

Death should be different

By DAVID T. JOHNSON

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Death is different from any other punishment. As the U.S. Supreme Court has observed, death "differs more from life imprisonment than a 100-year sentence differs from one of only a year or two." In America, this recognition justifies a wide array of special procedural protections for capital defendants. Most notably, due process is not enough; there must be "super due process." International human rights law proceeds from a similar premise.

Japan is, with the United States, one of only two developed democracies that retain capital punishment and continue to carry out executions on a regular basis. But strikingly, while Japan has capital punishment, it does not really have capital trials, because nobody knows until the penultimate session — when prosecutors make their sentencing request — whether the punishment sought is death or something less. This has several unfortunate consequences, especially now that Japan's lay judge system requires citizens to help decide who the state should kill.

For starters, without a reliable basis for discerning whether a case is capital, there can be no promise or expectation of super due process. In Japan this means there is no special procedure for selecting lay judges, no special guarantee for ensuring adequate representation by defense counsel, no special sentencing hearing separate from the adjudication of guilt, and no special right to appeal. There is not even a requirement that all of the judges and lay judges agree that a death sentence is deserved — a mere "mixed majority" is enough.

In Japan, it seems, death is not different.

In America, about two-thirds of all capital sentences are overturned on appeal for failing to satisfy the requirements of super due process. This reflects both the high hopes of

American death penalty law and the poor performance of American capital justice.

But law can fail in more than one way. If American death penalty law fails to fulfill many of its promises, law in Japan fails by making few promises at all. This can be called a failure of aspiration.

Japan's system of capital punishment without capital trials also handicaps defense lawyers. Not knowing whether their client's life is at stake, even the best attorneys have difficulty discerning the most effective strategy. Should the defendant be encouraged to acknowledge guilt, and should the focus of the defense be why he or she deserves to continue living? Or should the defense challenge core prosecution claims? These questions are fundamental, and their answers should not depend on guesswork.

There is also the matter of defense lawyers' time and motivation. The first lesson of economics is that there is no free lunch; everything has an opportunity cost, and time spent on one case cannot be spent on another. How many defense lawyers would have spent more time and energy developing a defense if they had known before trial that their client's life was on the line?

Japan's present system seems especially ill-suited for lay judge trials. The first 20 months of this new system have demonstrated that the large majority of lay judges take their responsibilities seriously. But if they were told at the start of trial that prosecutors are seeking a sentence of death, would they not be even more motivated to consider the evidence carefully and ask relevant questions of the witnesses, defendant and each other? And when the time comes for deliberations, wouldn't they also be better prepared for having had more time to consider what it means to condemn a person to death?

Prosecutors contend that they cannot say until the end of trial whether they will seek a sentence of death because only then has all of the evidence been presented. This is unpersuasive. In practice, prosecutors know well before trial whether they plan to seek a death sentence, and if they change their mind during trial, there is nothing to prevent them from reducing their demand to something less than death.

Japanese citizens are being asked to make life-or-death

decisions in some murder trials. One central purpose of the pretrial process is to clarify what points will be contested at trial. During that process, prosecutors should be required to disclose whether they intend to seek a sentence of death. As one Japanese attorney told me, "the failure to disclose whether a case is capital is a failure to disclose the most important question of all: does the state want my client killed?" There is nothing in Japanese law to prevent prosecutors from answering this question before trial starts — the presiding judge simply needs to require it.

But a more fundamental fix would amend Japan's Code of Criminal Procedure to say that prosecutors may not demand a sentence of death unless they have told the defense before trial that they plan to do so.

In this way (and others), Japanese criminal justice should reflect the reality that death is indeed different. As Japan's own Supreme Court recognized in 1948, "a single life is heavier than the entire Earth."

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