Articles

The Constitutionality of the Death Penalty and Methods of Execution, and Citizen Participation in Death Penalty Trials

*Noboru Yanase**

1. Introduction

A *Saiban-in* (lay judge) trial system enabling citizen participation in criminal trials was introduced in Japan in May of 2009. Under this system, ordinary Japanese citizens are randomly selected and appointed as *saiban-ins* to take part in the adjudication of criminal trials. Six *saiban-ins* and three professional judges form a panel that determines the facts of a case and sentences the defendant in a district court. The harshest sentence that can be imposed is the death penalty, a punishment that Japan retains (Articles 9 and 11 of the Penal Code).

As stipulated by Article 2, Paragraph 1, Item 1 of the Act on Criminal Trials with the Participation of *Saiban-in* (hereafter, the "*Saiban-in* Act"), district courts shall handle cases involving offenses punishable with the death penalty or life imprisonment through panel with the participation of *saiban-ins*. This means that *saiban-ins* appointed from among the general public are involved in trials in which a defendant may be sentenced to death.

This paper examines the constitutionality of the death penalty and the methods of execution, focusing also on the involvement of *saiban-ins* in sentencing death.

Note that this paper interprets legal issues to do with the death penalty on the premise that Japan has the death penalty. At no point does the paper discuss whether the death penalty should be retained or abolished.

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2. The Constitutionality of the Death Penalty and the Methods of Execution

There have been numerous arguments over the death penalty, such as what criteria should be applied in sentencing the death penalty in criminal trials[1)] and whether capital punishment should be abolished as a criminal policy.[2)] However, the constitutionality of the death penalty has not been actively discussed in Japanese constitutional law scholarship, although it is a significant human rights issue. Since the Supreme Court ruled it to be constitutional in 1948, the court's position has been clear and unwavering.

2.1. The Constitutionality of the Arguments for the Death Penalty

Among the various provisions of the Japanese constitution, the most contested provision regarding the constitutionality of the death penalty is Article 36, which stipulates that "cruel punishments are absolutely forbidden" (derived from the Eighth Amendment to the Constitution of the United States, which stipulates that "Excessive bail shall not be required, nor excessive fines imposed, nor *cruel and unusual punishments* inflicted.").[3)]

According to the dominant view in the Japanese constitutional scholarship, the meaning of "cruel punishments" prohibited under Article 36 of the Constitution of Japan should be interpreted in view of the time and

1) A prominent study on this topic in Japan is Kenji Nagata, *Shikei Sentaku Kijun no Kenkyu* [*A Study on the Criteria for Selecting the Death Penalty*], Kansai University Press, 2010.

2) Kenzo Mihara, *Shikei Haishi no Kenkyu* [*A Study on Abolition of the Death Penalty*], 6th ed., Seibundo, 2010 provides a summary of the debate on the retention and abolition of the death penalty in Japan from the perspective of abolitionism. Shigemitsu Dando, *Shikei Haishi-ron* [*Argument of Abolition of the Death Penalty*], 6th ed., Yuhikaku, 2000 is another often-cited source when considering the abolitionist theories.

3) The difference can be seen in the wording "cruel punishments" in the Japanese constitution versus "cruel and unusual punishments" in the American constitution. Although "cruel and unusual punishment" was initially proposed in the draft by the General Headquarters, Supreme Commander for the Allied Powers (SCAP), the word "unusual" was deemed to be redundant and useless in discussions between the Japanese Government and the SCAP, and accordingly removed (Kenzo Takayanagi, et al. eds., *Nihonkoku Kempo Seitei no Katei* [*The Making of the Constitution of Japan*], vol. 2, Yuhikaku, 1972, p. 188). Hence, the difference in wording should not be construed to have any special significance. Hogaku Kyokai, ed., *Chukai Nihon-koku Kempo* [*Annotated the Constitution of Japan*], vol. 1, Yuhikaku, 1953, p. 636.

environment.[4] One of the most authoritative commentaries on the Japanese constitution argues that the term "cruel" denotes "de-culturalized and anti-humanitarian" conduct that would "shock those with the normal human feelings of ordinary people," further noting that "what constitutes cruelty is ultimately a matter of the socially accepted ideas."[5]

The Supreme Court judgment most often cited by contemporary scholars to establish the meaning of "cruel punishments" prohibited under Article 36 (S. Ct. Grand Bench, Judgment, June 23, 1948, 2(7) KEISHU 777)[6] defined them as "punishments that are deemed cruel from a humanitarian perspective and that involve unnecessary mental or physical suffering."[7] According to that judgment, as well as another Supreme Court judgment on the constitutionality of the death penalty (S. Ct. Grand Bench, Judgment, March 12, 1948, 2(3) KEISHU 191) (to be discussed below), two articles from the Constitution of Japan support the interpretation that the death penalty is not constitutionally prohibited: Article 13 stipulates that "Their right to life […] shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs"; Article 31 stipulates that "No person shall be deprived of life […], except according to procedure established by law."[8] In sum, "It is not a

4) Some scholars, however, insist that the meaning of "cruel punishments" should be determined in light of the purpose of the penalty. Yasuo Sugihara, "Keibatsu-ken no Jittai-teki Genkai [Substantive Limits of the Power to Punish]," Nobuyoshi Ashibe ed., *Kempo* [*Constitutional Law*], vol. 2, Yuhikaku, 1981, p. 269. This minority view holds that the death penalty should be considered cruel if it lacks coercive power and can be substituted by life imprisonment. Junji Abe, "Shikei to Zangyaku-na Keibatsu [Death Penalty and Cruel Punishment]," in *Kempo Hanrei Hyakusen*, [*Leading Cases in Constitutional Law*], vol. 1, 2nd ed., Yuhikaku, 1988, p. 223.

5) Hogaku Kyokai, *supra* note (3), p. 636.

6) Although the official court reporter writes that this judgment was held on June 30, 1948, the correct date of judgment was June 23, 1948. This judgment clarified the meaning of Article 36 of the Constitution not in the context of the constitutionality of the death penalty, but in response to a defendant's claim that the sentence he incurred for violating an election law, namely, three months' imprisonment and the forfeiture of 140 yen, constituted cruel punishment.

7) Nobuyoshi Ashibe, *Kempo* [*Constitutional Law*], 8th ed., Iwanami Shoten, 2023, p. 278; Koji Sato, *Nihon-koku Kempo-ron* [*Japanese Constitutional Law*], 2nd ed., Seibundo, 2020, pp. 376-377.

8) Hideki Shibutani, *Kempo* [*Japanese Constitutional Law*], 3rd ed., Yuhikaku, 2017, pp. 261-262. In explaining why the death penalty cannot be construed to be prohibited under the Japanese constitution, Professor Hideki Shibutani cites, in addition to the interpretations of Articles 13 and 31, the fact that the Japan Socialist Party and Japanese Communist Party proposed that the abolition of the death penalty be included in the Constitution of Japan during the process of enacting it but without success. Another reason, which the author of this paper goes on to demonstrate, may be the choice by Germany to include a provision abolishing the death penalty in its postwar constitution, that is, to follow a course not taken by Japan in its own new constitution.

leading view that the death penalty constitutes 'cruel punishments' prohibited under Article 36 of the Japanese constitution," and "None of the major commentaries on the Japanese constitution explicitly assert that the death penalty violates Article 36 of the Constitution."[9)]

There is no disagreement that "cruel punishments" prohibited under Article 36 of the Constitution exclude the infliction of suffering necessary for punishment but include the infliction of unnecessary pain. For whom, then, is the pain intended? The pain inflicted should be construed to mean that suffered by the executed person. Professor Takeshi Tsuchimoto, a former public prosecutor, points out that the four methods of execution the Supreme Court ruled to be typical cruel punishments in its judgment on the constitutionality of the death penalty of 1948 (described below) seem to be reflective of the public's strong sense that the cruelty lies in the publicity of the execution rather than the physical pain suffered by the executed person. In particular, he criticizes the selection of beheading and the display of the severed head on the gallows, the latter being only an incidental post-execution treatment, and decries the fact that cruelty is determined solely based on the public's perception, which has no relation to the suffering of the person.[10)] "[G]iven that the human rights guaranteed by the Constitution protect the rights of the minority from the majority," states Professor Satoshi Yokodaido, "it is disconcerting to evaluate whether 'mental and physical suffering' is unnecessary from the perspective of an average person at a remove from the person who actually feels the pain."[11)] In the author's interpretation, "cruel punishments" prohibited under Article 36 not only encompass the imposition of mental and physical suffering on the executed person, but also seem objectively cruel to humanity from the viewpoint of ordinary people who are able to perceive whether the executed person actually feels pain. Given that the first sentence of Article 13 of the Constitution of Japan stipulates that "All people shall be respected as individuals," any punishments felt by ordinary people to undermine the dignity and respect of an executed person should be construed to subjectively or objectively constitute "cruel punishments" prohibited under Article 36 of the Constitution, even if such punishments cause no pain to the executed

9) Yasuo Hasebe, *Kempo* [*Constitutional Law*], 8th ed, Shinsei-sha, 2022, pp. 277-278.
10) Takeshi Tsuchimoto, "Koshu-kei no Hoteki-Konkyo to Zangyaku-sei [Legal Grounds for Hanging and its Cruelty]," *Hanreijiho*, No. 2143 (2012), pp. 5-6.
11) Satoshi Yokodaido, "Kempo kara Shikei wo Kangaeru [Considering the Death Penalty from a Constitutional Perspective]," *Hougaku Seminar*, No. 729 (2015), p. 31.

person himself.[12)]

Apart from Article 36, scholars have raised arguments questioning the constitutionality of the death penalty under several other articles of the Constitution, as well.

The first focuses on the relationship between the death penalty and Article 9 of the Constitution which renounces war. Professor Kameji Kimura, one of the first generation of criminal law professors after the enactment of the Constitution of Japan, states, "The new constitution proclaims international democracy by declaring the renunciation of war. War forces individuals to sacrifice their lives for the sake of a country's supremacy. To renounce war is to reject the supremacy of a country and affirm the dignity of an individual's life. It is an essential contradiction to renounce war and simultaneously support the death penalty, which takes an individual's life. The new constitution, which declares the renunciation of war, does not affirm the death penalty."[13)]

Some constitutional scholars argue that the death penalty violates Article 9 of the Constitution. For example, Professor Takasuke Kobayashi argues, "Article 9 of the Constitution renounces war. War is murder by public authority. As the death penalty is likewise nothing more than murder by public authority, it is not allowed in light of the purpose of Article 9."[14)] Professor Toshihiro Yamauchi states that "Although Article 9 of the Constitution stipulates the renunciation of war and the non-maintenance of war potential without explicitly prohibiting the death penalty, the Preamble and Article 9 order the Japanese Government not to kill. Therefore, considering the constitutional protection of human life, the termination of the life of a person by means of the death penalty is inconsistent with the spirit of the of the Preamble and Article 9, even if the person has committed a serious crime,

12) Professor Yasuo Hasebe points out the following as one factor to consider when deliberating whether the death penalty constitutes cruel punishment: "The pain people imagine from a punishment rather than the pain it actually imposes is significant to the punishment's effect as a general deterrent." Hasebe, *supra* note (9), p. 277.

13) Kameji Kimura, "Minshu Kakumei to Keiji-hou [Democratic Revolution and Criminal Law]," in his *Shin-kempo to Keiji-hou* [*The New Constitution and Criminal Law*], Hobunsha, 1950, p. 135. The "democracy" to which Kimura refers is probably liberalism. As the concept of democracy was still immature in Japan immediately after the war, we can infer that there was some confusion in the use of the concept. Masayoshi Ohno introduces Kimura's argument in "Capital Punishment and Penal Reform," *Osaka University Law Review*, vol. 22 (1975), pp. 1-18.

14) Takasuke Kobayashi, *Kempo* [*Constitutional Law*], new ed., Nippon Hyoron Sha, 1998, p. 107.

such as murder, in this country."[15)]

The second argument maintains that the death penalty infringes on the constitutional right to life of the person to be executed on the grounds that the Constitution of Japan guarantees the right to life as a human right. The second sentence of Article 13 of the Constitution stipulates that "Their right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs." Professor Yamauchi states that "Under the Constitution, the right to life should be recognized as a constitutionally guaranteed human right that is relatively separate from the right to liberty and the right to the pursuit of happiness," for three reasons: the interpretation of the text, the uniqueness of the content of such right, and the international trend of the right to life.[16)] Yamauchi further argues that "the death penalty is unconstitutional because it infringes on the right to life, [which is constitutionally guaranteed by the second sentence of Article 13]."[17)]

The mainstream constitutional scholars, however, eschew the arguments that hold the right to life to be a constitutionally guaranteed human right. Most of the scholars see no need to distinguish the individual rights guaranteed by Article 13 into three different rights, finding it sufficient to construe them as a single comprehensive right and seeing no real merit in interpretation.[18)]

The third argument is that the death penalty violates the spirit of the Constitution when compared to other stronger human rights guarantees, such as the absolute prohibition of holding persons in slave-like bondage or servitude in Article 18.

Professor Kobayashi states, for example, that "It is difficult to say what constitutes cruel punishments, but nothing can be crueler than the deprivation of life. All people are equally guaranteed human rights and have the right to life (Articles 11 and 25). Therefore, only 'servitude' can be toler-

15) Toshihiro Yamauchi, "Seimei-ken to Shikei Seido [Right to Life and the Death Penalty]" in his *Jinken, Shuken, Heiwa* [*Human Rights, Sovereignty and Peace*], Nippon Hyoron Sha, 2003, p. 53.

16) Toshihiro Yamauchi, "Kihon-teki Jinken toshiteno Seimei-ken [The Right to Life as a Fundamental Human Right]," in his *Jinken, Shuken, Heiwa*, p. 3.

17) Yamauchi, *supra* note (16), p. 9.

18) Yasuo Hasebe ed., *Chushaku Nihon-koku Kempo* [*Annotated Constitution of Japan*], vol. 2, Yuhikaku, 2017, p. 96 (written by Masakazu Doi). It is understood that all three rights listed in the second sentence of Article 13 of the Constitution should be comprehensively understood as relating to the interests of individuals. Yoichi Higuchi, et al., *Chukai Horitsu-gaku Zenshu: Kempo* [*Annotated Jurisprudence Collection: Constitutional Law*], vol. 1, Seirin Shoin, 1994, p. 277 (written by Koji Sato).

ated, not 'slave-like bondage,' as a criminal punishment (Article 18). The death penalty must also be impermissible, because even slave-like bondage is forbidden."[19] Professor Sota Kimura states, "If asked which is a more severe restriction of rights, slave-like bondage, servitude, or the death penalty, most people would probably say the last. As slave-like bondage and servitude are prohibited, the death penalty should also be prohibited. This kind of argument, which draws a comparison, is persuasive."[20] He continues, "For example, most scholars seem to believe that punishments such as destroying eyes or chopping off arms can be considered 'cruel punishments,' and the Supreme Court would agree"; and "the conclusion that depriving a person of his eyes or arms is unconstitutional while depriving a person of his life is constitutional is also quite strange." He therefore argues that "the death penalty falls into the category of 'cruel punishments' and can be more naturally thought to be unconstitutional."[21] Furthermore, Professor Sota Kimura states that "the death penalty also infringes on an individual's freedom of internal thought, which is considered absolutely guaranteed. […] According to the prevailing theory, the right to think and form values in the mind is absolutely guaranteed by Article 19 of the Constitution," whereas a person executed will lose his "internal thoughts and no longer be able to think." Therefore, "a natural train of thought leads to the conclusion that the death penalty is unconstitutional as long as it is based on the generally accepted premise of the absolute guarantee of freedom of thought and conscience."[22]

The theories presented above argue that the death penalty is unconstitutional based on provisions other than Article 36 of the Constitution. Yet according to Professor Yasuhiro Okudaira, "Arguments based on pacifism, one of the fundamental principles of the Constitution, or on the right to live in peace, a dignity of an individual specified under Article 13 of the Constitution, or freedom from slave-like bondage and servitude under Article 18 of the Constitution, and so on, are only abstract arguments that are too far from the core, or arguments that are satisfied with numerous reasons that provoke counterarguments. These arguments serve only as a kind of

19) Kobayashi, *supra* note (14), p. 107.

20) Sota Kimura, "Shikei Iken-ron wo Kangaeru [Considering the Unconstitutionality of the Death Penalty]" in his *Kempo Gakusha no Shikoho* [*The Way of Thinking of the Constitutional Scholar*], Seido-sha, 2021, p. 133.

21) Kimura, *supra* note (20), pp. 133-134. Professor Koichi Kikuta, a prominent criminologist and abolitionist of the death penalty, argues the same point. Koichi Kikuta, *Shikei Haishi wo Kangaeru* [*Considering Abolition of the Death Penalty*], revised ed., Iwanami Shoten, 1994, p. 6.

22) Kimura, *supra* note (20), p. 134.

abolitionism or as a policy argument that 'according to the spirit of the Constitution, the death penalty is undesirable and should be prohibited,' and that constitutional studies 'have so far been unable to find an effective theory under which the death penalty is unconstitutional.'"[23)]

2.2. The Supreme Court's Judgment on the Constitutionality of the Death Penalty

What was the Supreme Court of Japan's stand on the constitutionality of the death penalty? In 1948, the Supreme Court handed down a rulings on the constitutionality of the death penalty in a judgment to an appeal contesting a lower court judgment under which a defendant was sentenced to death under Articles 200 (for the crime of parricide, deleted later), 199, and 190 of the Penal Code for killing his mother and sister and abandoning their corpses (S. Ct. Grand Bench, Judgment, March 12, 1948, 2(3) KEISHU 191[24)]). The defense counsel argued that Article 36 of the new constitution stipulated that while "The infliction of torture by any public officer and cruel punishments are absolutely forbidden," the Constitution should be assumed to "naturally eliminate the provisions of the death penalty in the Penal Code," given that "the death penalty is the cruelest form of punishment."

The Supreme Court began the analysis for its judgment in response by explaining the preciousness of life: "Life is precious. One human life is more important than the whole earth. The death penalty is certainly the grimmest of all punishments; it is the ultimate punishment and is indeed generated from things that are unavoidable." The judgment went on to indicate that "the institution of the death penalty always requires deep thought and consideration, both from the standpoint of national criminal policy and from a humanitarian perspective." It pointed out that the legal issue of the death penalty as a punishment for deprivation of life (rather than being unambiguous and universally defined from provisions of the Constitution) generally depends on the times and environment (not only in Japan, but also in other countries), by stating, "if we review the history of the punishment in each country, the death penalty and its application can be construed to have changed, shifted, and evolved according to history and circumstance,

23) Yasuhiro Okudaira, *Kempo (Kempo ga Hosho-suru Kenri)* [*Constitutional Law (Rights Guaranteed by the Constitutional Law)*], vol. 3, Yuhikaku, 1993, pp. 379-380.

24) An unofficial English translation of the text of this judgment (translated by John M. Maki) is available in John M. Maki ed., *Court and Constitution in Japan: Selected Supreme Court Decisions, 1948–1960*, University of Washington Press, 1964, pp. 156-164.

like everything else."[25)]

The passage that follows argued for the constitutionality of the death penalty: "First of all, Article 13 of the Constitution provides that all the people shall be respected as individuals and that their right to life shall be a supreme consideration in legislation and in other governmental affairs. Yet in interpreting the same Article, it must naturally be presumed that even a person's right to life can be legally limited or taken away in a case in which the basic principle of public welfare is violated. Nevertheless, according to Article 31 of the Constitution, it is clear that, notwithstanding the preciousness of human life, a punishment that would deprive an individual of life can be imposed under appropriate procedures established by law." In sum, if one logically interprets the second sentence of Article 13, "Their right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs," one can conclude that the right of the people to life cannot be respected if it interferes with the public welfare. If one logically interprets Article 31, "No person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, except according to a procedure established by law," one can conclude that a person can be deprived of his life in accordance with the procedures established by law. In response to the defense counsel's claim that the death penalty violates Article 36 of the Constitution, the judgment, referring to Articles 13 and 31, explicitly declared that "the Constitution of Japan, like those in most civilized countries at the present time, must be interpreted to recognize and affirm the retention of the death penalty as a form of punishment." The judgment went on as follows: "In the Constitution, in other words, the threat of the death penalty itself may be a general deterrence, the execution of the death penalty may be a means of cutting off at the root special social evils, and both may be used to protect society. Again, the approval of the death penalty must be interpreted as giving supremacy to the concept of humanity as a whole rather than to the concept of humanity as individuals, and the retention of the death penalty must ultimately be recognized as

25) This phrase reminds readers of the "evolving standards of decency that mark the progress of a maturing society," which is a determinative factor for cruel and unusual punishment in the Eighth Amendment of the U.S. Constitution. In *Gregg v. Georgia* (428 US 153 (1976)), the Supreme Court of the United States applied this standard and held that the death penalty does not violate the Eighth Amendment in all circumstances. It can be said that both Japan and the United States have similar standards regarding the cruelty of punishment. In 1948, the Supreme Court of Japan, preceded by the highest court of the country on the other side of the Pacific, upheld the constitutionality of the death penalty by applying the "evolutionary theory" standard.

necessary for public welfare." The judgment thus recognized the deterrent effect of the death penalty as a punishment and affirmed that the principle of public welfare necessitates the death penalty. Although the defense counsel contended that the provisions of the Criminal Code authorizing the death penalty violate Article 36 of the Constitution, which absolutely prohibits cruel punishments, the Court concluded that "The death penalty, as we pointed out above, is both the ultimate and the grimmest of punishments; however, the death penalty, as a punishment, is not generally and immediately regarded as being one of the cruel punishments referred to in the said Article."

The Supreme Court, however, abstained from the view that the death penalty is categorically not a cruel punishment. "Nevertheless, the death penalty, when the method of execution is deemed to be generally recognized as cruel from the humanitarian point of view of a particular period under certain circumstances, must then, like other punishments, be deemed cruel. Therefore, if a law that calls for a cruel method, such as those used in the past—burning at the stake, crucifixion, cutting off the head and displaying it on the gallows, or boiling alive to death in a cauldron—is enacted, then that law itself must be regarded as truly in contravention of Article 36 of the Constitution." In sum, the Supreme Court suggested that although the death penalty itself does not "generally and immediately" violate Article 36 of the Constitution, one can expect that it will violate Article 36 in the future if the public perception of the cruelty of the method of execution changes from a humanitarian perspective. The judgment also noted that the current method of execution, that is, hanging, does not constitute a cruel punishment when compared to other methods of execution, such as burning at the stake.

Two opinions were handed down in this judgment: that delivered by the Justices Tamotsu Shima, Hachiro Fujita, Saburo Iwamatsu, and Matasuke Kawamura (hereafter, the "four-Justice joint opinion"), and that delivered by Justice Noboru Inoue.

The four-Justice joint opinion suggested that the constitutionality of the death penalty itself may change in the future, as the Constitution only established the death penalty as a reflection of public sentiment at the time of its enactment and cannot be considered a permanent endorsement of the death penalty. The four-Justice joint opinion pointed out that the cruelty of the death penalty itself (not of the method of execution) depends on public sentiment, which is variable, and further suggested that, depending on public sentiment, the interpretation of Article 31 of the Constitution may be limited and that the death penalty itself may be unconstitutional. Justice Inoue's opinion also supported the majority opinion on the argument that the death penalty is constitutional based on the interpretation of Articles 13 and

31 of the Constitution, and confirmed that Article 36 cannot be interpreted as an absolute prohibition of the death penalty, given that Article 31 explicitly allows the punishment of life. He also stated, however, that there are no constitutional requirements that the death penalty be retained, and that if the death penalty is deemed to be unnecessary or opposed by the people as a whole, the Diet will willingly abolish the death penalty or judges will refrain from imposing the death penalty if the provisions for it remain.

In examining the significance of this judgment, the author focuses closely on the following points: (1) In its interpretation of Articles 13 and 31 of the Constitution, the Supreme Court maintained that the Constitution both assumes and endorses the preservation of the death penalty; (2) As grounds for judging the constitutionality of the death penalty, the Court cited the trends in the penal systems of other countries at the time; and (3) The Court suggested that if the method by which the death penalty is executed is generally recognized as cruel from a humanitarian perspective at the time and in the environment, it can be judged to be in violation of Article 36.

With regard to the first point, the Supreme Court seems to believe that the conduct of a defendant who commits a crime punishable by death constitutes a violation of the "public welfare" in Article 13 of the Constitution. In its judgment of 1949 (S. Ct. 1st Petty Bench, Judgment, August 18, 1949, 3(9) Keishu 1478), the Supreme Court cited its earlier judgment of 1948 and affirmed the constitutionality of the death penalty, stating, "The right to life is sacred by nature, and the right to life is inalienable, but respect for the lives and personalities of the individuals who constitute a society must be the same for oneself as for others, and therefore, a person who intentionally invades the life of another without respect for that life deserves the penalty of the loss of his own life and is responsible for his own act." In examining Article 31 of the Constitution in its judgment of 1948, the Supreme Court stated, "the retention of the death penalty must ultimately be recognized as necessary for the public welfare." The author disagrees with this view. Article 31 neither prohibits a penalty depriving a person of life nor requires the death penalty. The author therefore believes the retention of the death penalty is not constitutionally required (the Constitution simply allows its existence) and that the retention or abolition of the death penalty is merely a matter of legislation.

With regard to the second point, the Supreme Court ruled that "the Constitution of Japan, like those in most civilized countries at the present time, must be interpreted to recognize and affirm the retention of the death penalty." Many other countries retained the death penalty in 1948, when this judgment was rendered. Since this judgment, however, the abolition of the death penalty has been proceeding rapidly in other countries, especially in

the those recognized by the Supreme Court as the "most civilized," and the retention of the death penalty under the Constitution does not necessarily mean that the countries that retain it are "like […] most civilized countries at the present time." In 1965, for example, the United Kingdom enacted a five-year moratorium on executions with the support of public opinion calling for the abolition of the death penalty on humanitarian grounds and the possibility of a miscarriage of justice. When elected president of France in 1981, Francois Mitterrand brought with him a promise to submit a parliamentary bill to abolish the death penalty, and a law abolishing the death penalty was subsequently enacted despite the prevailing public opinion in favor of the death penalty. The death penalty was abolished from the 1960s to the 2000s in other European countries pursuant to the adoption of two protocols. The first, Protocol VI by the Council of Europe to the European Convention on Human Rights (ECHR), was adopted in 1982 to prohibit the imposition of the death penalty during peacetime. The second, Protocol XIII to the ECHR, was adopted to extend the prohibition to all circumstances, including wartime, as the European Union had abolished the death penalty as a condition of membership.[26] Article 6, Paragraph 1 of the International Covenant on Civil and Political Rights, an accord adopted by the United Nations General Assembly in 1966, entered into force in 1976, and ratified by Japan in 1979, states that "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." Paragraph 2 of the same Article states that, "In countries which 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 and not contrary to the provisions of the present Covenant and the Convention on the Prevention and Punishment of the Crime of Genocide." Although the UN General Assembly adopted the Second Optional Protocol to the International Covenant on Civil and Political Rights with the aim of abolishing the death penalty in 1989, Japan has never ratified this optional protocol. Thus, Japan is not necessarily obliged to abolish the death penalty under this or other interna-

26) Article 2, Paragraph 2 of the Charter of Fundamental Rights of the European Union stipulates that "No one shall be condemned to the death penalty or executed."

tional treaties.[27)]

The Supreme Court of Japan does not ignore the trend toward abolishing the death penalty in other countries or in the international community. A Supreme Court judgment rendered in 1993 (S. Ct. 3rd Petit Bench, Judgment, September 21, 1993, 262 Shukei 421) concluded that the provisions of the Penal Code that provide for the death penalty are constitutional, citing the court's 1948 judgment on the constitutionality of the death penalty. Justice Masao Ohno wrote the following concurring opinion to the 1993 judgment: "Unlike in 1948 [when the death penalty was first ruled constitutional by the Supreme Court], many civilized countries have gradually come to regard the death penalty, a punishment by which a country deprives a person of life, as a system inimical to the human dignity of individuals and not essential to the general deterrence of society"; and "it should be noted that in the 45 years [since the ruling on the death penalty] there has been a profound change in the underlying legislative facts [that support the constitutionality of the death penalty]."[28)]

Some scholars insist that Japan should abolish the death penalty in align-

27) As Article 98, Paragraph 2 of the Constitution stipulates that "The treaties concluded by Japan and established laws of nations shall be faithfully observed," the Japanese Government should abolish the death penalty if Japan ratifies the Second Optional Protocol to the International Covenant on Civil and Political Rights or if treaties ratified by Japan otherwise require the abolition of the death penalty. Japan, however, has never ratified this Optional Protocol, and there are no other treaties that legally oblige Japan to abolish the death penalty. Professor Yokodaido establishes that the Human Rights Committee of the United Nations has repeatedly recommended that Japan abolish the death penalty or introduce a moratorium, that the Japanese Government has refused to do so because the majority of Japanese citizens support the death penalty, and that the General Assembly of the United Nations has also adopted several resolutions for a moratorium on the use of the death penalty. On the basis of the foregoing, he concludes the following: "There have been many requirements and recommendations made by other countries to abolish the death penalty in Japan, but none of these are *legally* binding," and "the Japanese Constitution does not require considering international law that Japan is not party to, nor does it specifically require for the use of foreign law in constitutional interpretation." Satoshi Yokodaido, "Discussing the Constitutionality of the Death Penalty in Japan: Toward More Humane Methods of Execution," *Journal of Japanese Law*, vol. 28, No. 56 (2023), pp. 62-65 (emphasis in the original).

28) Justice Ohno states that "when sentencing a person to death, judges should always consider whether there is room to assess the death penalty as a cruel punishment in view of changes in the times, social conditions, and public awareness of the balance between crimes and punishments." He notes two points to forward this view: (1) a growing number of countries have abolished the death penalty and the Second Optional Protocol to the International Covenant on Civil and Political Rights has been adopted and enacted, and (2) over the past 45 years, four persons sentenced to death were acquitted after retrial in Japan. Alternatively, he notes that a public opinion survey conducted by the Cabinet Office on the death penalty reveals hardly any change in the public's attitude toward the death penalty, that is, consistent support for the retention of the death penalty by the majority of the public, over the past 40 years. Considering the standard of tolerance in society in general and the current limited sentencing to the death penalty by the courts in Japan, it is impossible to declare that the death penalty is an unbalanced and excessive punishment that violates the Constitution at this point in time.

ment with the foreign and international trends toward its abolition. Professor Kazuhiko Matsumoto, for example, states, "When considering the cruelty of the death penalty in light of the standards of modern civilization, the death penalty should be considered a cruel punishment, given that the majority of developed countries have abolished the death penalty, including a growing number of countries that have joined the Convention on the Abolition of the Death Penalty."[29] However, arguments for the unconstitutionality of the death penalty on the grounds of foreign and international trends toward its abolition are criticized as logically ambiguous.[30] The abolishment of the death penalty in a growing number of countries has no direct legal effect domestically: there are no direct changes to the meaning of the Constitution of Japan resulting from the trend, and the execution of the death penalty in Japan, a country that is not a party to the Treaty on the Abolition of the Death Penalty, does not constitute a violation of international law.[31]

With regard to the third point, the judgment of the 1948 death penalty held that cruelty is measured by whether it is objectively recognized as cruel from a humanitarian perspective rather than by whether it is subjectively perceived as cruel by the person sentenced to death, and that this is not universal but the perceptions of the public and individuals vary over time and under changing circumstances. While the majority opinion of the judgment held that "when the method by which the death penalty is executed *is deemed to be generally recognized as cruel* from the humanitarian point of view of a particular period under certain circumstances, the death penalty can be called cruel," the four-Justice joint opinion stated that the cruelty of the death penalty depends on *public sentiment*, which is variable.

Some scholars argue that it is inappropriate to define the death penalty based on public sentiments, which are unstable.[32] Professor Ken Nemori, for example, criticizes "the constitutional interpretation that makes so-called 'socially accepted ideas' the deciding factor in judgments when human rights are at stake."[33] In his concurring opinion to the above-mentioned Supreme Court judgment of 1993, on the other hand, Justice Ohno stated, "As

29) Yasuyuki Watanabe et al., *Kempo: Kihon-ken* [*Constitution Law: Fundamental Rights*], vol. 1, 2nd ed., Nippon Hyoron Sha, 2023, p. 319 (written by Kazuhiko Matsumoto).
30) Masaomi Kimizuka, *Zoku Shiho-ken / Kenpousosho-ron* [*Sequel to the Arguments on the Judicial Power and the Power of Constitutional Litigation*], Horitsu Bunka Sha, 2023, p. 534.
31) Kimizuka, *supra* note (30), pp. 504-505.
32) Sugihara, *supra* note (4), p. 272.
33) Ken Nemori, "Saikou-sai to Shikei no Kempo Kaishaku [Supreme Court and Constitutional Interpretation of Capital Punishment]," in Yasuhiro Okudaira ed., *Gendai Kempo no Shoso* [*Some Aspects of Contemporary Constitutional Law*], Senshu University Press, 1992, pp. 134-135.

the justification for punishment lies in the proper balance between crime and punishment, one needs to consider whether the death penalty seriously undermines the balance between crime and punishment in light of the standard of tolerance in society as a whole, taking into account the severity of *injuria* and the public's attitude toward the death penalty," adding that it is appropriate to rely on "the consciousness and sentiment of the people in Japan toward the death penalty" to define cruel punishments.

As cruel punishments are prohibited under Article 36 of the Constitution, the cruelty of the death penalty itself creates problems with regard to its constitutionality. The Supreme Court has often applied the standard of the average person in light of socially accepted ideas when deciding constitutional cases (including restrictions on the individual's freedom of expression, which should be given the highest weight in the catalog of human rights, and the question of whether the penal laws and regulations are clear).[34] As such, it is unreasonable to deviate from the standards of an average person or socially accepted ideas only when assessing the cruelty of the punishment.

Professor Munenobu Hirakawa argues that "Whether the death penalty is constitutional should be a problem of the limits of the right to life, that

34) According to Professor Tatsuhiko Yamamoto, the standard of the average person is often applied as a criterion for legal judgment in cases involving restrictions on an individual's freedom of expression or the clarity of penal laws and regulations, as well as in cases of defamation resulting in torts. Tatsuhiko Yamamoto, "'Yomu' Hito, 'Yomanu' Hito: 'Ippan-Jin Kijun' Zakkou ['Reading' Person, 'Non-Reading' Person: A Miscellaneous View of 'the Standards of the Average Person']," in Akio Nakabayashi & Tatsuhiko Yamamoto, *Kempo Hanrei no Kontekusuto* [*Context of Constitutional Cases*], Nippon Hyoron Sha, 2019, p. 57. The standards of the average person or socially accepted ideas are also often applied in Supreme Court rulings when the violation of the principle of separation of religion and state is raised as an issue. The Court has objectively made judgments in light of socially accepted ideas as they come into play under various circumstances, such as the religious reputation of the average person or the effect or impact of an activity by the State on the average person. According to Professor Yasuyuki Watanabe, "The Supreme Court has always regarded 'socially accepted ideas' as normative." Yasuyuki Watanabe, "Iken-Shinsa no Seito-sei to 'Konsensasu' naishi 'Shakai Tunen' [Legitimacy of Constitutional Review and 'Consensus' or 'Socially Accepted Ideas']," *Jurist*, No. 1022 (1993), p. 131. Professor Yokodaido also comments, "It is certainly not difficult to understand the approach adopted by the Supreme Court in this ruling [on the constitutionality of the death penalty in 1948], given that the Supreme Court has applied the standard of the average person in making constitutional judgments in various aspects of its rulings." He goes on to conclude as follows, however: "Considering that the death penalty is a capital punishment that deprives a person of life and that corporal punishments are prohibited, whether or not a sentence constitutes 'cruel punishments' prohibited under Article 36 of the Constitution should in principle be assessed solely based on whether the individual feels *unnecessary* physical or mental suffering." Satoshi Yokodaido, "Saiban-in Seido to Shikei [The *Saiban-in* System and the Death Penalty]," in Miyoko Tsujimura ed., *Kempo Kihon Hanrei: Saishin no Hanketsu kara Yomitoku* [*Basic Constitutional Cases: Reading from the Latest Cases*], Shogakusya, 2015, p. 249 (emphasis in the original).

is, the extent to which an individual's life is guaranteed under the Constitution," and that "it is inappropriate as a human rights theory that it be determined by the sentiments and opinions of the majority of the people, in other words, by 'numbers.'"[35)]

The public sentiment referred to in the four-Justice joint opinion is not a sentiment of a large number of people that can be measured quantitatively (as Professor Hirakawa states). The author points out that misunderstanding and confusion were caused by the fact that the majority opinion in the Court's judgment on the death penalty in 1948 carefully stated that practices "are deemed to be generally recognized as cruel," whereas the four-Justice joint opinion paraphrased this standard as "public sentiment." While Justice Ohno's concurring opinion in the Supreme Court judgment of 1993 relies on the four-Justice joint opinion in the judgment of 1948, Ohno shows that he was aware of the problem when he stated, "As the death penalty is a measure of criminal policy based on people's moral sentiment, it cannot be determined solely by people's actual awareness of the issue." Hirakawa, meanwhile, states, "It must be said that on issues related to human rights [including the death penalty], the constitutional principles and ideals are the objective will of the people (so-called 'general will'), and that 'public consciousness and sentiment' are merely a set of subjective opinions."[36)] The author agrees with Hirakawa on this point. The cruelty of the death penalty is evaluated in view of not the sentiment of individuals or a group of people, but rather the abstract or conceptual understanding and perception of the general population, or a set of socially accepted ideas and the consciousness of the public as a whole.[37)]

In 1951, moreover, the Supreme Court of Japan rejected several other arguments maintaining that the death penalty was unconstitutional based on articles other than Article 36. The defense counsel in the case in ques-

35) Munenobu Hirakawa, "Shikei-Seido to Kempo Rinen: Kempo-teki Shikei-ron no Koso [The Death Penalty System and Constitutional Ideals: Constitutional Argument on the Death Penalty]," in his *Kempo-teki Keiho-gaku no Tenkai: Bukkyo Shiso wo Kiban to shite* [*Constitutional Criminal Law Studies: Based on the Buddhist Theory*], Yuhikaku, 2014, p. 202. Hirakawa argues that it is problematic to suggest that the constitutionality of the death penalty could change simply because public opinion changes. This logic is flawed because it would make constitutional interpretation dependent on shifting public sentiments, which risks making constitutional interpretation fluid over time. (*ibid*., pp. 202-203).

36) Hirakawa, *supra* note (35), p. 192.

37) In its judgment (S. Ct. Grand Bench, Judgment, March 13, 1957, 11(3) Keishu 997), the Supreme Court defined socially accepted ideas as "the common sense in general society," one that "is not a collection or average of individual perceptions, but a greater collective consciousness that cannot be denied by individual people with contrary perceptions," and held that "it is up to judges under the present system to decide what such socially accepted ideas are."

tion relied on Professor Kameji Kimura's argument. The Supreme Court, however, explicitly stated that it could find no reason to conclude that the death penalty should be abolished from the provision of Article 9 of the Constitution, and held that the argument that the death penalty violates Article 13 of the Constitution could not be accepted, as indicated by the earlier Supreme Court judgment of 1948 on the constitutionality of the death penalty.[38] Whenever a defendant or defense counsel has questioned the constitutionality of the death penalty in cases since the 1948 judgment, the Supreme Court has consistently ruled that the death penalty itself is not unconstitutional, citing its 1948 judgment as a precedent. Professor Masahide Maeda states, "The constitutionality of the death penalty has never wavered in the courts."[39]

2.3. The Supreme Court's Judgment on the Constitutionality of the Method by which the Death Penalty is Executed in the 20th Century

The Supreme Court judgement of 1948 on the constitutionality of the death penalty suggested that, while the death penalty itself is not generally and immediately regarded as a cruel punishment as referred to in Article 36, it may be unconstitutional and void if the method by which the punishment is executed is generally recognized as cruel from a humanitarian point of view during a particular period under certain circumstances.

In deliberating whether hanging, the method of execution currently used in Japan, constitutes cruel punishment, the Supreme Court ruled as follows in the Teikoku Ginko Bank Poisoning Murder Case (S. Ct. Grand Bench, Judgment, April 6, 1955, 9(4) Keishu 663): "The methods of execution currently used in other countries include hanging, beheading, shooting, electrocution, and gas poisoning; although there are criticisms of the merits and demerits of these methods, there is no reason to consider the method of hanging currently used in Japan to be particularly cruel from a humanitarian perspective in comparison with the other methods; therefore, there is no reason to claim that hanging violates Article 36 of the Constitution."

While the judgment was significant as the Supreme Court's first to rule on the constitutionality of the method of execution, it was quite brief as a response to the defense counsel's argument (among many others) that hanging violates Article 36 of the Constitution. Although the judgment dis-

38) S. Ct. Grand Bench, Judgment, April 18, 1951, 5(5) Keishu 923.

39) Masahide Maeda, "Shikei to Muki-kei to no Genkai [The Limits of the Death Penalty and Life Sentence]," in Harada Kunio Hanji Taikan Kinen Ronbun-shu Kankou-kai ed., *Atarashii Jidai no Keiji Saiban* [*Criminal Trials in the New Era*], Hanrei Times, 2010, p. 470.

cussed hanging in comparison to other methods of execution, it offered no detailed examination of the legal basis or content of the death penalty or other methods of execution under scrutiny. Hence, two open questions remain in this regard: what is the current method by which the death penalty is executed as provided for by law, and is this method constitutional? The next sections of this paper, 2.3.1 and 2.3.2, examine the procedural and substantive aspects of the method by which the death penalty is executed.

2.3.1 Procedural Aspects of the Method by which the Death Penalty is Executed

Regarding the procedures for the execution of the death penalty, Article 11, Paragraph 1 of the Penal Code stipulates that "The death penalty is executed by hanging at a penal institution"; Article 475, Paragraph 1 of the Code of Criminal Procedure stipulates that the "Execution of the death penalty shall be ordered by the Minister of Justice"; Article 178, Paragraph 1 of the Act on Penal Detention Facilities and the Treatment of Inmates and Detainees stipulates that "The death penalty is to be carried out at an execution site inside a penal institution"; and Article 179 of the same Act stipulates that "Nooses are to be unfastened five minutes after the confirmation of death when the death penalty is carried out by hanging."[40)]

In addition, the Dajokan[41)] Announcement No. 65 of 1873 (the so-called "Hangman's Instrument Scheme," hereafter referred to as the "Dajokan Fukoku of 1873")[42)] regulates such matters as the structure and method of use of the instruments used in the execution and the method of handling the body of the person to be executed.

40) In addition, the Code of Criminal Procedure stipulates that, in principle, executions shall be carried out within five days of an order by the Minister of Justice (Article 475, Paragraph 2), that the public prosecutor and other officers shall be present at the execution, that no person unauthorized to enter the execution site may do so (Article 477, Paragraphs 1 and 2), that the execution shall be suspended if the person sentenced to death is insane or pregnant (Article 479, Paragraphs 1 and 2), and so on. Article 178, Paragraph 2 of the Act on Penal Detention Facilities and Treatment of Inmates and Detainees lists the days when the death penalty is not to be carried out. The former Prison Act, the law in effect prior to the enactment of the Act on Penal Detention Facilities and Treatment of Inmates and Detainees, also contained provisions similar to those of the current Act (Articles 71 and 72).

41) Dajokan [Grand Council of State] was the highest organ of Japan's premodern Imperial government until it was replaced by the Cabinet in December 1885.

42) The e-Gov Laws and Regulations Search, a database managed and designated by the Digital Agency, lists the Dajokan Fukoku of 1873 (it is not treated as repealed, expired, or no longer in effect). This listing implies that the Japanese Government considers the Dajokan Fukoku of 1873 to be a valid law (the data on laws and regulations listed in the e-Gov Laws and Regulations Search are said to have been verified by the Judicial Law Department of the Ministry of Justice and other government ministries).

In the trial of a robbery-murder case in which the defendant was sentenced to death, the defense counsel argued that a death sentence without any specification of the method of execution violated Articles 31 and 36 of the Constitution, as the court essentially dared to sentence the defendant to death when there was no provision in the laws regarding the method by which the death penalty is to be executed. In an appeal to this case, the Supreme Court ruled that the procedural aspect of the method of execution was constitutional (S. Ct. Grand Bench, Judgment, July 19, 1961, 15(7) KEISHU 1106). The specific arguments of the defense counsel were as follows: (1) Although the basic matters concerning the method by which the death penalty is executed should be provided by law (Article 31 of the Constitution), the Penal Code only provides for the death penalty in Article 11, Paragraph 1, and does not specify the method by which the execution is carried out. There are no provisions in the Code of Criminal Procedure, the Prison Act (at that time), or other laws providing for basic matters concerning the method of execution. (2) Although the Dajokan Fukoku of 1873 provides for basic matters concerning when the death penalty is executed by hanging, (i) this Fukoku expired at the end of 1881 pursuant to the implementation of the so-called Former Penal Code (the Dajokan Fukoku No. 36 of 1881), and (ii) even if this Fukoku had neither expired nor been repealed, it was repealed at the end of 1947 pursuant to Article 1 of the Act No. 72 of 1947.[43] Moreover, (iii) even if it had not expired, this Fukoku should be deemed to be in violation of Article 36 of the Constitution and invalid in light of the method of execution specified (in that a person who may be in a coma is nonetheless placed on the gallows to be hanged). (3) The method of execution currently employed in Japan, hanging below ground, with the dropping of the body into an underground moat, differs from the method of hanging above ground prescribed in the Dajokan Fukoku of 1873, and there is no clear legal basis for the adoption of such a different method, and the method cannot be said to be in accordance with the "procedure established by law" prescribed by Article 31 of the Constitution; and (4) As stated above, the defense counsel argued that the execution of the death penalty, not pursuant to the provisions of the law and without knowledge of the method of execution to be adopted, violates Article 31.

The Supreme Court dismissed the appeal in response, rejecting the de-

43) This act addressed ordinances that were enacted under the former constitution (the Constitution of the Empire of Japan) without deliberation by the Imperial Diet, to provide for matters to be described by law. Specifically, the Act ensured that such ordinances were to retain tentative effects as laws until the end of the year when the new constitution (the Constitution of Japan) took effect.

fense counsel's claim regarding Articles 31 and 36 of the Constitution. The majority opinion of the judgment reads as follows: (1) There is no legal basis for finding that the Dajokan Fukoku of 1873 has been repealed or has expired as of the date of this judgment.[44] (2) Although not all matters concerning the method by which the death penalty is executed stipulated in the Fukoku are matters that should be stipulated by law, important matters concerning the method by which the death penalty is executed are basic matters that should have been stipulated by law, and had the force of law, under the former constitution. (3) The basic matters regarding the method by which the death penalty is executed stipulated in the Fukoku[45] are still matters to be addressed by law under the new constitution (Article 31). (4) The Act No. 72 of 1947 regulates the effects of the provisions of previous ordinances that provide for matters to be prescribed by law under the new constitution and does not provide for laws that were already recognized as laws under the former constitution, such as the Dajokan Fukoku of 1873. Therefore, the Fukoku cannot be deemed to have expired as of the end of 1947 and remains valid under the new constitution as having the same effect as a law (Article 98, Paragraph 1 of the Constitution). (5) According to the Supreme Court judgement of 1955, the current method of executing the death penalty cannot be construed as "cruel punishments" prohibited under Article 36 of the Constitution. (6) Therefore, the existing laws concerning the death penalty include the Penal Code, the Code of Criminal Procedure, the Prison Act, and other laws, as well as the Dajokan Fukoku of 1873, which is recognized as having the same effect as a law under the Constitution, and the death sentence imposed pursuant to these laws was based on the "procedures established by law" as stipulated in Article 31 of the Constitution. (7) The current method by which the death penalty is executed is based on the "procedure prescribed by law" as stipulated in Article 31 of the Constitution. (8) Although the current method of executing the death penalty may not be in accordance with the provisions of the Dajokan Fukoku of 1873, it cannot be said to violate Article 31 of the Constitution because it does not violate the basic principles of the method of executing the death penalty stipulated in the Dajokan Fukoku of 1873.

The research law clerk in charge of the Supreme Court judgement of

44) Laws and regulations enacted prior to the enactment of the former constitution, regardless of their title, were valid as laws if they regulated matters that should be regulated by law (Article 76, Paragraph 1 of the Constitution of the Empire of Japan).

45) The Fukoku states that, "To hang a person, his hands must be tied behind his back, his face is to be covered, he is to be placed on a platform, and the rope is to be placed around his neck. […] The platform opens immediately and the person falls, his body flying through the air."

1961 stated, "Even so, the continued reliance on an antiquated Dajokan Fukoku from about a century ago in governing the basic matters concerning the method executing such a grave punishment, the death penalty, is truly bizarre, apart from any questions concerning the legal validity of the Fukoku."[46] He also expressed, "It is my earnest hope that the Dajokan Fukoku, an antiquated document from about a century ago, will be promptly replaced by a new act adapted to modern times."[47]

The Dajokan Fukoku was promulgated in 1873, and explanatory notes by the research law clerk were published in 1961. There has been no new legislation, however, on the method of executing the death penalty. As of this paper, in 2024, the death penalty is being executed in Japan pursuant to a Fukoku promulgated more than 150 years ago, but not in accordance with that Fukoku's procedures.

2.3.2 Substantive Aspects of the Method by which the Death Penalty is Executed

The substantive judgment, prior to the Supreme Court judgement of 1961, on whether hanging constitutes "cruel punishments" prohibited under Article 36 of the Constitution, was disputed in a trial at the court of second instance in a certain robbery-murder case occurring shortly after the Constitution was enacted. The defendant's defense counsel argued that hanging violated Article 36 of the Constitution and requested an expert opinion on the cruelty of hanging. The Court ordered two criminal law scholars and one forensic scientist to evaluate the constitutionality of hanging. One of the three experts, Professor Tanemoto Furuhata, a forensic scientist, wrote the following in his appraisal report submitted to the court: "There are five methods of execution in other countries: hanging, beheading, electrocution, gas poisoning, and shooting. Cyanide gas poisoning and hanging are considered the best among these five methods of execution from a forensic perspective, as both cause less pain to the executed person and result in instant death. When carried out in an ideal manner, hanging is superior to other methods in that it causes no damage to the corpse, no pain to the ex-

46) Tadashi Kurita, "Case Commentary," *Saiko Saiban-sho Hanrei Kaisetsu, Keiji-hen, Showa 36-nendo* [*Supreme Court's Case Commentaries, Criminal Cases, FY 1961*], Hosokai, 1973, p. 197.

47) Tadashi Kurita, "Toki no Hanrei, Shikei (Koushu-kei) no Senkoku ha Kempo 31-jou ni Ihan-suru ka: Meiji 6-nen Dajokan Fukoku Kouzai Kikai Zushiki no Koryoku [Contemporary Cases, Does Sentencing to Death (Hanging) Violate Article 31 of the Constitution? The Validity of the Dajokan Announcement No. 65 of 1873, Hangman's Instrument Scheme]," *Jurist*, No. 232 (1961), p. 55.

ecuted person, and no postmortem cruelty. […] I believe that the hangings currently practiced in Japan are no crueler than the methods of execution currently practiced in other countries."

The author considers that "cruel punishments" prohibited under Article 36 of the Constitution refer to punishments that not only cause unnecessary mental or physical suffering to the executed person, but also may be perceived by the general public as undermining the dignity of the executed person. Assuming that Furuhata's view is correct, hanging, according to the author's definition, is not an unconstitutional cruel punishment, as it causes no physical pain to the executed person or damage to the executed person's corpse.

The Tokyo High Court affirmed a district court judgment (Nagano District Court, Matsumoto Branch, Judgment, March 31, 1950) that sentenced a defendant to death. In dismissing the appeal (Tokyo High Court, Judgment, December 19, 1955), the High Court stated, "As stated in several Supreme Court precedents, the death penalty in the Penal Code does not violate Article 36 of the Constitution, and that the hangings currently employed in Japan for executions do not constitute 'cruel punishments' prohibited under Article 36 of the Constitution." The defense counsel appealed, but the Supreme Court dismissed the appeal on the same grounds as the High Court (S. Ct. 1st Petty Bench, Judgment, April 17, 1958, 124 Shukei 253).

2.4. The Supreme Court's Judgment on the Constitutionality of the Method by which the Death Penalty is Executed in the 21st Century

The constitutionality of the method by which the death penalty is executed has been repeatedly challenged since the Supreme Court judgment of 1955. Every time the Supreme Court of Japan dismissed such claims of unconstitutionality, it cited its judgments of 1948, 1955, and 1961. In the 21st century, the constitutionality of the substantive aspects of the method of execution was challenged in the Tokyo Metro (Subway) Sarin Attack Case (against defendant Tomomasa Nakagawa). The defense counsels claimed that the death penalty in Japan violates Article 36 of the Constitution as a cruel punishment, on the following grounds: literature describing the occurrences of head separation in Japan and other countries suggests that "In Japan, as in other countries, there is a possibility that the head of the executed person will be torn off," and that "It may take several minutes

or more to suffocate the executed person."[48] In addition, Sinritsu-Koryo (1899), the penal code in force at the time of the Dajokan Fukoku of 1873, distinguished between "hanging" and "beheading," stipulating that hanging "maintains the body in a perfect form," whereas the current method by which the death penalty is executed, in which there is a possibility that the head will be separated, cannot be considered hanging as stipulated in Article 11 of the current Penal Code and violates Article 31 of the Constitution, which stipulates that "No person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, except according to procedure established by law."[49] To support their argument, the defense counsels referred to the opinion of Austrian forensic scientist Professor Walter Rabl, who argues that Furuhata's expert opinion on the non-cruelty of the method of execution is incorrect.[50] The Supreme Court, however, dismissed the defense counsels' claim that hanging violates Articles 31 and 36 of the Constitution, on the grounds that Supreme Court precedents (judgments of 1948, 1955, and 1961) firmly establish that the death penalty, including the method of execution, is not in violation of the Constitution (S. Ct. 2nd Petty Bench, Judgment, November 18, 2011, 305 Shukei 1).

After the *saiban-in* system was introduced, the argument that hanging violates Articles 36 and 31 of the Constitution on the grounds that head separation may occur and consciousness may remain was raised again in

48) 305 Shukei 16-28; Nakagawa Tomomasa Bengo-dan [Defense Counsel Team for Tomomasa Nakagawa] & Walter Rabl, ed. *Koshu-kei ha Zangyaku-na Keibatsu deha nainoka?: Shimbun to Hoigaku ga Kataru Shinjitsu* [*Hanging is a Cruel Punishment: The Truth Revealed by Journalism and Forensic Science*], Gendai Jinbun-sha, 2011, pp. 32-46. As the defense counsels themselves confess, the examples of head separation they showed "are largely out of date" with the exception of one execution in Iraq known from an interview report (*ibid*., p. 60), and one "actual case" (according to the defense counsels) from Japan known from a newspaper account of an execution that took place in 1883.

49) 305 Shukei 28-29; Tomomasa Nakagawa Bengo-dan & Rabl, ed., *supra* note (48), 46-47. The defense counsels also argued that the lack of requisite provisions in the law relating to the death penalty (on "the method of execution by hanging without head separation of the executed person") and improper procedures (on "methods of execution other than that provided for in Article 11 of the Penal Code") violate Article 31 of the Constitution. 305 Shukei 30-31; Tomomasa Nakagawa Bengo-dan & Rabl, ed., *supra* note (48), 48-50.

50) Professor Rabl's view of how hanging causes a person to die is briefly described, with illustrations, in Yukihiro Masaki, "Is Judicial Hanging a Cruel Punishment?" *Ryukoku Corrections and Rehabilitation Center Journal*, No. 4 (2014), pp. 24-27. Attorney Yukihiko Masaki concludes that "Judicial [h]anging in Japan is a cruel punishment, and that Article 11 of the Penal Code violates Article 36 of the Constitution of Japan" (*ibid*., p. 28).

the Osaka Pachinko Parlor Arson Murder Case.[51] The defense counsels believed that *saiban-ins* have the right and need to know how the death penalty is executed, that hanging is unconstitutional in light of the possibility of head separation, and that *saiban-ins* need to understand the method of execution in detail because they take part in the selection of both the punishment to be imposed and the severity of punishment. Therefore, they requested that the district court allow the examination of documentary evidence concerning execution by hanging and the examination of witnesses Professors Rabl and Tsuchimoto in the trial, one in which *saiban-ins* were participating. The public prosecutors objected, arguing that such examinations were unnecessary and confusing for the *saiban-ins*.

The matter that the defense counsels were attempting to argue and prove regarding the death penalty was not about sentencing (Article 6, Paragraph 1, Item 3 of the *Saiban-in* Act), which should be decided by a panel composed of both judges and *saiban-ins*, but rather about the interpretation of laws and regulations (Article 6, Paragraph 2, Item 1 of the same Act), which should be decided by a panel composed of only of judges, apart from *saiban-ins* (Article 6, Paragraph 3 of the same Act). The *saiban-ins* in this case, however, were inevitably aware that the constitutionality of the death penalty was being discussed through court proceedings, and as such, could be expected to have a natural interest in what arguments and evidence were presented. It conforms with the purpose of Article 1 of the *Saiban-in* Act that *saiban-ins* are to be given them the opportunity to be present at the proceedings (including those that examine evidence and arguments) and to observe judges' deliberations concerning the interpretation of laws and regulations, even though they are not bound by duty to do so as *saiban-ins*. Pursuant to Article 60 of the *Saiban-in* Act, the judges on the panel decided to allow the *saiban-ins* to be present at the proceedings to review the constitutionality of the death penalty. At the proceedings, Professor Rabl "testified scientifically and empirically, using papers and videos, about what happens during a hanging." Professor Tsuchimoto "testified about his experience in corresponding with an inmate, a person for whom he had

51) Due to a mental disorder, the defendant had delusions that the unpleasant happenings around him were caused by a psychic named "Mihi" who possessed him, and by a group named "Mark" (associated with Mihi) that harassed him. He planned to commit random mass murders as revenge against a society that tolerated and neglected the harassment by Mihi and Mihi's colleagues. He poured gasoline, which he had prepared in advance, into a crowded pachinko parlor and set fire to it, burning down the parlor and killing five customers and seriously injuring ten others. The defense counsel team included an attorney (Attorney Sadato Goto) who had previously served as a defense counsel in the Tokyo Metro Sarin Attack Case (against defendant Tomomasa Nakagawa).

sought the death penalty as a prosecutor and who was later executed, and his experience of being present at an execution."[52] The judges also allowed the *saiban-ins* who wanted to observe the judges' deliberations on the constitutionality of the death penalty pursuant to Article 68, Paragraph 3 of the *Saiban-in* Act.

In response to the defense counsels' claim that hanging violates Articles 36 and 31 of the Constitution, the Osaka District Court ruled that "after hearing the opinions of the *saiban-ins* (Article 68, Paragraph 3 of the *Saiban-in* Act) and considering the defense counsels' claim, we have come to the conclusion that hanging is not unconstitutional" (Osaka District Court, Judgment, October 31, 2011, 1397 HANTA 104). Citing the testimony of witnesses Rabl and Tsuchimoto, this judgment stated that "Hanging often requires a minimum of five to eight seconds for loss of consciousness, or two minutes or more depending on how the neck is tightened, during which time the executed person may continue to feel pain," that "In some cases, head separation, especially damage to the internal tissues of the neck, may be involved," and that "There are problems in that the course of a person's death cannot be fully predicted."

However, the Osaka District Court dismissed the defense counsels' claim that hanging violates Articles 36 and 31 of the Constitution, stating the following: "The death penalty is a punishment that makes a criminal atone for his crime by depriving him of his life against his will. The Constitution of Japan also recognizes the inevitable nature of the death penalty by continuing to maintain its constitutional status. […] The execution of the death penalty constitutes a 'cruel punishment' prohibited under Article 36 of the Constitution only in the most bizarre cases among the possible methods of execution. While it is true that methods of execution that cause unnecessary suffering to the person, offend his honor, or humiliate him are not permitted, there is clearly no obligation to alleviate the mental and physical suffering of the person insofar as possible or to limit such suffering to the minimum necessary level, as in the case of medical treatment. Whether the execution is particularly bizarre may vary from country to country, ethnic group to ethnic group, or person to person due to differences in history, religious background, and values. The method of execution should be considered cruel only if it is inhumane, unhumanitarian, and shocking to

52) Satoru Shinomiya, "Kokumin wo Ningen-teki / Jindou-teki Handan kara Toozakete-iru mono ha Nani-ka: Koshu-kei no Zangyaku-sei ga Arasowareta Saiban-in Saiban no Igi [What Prevents People from Making Human and Humanitarian Decisions: The Significance of the *Saiban-in* Trials in which the Cruelty of Hanging was Contested]," *Horitsu Jiho*, vol. 84, No. 2 (2012), p. 2.

those with the normal feelings of ordinary people; if it is not, the method chosen is a matter of legislative discretion. Whether hanging is the best method of execution is controversial and divisive. Although hanging is premodern and unpredictable, the person sentenced to death has committed a crime that warrants the punishment, and the executed person should bear some mental and physical pain from the execution as a matter of course. If other methods of execution are used, unpredictable situations may still occur; thus, hanging cannot constitute cruel punishments prohibited under Article 36 of the Constitution. Head separation occurs only by accident in exceptional cases, and in most cases when it does occur it is limited to the separation of the internal tissues of the neck and does not result in decapitation. It is unreasonable to generalize very rare exceptional cases by saying that they are instances of decapitation rather than hanging."[53]

As stated in Section 2.1., the author believes that the suffering necessary for punishment is not considered "cruel punishment" prohibited under Article 36 of the Constitution. This judgment, which stated that "some mental and physical pain from the execution should naturally be borne by the executed person," is in line with the author's view.[54] Scholars who interpret the cruel punishments prohibited under Article 36 of the Constitution as punishments that impose suffering only for the person to be executed will criticize the judgment in its contention that "The method of execution should be considered cruel only if it is inhumane, unhumanitarian and shocking to those with the normal feelings of ordinary people."[55] From the author's perspective, the cruel punishments in question include those perceived by the general public to impose a loss of the executed person's dignity as an individual.

The defense counsels appealed, but the Osaka High Court dismissed

53) Professor Yokodaido focuses on the difference in the definition of unconstitutional "cruel punishment" between the Supreme Court precedents and this Osaka District Court ruling, stating, "This Ōsaka District Court ruling of 2011 seems to define a cruel punishment more restrictedly than the SC, seemingly shifting from '*unnecessary* psychological and physical suffering' to '*intentional* psychological and physical suffering.'" Yokodaido, *supra* note (27), p. 80 (emphasis in the original).

54) Contrarily, Professor Yokodaido argues that the death penalty can be judged to be unconstitutional if the court does not consider methods other than hanging (such as lethal injection), stating, "[I]f the Japanese courts use the standard of 'unnecessary psychological and physical suffering' properly, they should not ignore methods of execution introduced in other countries that may minimize suffering" (Yokodaido, *supra* note (27), p. 82), and "Because other methods of execution can reduce 'unnecessary psychological and physical suffering' to the utmost, as long as such methods are available, and in the absence of any justifiable reason not to consider the introduction of such an alternative, hanging may be said to inflict not only 'unnecessary' but also 'intentional' mental and physical suffering on the executed." (*ibid*., p. 81).

55) Yokodaido, *supra* note (34), p. 249.

their motion (Osaka High Court Judgment, July 31, 2013, 1417 Hanta 174). The defense counsels further appealed, but the Supreme Court dismissed this appeal, as well. Addressing the defense counsels' argument that the method of execution in death penalty cases violates Articles 31 and 36 of the Constitution, the Supreme Court referred to precedents (Supreme Court judgments of 1948, 1955, and 1961) establishing that neither the death penalty nor the method by which it is executed violates the aforesaid provisions (S Ct. 3rd Petit Bench, Judgment, February 23, 2016, 319 Shukei 1).

3. *Saiban-ins'* Involvement in the Judgment on the Constitutionality of the Death Penalty

3.1. *Saiban-ins'* Involvement in the Trial of the Osaka Pachinko Parlor Arson Murder Case

The constitutionality of the death penalty was solely determined by professional judges before the *saiban-in* system was introduced. Since the introduction of the *saiban-in* system, however, *saiban-ins* have generally participated in the trials of cases involving crimes punishable with the death penalty (Article 2, Paragraph 1, Item 1 of the *Saiban-in* Act). If the defendant or his defense counsel argues that the death penalty is unconstitutional in such a case, the constitutionality of the death penalty arises as an issue in a trial in which *saiban-ins* can participate.

Whether the death penalty as a punishment (Article 11 of the Penal Code) violates Article 36 or other Articles of the Constitution is a decision based on the interpretation of laws and regulations (Article 6, Paragraph 2, Item 1 of the *Saiban-in* Act). As mentioned above, the question is deliberated and decided not by a panel composed of both professional judges and *saiban-ins*, but a panel of professional judges alone (Article 6, Paragraph 3, and Article 68, Paragraph 1 of the same Act).

Why was the process designed to exclude *saiban-ins* from participating in decisions that involve the interpretation of laws and regulations? According to a commentary written by the official in charge of drafting the *Saiban-in* Act, the interpretation of laws and regulations often requires professional and complex legal judgments, and the uniformity of judgments should be maintained from the standpoint of legal stability.[56)]

During the process to legislate the *Saiban-in* Act, it was already recog-

56) Hiroyuki Tsuji, "'Saiban-in no Sanka-suru Keiji Saiban ni Kansuru Houritsu' no Kaisetsu [Commentary on the 'Act on Criminal Trials with the Participation of *Saiban-in*] (1)," *Hoso Jiho*, vol. 59, No. 11 (2007), p. 96.

nized that the *saiban-ins* who participate in a criminal trial, being ordinary citizens who are selected by lottery and do not necessarily possess legal expertise or rationality, lack the legitimacy to exercise the right to review the constitutionality of laws and regulations.[57)]

However, as it may be necessary or useful for *saiban-ins* to know the content of proceedings in which decisions are to be made only by professional judges, such as decisions based on the interpretation of laws and regulations, the professional judges on the panel may permit *saiban-ins* to attend such proceedings (Article 60 of the *Saiban-in* Act).[58)] The *saiban-ins'* attendance in proceedings falling within the purview of the duties of professional judges can also help achieve the purpose of the *saiban-in* system, that is, to enhance citizens' understanding of and trust in the judiciary,[59)] albeit in matters beyond the duties of the *saiban-ins*. Moreover, because it may sometimes be useful, in some contexts, for the professional judges to hear the *saiban-ins'* opinions as a reference in rendering their decisions, the professional judges may permit the *saiban-ins* to observe their deliberations on decisions that should be made only by professional judges and to hear the *saiban-ins'* opinions on their decisions (Article 68, Paragraph 3 of the same Act).[60)] Even if *saiban-ins* are permitted to attend such proceedings and deliberations, decisions on the interpretation of laws and regulations (as well as whether to involve the *saiban-ins* in such proceedings and deliberations) should be made solely by professional judges.

57) For example, the statement by Professor Morio Takeshita, Acting Chairman of the Justice System Reform Council, at the 51st meeting of the Justice System Reform Council (March 13, 2001), and the response by Judge Ushio Yamazaki, Executive Director of the Office for Promotion of Justice System Reform, at the House of Representatives Committee on Judicial Affairs (April 6, 2004). *See* Noboru Yanase, *Saiban-in Seido no Rippou-gaku: Tougi-Minshushugi Riron ni motoduku Kokumin no Shihou-Sanka no Igi no Sai-kousei* [*Institutional Design of the Saiban-in System: Reanalysis of the Meaning of the General Public's Participation in the Criminal Justice System Based on the Theory of Deliberative Democracy*], Nippon Hyoron Sha, 2009, pp. 41-42, 80-81. *See* also Tsuji, *supra* note (56), p. 97.

58) Hiroyuki Tsuji, "'Saiban-in no Sanka-suru Keiji Saiban ni Kansuru Houritsu' no Kaisetsu [Commentary on the 'Act on Criminal Trials with the Participation of *Saiban-in*] (3)," *Hoso Jiho*, vol. 60, No. 3 (2008), pp. 56-57.

59) As for the purpose of the *saiban-in* system, *see* Noboru Yanase, "Deliberative Democracy and the Japanese *Saiban-in* (Lay Judge) Trial System," *Asian Journal of Law and Society*, vol. 3 (2016), pp. 327-349.

60) Sometimes, during deliberation by a panel composed of both professional judges and *saiban-ins*, a situation calling for decisions on the Items of Article 6, Paragraph 2 of the *Saiban-in* Act may sometimes arise, in which case a panel composed of professional judges only (stipulated in Paragraph 1) must be conducted. When this situation arises, the professional judges must halt the deliberation with the *saiban-ins*, remove them from the deliberation room, convene their deliberation, and invite the *saiban-ins* back into the room to resume the deliberation with the *saiban-ins*. This procedure is too formal and not always appropriate in terms of the reality and efficiency of the deliberation, and this is another of the reasons for Article 68, Paragraph 3. Tsuji, *supra* note (58), pp. 94-96.

As described in Section 2.4., in the trial of the Osaka Pachinko Parlor Arson Murder Case at the District Court, the professional judges permitted the *saiban-ins* to attend the proceedings to review the constitutionality of hanging as a method of execution pursuant to Article 60 of the *Saiban-in* Act, permitted the *saiban-ins* to attend the deliberations on the matter, and reached their decision after hearing the *saiban-ins'* opinions on the matter pursuant to Article 68, Paragraph 3 of the same Act. The professional judges dared to state in the judgment that they had heard the *saiban-ins'* opinions on rendering the constitutionality of the death penalty. After hearing the *saiban-ins'* opinions, the professional judges concluded that hanging does not violate the Constitution.

What is the significance of the professional judges' decision to state in their judgment that they had heard *saiban-ins'* opinions on rendering the constitutionality of the death penalty? Some scholars may conclude that by including this statement, namely, that *saiban-ins* selected from among ordinary citizens agreed that hanging was constitutional, in their judgment, the professional judges intended to demonstrate that the constitutionality of hanging was supported by ordinary citizens as well as professional judges. In other words, hanging was legitimized not only by legal experts, but also by democratic opinion. As Professor Toshikuni Murai points out, however, "It is impossible to generalize the judgment of a citizen randomly selected as a *saiban-in* and assigned to a death penalty case as a citizen's opinion on the constitutionality of the death penalty."[61)]

Rather, the mention of *saiban-ins* in the judgment should be understood merely as the judges' response to a strong request from the defense counsel that the *saiban-ins* be given a role in the decision on the constitutionality of the method of execution. One should avoid other general interpretations, such as the characterization of the judgment as a significant ruling in which a *saiban-in*, a general citizen without any right to interpret laws and regulations or review the constitutionality of the State's action, affirmed the constitutionality of hanging.[62)] While *saiban-ins'* opinions may be considered for reference, decisions about the constitutionality of the death penalty rest

61) Toshikuni Murai, "Case Comment," *Shin Hanrei Kaisetsu Watch*, No. 11 (2012), p. 146.

62) If the constitutionality of the death penalty or the method of execution is challenged in a *saiban-in* trial similar to this case in the future and the combined panel of professional judges and *saiban-ins* rules that the death penalty is a cruel punishment, the judgment should not be overstated. The judgment should not, for example, state that the *saiban-ins* have denied the constitutionality of the death penalty or the method of execution. Professor Murai's remark should be quoted again here: "It is impossible to generalize the judgment of a citizen randomly selected as a *saiban-in* and assigned to a death penalty case as a citizen's opinion on the constitutionality of the death penalty."

solely with the professional judges, as these decisions involve legal interpretation.

As mentioned above, Supreme Court precedent clearly establishes that the death penalty itself and hanging as a method of execution are constitutional. Professional judges cannot be expected to make decisions that differ from the Supreme Court precedent unless there is a particular change in circumstances. Alternatively, the defense counsels probably expected that if they could illustrate the details of hanging in court, the *saiban-ins* selected from among ordinary citizens to serve in the court would be more likely to think that hanging was a cruel punishment. Although the *saiban-ins* were invited to participate in both the proceedings and deliberations on the constitutionality of hanging, and despite the testimony by Professors Rabl and Tsuchimoto describing the brutality of hanging —testimony presented at the defense counsels' request— the final judgment reached with the *saiban-ins'* involvement, which found hanging constitutional, was contrary to the defense counsels' expectations.

Two issues emerged when the defense counsels appealed to the Osaka High Court: the cruelty of hanging and the appropriate role of *saiban-ins* in the decision. The defense counsels argued as follows: "A detailed examination of how hanging ends the life of a death row inmate provides essential facts for the *saiban-ins* when deciding whether or not to impose the death penalty in sentencing; these matters fall under the jurisdiction of the combined panel of professional judges and *saiban-ins*." Even if the fact of the execution itself was not a matter to be decided by the combined panel of professional judges and *saiban-ins*, they went on to argue, the matters they attempted to prove regarding the cruelty of hanging were still matters to be heard in a courtroom in which *saiban-ins* participate. The district court judges ruled that the constitutionality of hanging was a matter to be decided only by the professional judges (not by the *saiban-ins*) and that the presence of the *saiban-ins* was only to be permitted at the proceedings to review the constitutionality pursuant to Article 60 of the *Saiban-in* Act, in this case. The defense counsels insisted that such proceedings by the district court judges violated the *Saiban-in* Act, arguing that the constitutionality of hanging was a matter to be decided by *saiban-ins* and professional judges together.

The Osaka High Court dismissed the defense counsels' claim in the appeal, holding the following (Osaka High Court, Judgment, July 31, 2013, 1417 Hanta 174). "Unlike a decision reached with the participation of *saiban-ins* (Article 6, Paragraph 2, Item 1 of the *Saiban-in* Act), a decision on the interpretation of laws and regulations (Article 6, Paragraph 2, Item 1 of the same Act) often requires professional and complex legal judgments.

Given the need to maintain the uniformity of judgments from the standpoint of legal stability, it is appropriate that the decision be reached only by judges with legal expertise. The 'interpretation of laws and regulations' referred to in Paragraph 2, Item 1 of the same Article generally means the objective and concrete clarification of the meaning of laws and regulations in applying them to specific cases. The interpretation of substantive penal laws is a typical example of such an interpretation. In view of the purpose of this provision, the judgment under this item also includes a decision on the constitutionality of substantive penal laws, as such a decision is requisite for the interpretation of these laws. One should understand that the determination of the legislative facts, which forms the basis for evaluating the constitutionality of substantive penal laws, remains exclusively within the purview of judges with legal expertise. This authority falls under their judicial scope since it involves factual determinations necessary for assessing whether laws and regulations are constitutional. The *saiban-ins* need to have a certain level of understanding of the general content of the current laws in order to determine conditions pertaining to the degree of punishment and execution, such as the content of the sentence, the method of execution, and the treatment of the sentenced person. One does not expect, however, that the *saiban-ins* will consider the detailed implementation of the penal laws, the historical course, or the actual situations in other countries, that is, matters that were argued and proved by the defense counsels in the district court and that should serve as materials for judging the constitutionality of substantive penal laws or for establishing laws."

The defense counsels appealed to the Supreme Court, stating as follows: "What happens in the execution of hanging is knowledge that the *saiban-ins* must possess in order to determine the degree of punishment. The method of execution is a matter to be decided not only by judges, but also by the *saiban-ins* who are charged with the responsibility of determining the amount of punishment. As executions by hanging in Japan have been carried out in secret, *saiban-ins* have no knowledge of what happens to persons executed by hanging, and judges also lack that knowledge or have incorrect knowledge (and thus are unable to explain the details of the execution of hanging to the *saiban-ins*). Thus, presenting arguments and evidence before the *saiban-ins* is essential to establishing the grounds for an appropriate sentence. The matters regarding hanging, which were argued by the defense counsels in the district court, are not interpretations of the text of the laws and regulations but legal arguments based on factual assertions from a forensic perspective and historical facts from various countries. In light of the meaning and purpose of the *Saiban-in* Act, the involvement of *saiban-ins* should be guaranteed in cases in which the defendant and

defense counsels challenge the constitutionality of the method by which the death penalty is executed, citing specific grounds and evidence. The district court, however, erroneously ruled that the constitutionality of the method of execution was not a matter to be decided with the participation of the *saiban-ins*; thus, the case was conducted as an illegal proceeding in violation of Article 6, Paragraph 2 of the *Saiban-in* Act, and the second sentence of Article 6, Paragraph 3 of the same Act. As the presiding judge of the district court misinformed the *saiban-ins* that they were not obliged to be present on the hearing date when the cruelty of hanging was to be examined, some *saiban-ins* were absent or left court on that date."

In response, the Supreme Court rejected all of the aforesaid arguments raised by the defense counsels (S. Ct. 3rd Petty Bench, Judgment, February 23, 2016, 319 Shukei 1).

Even if the constitutionality of the death penalty or the method of execution was to be challenged in a *saiban-in* trial, and even if a defense counsel argued, in a proceeding conducted without the involvement of a *saiban-in* to determine the constitutionality of the death penalty, that the death penalty would remain unconstitutional or illegal in the future barring a particular change in circumstances, the Supreme Court's precedent of 2016 would compel every court to reject such an argument. This is because the constitutionality of the death penalty or the method of execution is a decision on the interpretation of laws and regulations, and is therefore not a matter to be decided by a panel composed of both professional judges and *saiban-ins*. The professional judges in a *saiban-in* trial make decisions on the interpretation of laws and regulations, whereupon the presiding judge indicates the decisions to the *saiban-ins*, who are charged with duties accordingly (Article 66, Paragraph 4 of the *Saiban-in* Act). As the Osaka High Court ruled that a *saiban-in* was not to be expected to consider the details of the execution of the death penalty, all district courts will determine that *saiban-ins* need not be present during proceedings to examine the constitutionality of the death penalty, when a defendant or defense counsel requests that they be present.

In sum, while *saiban-ins* randomly selected from among ordinary citizens can participate in proceedings to judge the constitutionality of the death penalty or the method of execution by attending the proceedings, observing the deliberations, and hearing opinions, provided that the professional judges hearing the case approve such participation, the *saiban-ins* are not permitted to make substantive judgments on the constitutionality of the death penalty. The Supreme Court affirmed that it was neither unconstitutional nor illegal for a *saiban-ins* not to make a substantive judgment on the constitutionality of the death penalty or the method of execution.

Therefore, unless particular changes in circumstances arise, the trial of the Osaka Pachinko Parlor Arson Murder Case should be deemed as the last case in which *saiban-ins* attended the proceedings and deliberations and gave opinions as a reference on the constitutionality of the death penalty or its execution.

3.2. The Meaning of *Saiban-in* Participation in Determining the Constitutionality of the Death Penalty: A Conclusion

The Supreme Court of Japan has continued to rule that the death penalty and the method of execution are constitutional. This ruling has never changed, even since the introduction of the *saiban-in* system to involve the public in sentencing in criminal trials. In one case in which the defense counsels representing a defendant facing the death penalty challenged the constitutionality of the method of execution, the *saiban-ins* attended the proceedings and deliberations on the constitutionality of the method of execution by the professional judges and expressed their opinions as a reference. Some may see this as a kind of participation of ordinary citizens as *saiban-ins* in a review of the constitutionality of the death penalty.

Constitutional scholars discussing the counter-majoritarian difficulty have questioned why the judicial branch can review and invalidate laws enacted by the legislative branch.[63] Why is it legitimate to allow judges who are not elected by the people, that is, who lack democratic legitimacy, to review the constitutionality of laws enacted by a legislature composed of democratically elected members and declare laws unconstitutional and void? The scholars have yet to agree on an answer to this question. If the participation of *saiban-ins*, who are selected from among the general public, in criminal trials is considered democratic, then the anti-democratic nature of a judicial review can be circumvented by a judicial review conducted by a democratic entity, the *saiban-ins*.

This assertion, however, is misguided. The constitutionality of the death penalty or the method of execution is a decision on the interpretation of laws and regulations and is to be decided solely by professional judges, not by a combined panel of professional judges and *saiban-ins*. In the earlier cases in which the *saiban-ins* took part in the proceedings to review the constitutionality of the death penalty and the method of execution, the *saiban-ins* offered their opinions only for reference, and all substantive de-

63) The counter-majoritarian difficulty was first raised in the United States by Professor Alexander Bickel in his book, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, Yale University Press, 1962.

cisions were reached by professional judges. At no point did the *saiban-ins*, who were ordinary citizens, review the issue of constitutionality. There is no justification for allowing a *saiban-in*, a person who has been randomly selected by lottery among ordinary citizens and lacks legal knowledge or experience, to review the constitutionality of the State's actions. As such, the Diet made the appropriate choice, in designing the *Saiban-in* Act, to disallow *saiban-in* participation in judicial reviews, and the Supreme Court was reasonable in upholding the constitutionality of this restriction.

This paper examined whether it is constitutional for a *saiban-in* not to be substantially involved in reviews of the constitutionality of the death penalty and the method of execution. It did not, however, examine whether it is constitutional for a *saiban-in* to participate in a trial in which a defendant potentially faces the death penalty. And if *saiban-in* participation in such a trial is constitutional, are there any additional conditions or constitutional requirements to be met when the *saiban-ins* join with professional judges in sentencing a defendant to the death penalty?[64] The author will examine these questions in the next paper.

64) Professor David T. Johnson strongly criticizes the death penalty in Japan from an American perspective. In analyzing the precedents of the U.S. Supreme Court since the 1970s, he finds that capital defendants are guaranteed a series of special procedural protections that constitute "super due process" as a constitutional requirement. David T. Johnson, *The Culture of Capital Punishment in Japan*, Palgrave Pivot, 2019, p. 21. According to Johnson, super due process has five implications in American criminal procedure: (1) bifurcated proceedings into separate guilt and sentencing phases; (2) providing instructions to guide jury discretion at the sentencing stage; (3) automatic appellate review; (4) engaging in proportionality reviews in appellate courts; and (5) a unanimous verdict to impose the death penalty (*ibid*., pp. 21-22). He identifies over 12 problems with the death penalty in Japan, stating that "Japanese law makes no promise of super due process" (*ibid*., pp. 24-31). As for adopting a unanimous verdict in the *saiban-in* trial for death penalty cases, Elizabeth M. Sher proposes that the Japanese *saiban-in* system adopt a unanimous requirement for a death sentence in order to adhere to Article 36 of the Constitution of Japan and comply with international legal standards. Elizabeth M. Sher, "Death Penalty Sentencing in Japan under the Lay Assessor System: Avoiding the Avoidable Through Unanimity," *Pacific Rim Law & Policy Journal*, vol. 20, No. 3 (2011), pp. 656-658.