decision for imposing capital punishment. This change will foster increased deliberation and counteract or lessen the emotional and psychological components of the experience of serving as a lay judge. Moreover, by increasing the amount of deliberation, Japan can better achieve the goals of reform including increased public participation, understanding, and trust regarding the legal system. A unanimity requirement for capital punishment will be more in line with the current direction of international law and will ensure that the death penalty is imposed in Japan only when it is truly unavoidable.

¹⁹⁶ *International Covenant on Civil and Political Rights*, <http://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-4.en.pdf>; Fisherow, *supra* note 194, at 464.

¹⁹⁷ Second Optional Protocol to the International Covenant on Civil and Political Rights, *supra* note 119.

¹⁹⁸ See *supra* Part III.C.1.