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# THE CONSTITUTIONAL DYNAMICS OF THE DEATH PENALTY IN JAPAN'S LEGAL SYSTEM AND THE MOVEMENT TO ESTABLISH ITS LIMITS IN THE FACE OF THE EXPANSION OF HUMAN RIGHTS

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**Abstract:** This article aims to verify the movement to limit the death penalty in Japan caused by the expansion of human rights. And as specific objectives, understand the dynamics in the Japanese legal system of the death penalty and identify the Japanese movement to establish limits to the death penalty rules in the face of the expansion of human rights. To this end, normative-legal research was carried out, which used qualitative methodology with primary and secondary sources, aiming at doctrinal and jurisprudential knowledge about the matter. In the first part of this work, the constitutional dynamics of the death penalty in the Japanese legal system were analyzed. In the second part, we sought to identify Japan's movement to establish limits on the death penalty rules in the face of the expansion of human rights.
**Keywords:** Death Penalty. Japan. Limits. Human rights.

## INTRODUCTION

The purpose of this article is to analyze the dynamics of the death penalty in Japan's legal system, as well as the movement towards its containment, especially as a result of the expansion of international human rights law.

It is intriguing to seek to understand how the country that has one of the largest economies in the world and has a consolidated democratic regime can maintain capital punishment in its legal system in the 21st century.

Interestingly, the first known abolition of capital punishment in the world occurred precisely in Japan, during the Heian era (794-1185), when an Emperor Shomu's edict prohibited the penalty in an interstice of 346 years (between 810 and 1156) (Yamamoto, 2015, p. 46; Walker, 2017, p. 66-75).

However, after its reintroduction into the Japanese legal system, the death penalty was no longer applied, except in short periods of moratorium. Although some sectors of society, such as academia, have begun to criticize the death penalty as a cruel punishment and have demanded recognition of its unconstitutionality based on respect for dignity and human rights, the fact is that the Japanese government has maintained this institute to the argument that it has massive support from the population and that it helps the country to remain among those with the lowest crime rates (Yamamoto, 2015, p. 52).

The problem question that will guide this research arises, namely: given the expansion of international human rights law, what are the criteria established for maintaining the death penalty in Japan? To answer this question, the general objective of this work is to verify the movement to limit the death penalty in Japan caused by the expansion of human rights. And, as specific objectives, understand the dynamics in the Japanese legal system of the death penalty and identify the Japanese movement to establish limits to the death penalty rules in the face of the expansion of human rights.

This research is justified by the relevance of understanding the impacts of human rights, from a global perspective, to define limits to national systems in the application of the death penalty. After all, as Amnesty International data shows, throughout 2021, the number of executions and death sentences increased (compared to 2020), as some of the main executing States resumed their normal functioning and the burdens were eased. restrictions imposed during the COVID-19 pandemic[1].

Aiming to achieve its objectives, this article is defined in normative-legal research (Bittar, 2017, p. 231), which used qualitative methodology with primary sources (analysis of judgments) and secondary sources (authors that make up the theoretical framework), aiming to doctrinal and jurisprudential knowledge about the matter, in addition

to using the inductive method (Lakatos; Marconi, 2021, p. 108), starting from particular cases to reach a broader question, and as bibliographical (theoretical investigation) and jurisprudential research techniques.

Therefore, the limitations defined by the death penalty in Japan in the face of the expansion of human rights internationally are observed in this work when considering the constitutional dynamics of the death penalty in its legal system (item 2) and, also, in identifying the movement Japanese to establish limits to the rules of capital punishment in the face of the expansion of human rights (item 3).

## THE CONSTITUTIONAL DYNAMICS OF THE DEATH PENALTY IN THE JAPANESE LEGAL SYSTEM

In the Japanese legal system, the constitutional dynamics of the death penalty are noticeable. Currently, the death penalty in Japan has legal legitimacy (item 2.1), with forms of execution defined by legislation (item 2.2) and constitutionally confirmed by the Japanese Supreme Court (item 2.3).

### THE LEGAL LEGITIMACY OF THE DEATH PENALTY IN JAPAN

Japan is one of the few developed countries where the death penalty still exists in the legal system. In fact, the Japanese archipelago and the United States of America are the only member nations of the Organization for Economic Co-operation and Development (OECD).[two] and the Group of Seven (G7)[3] – who still legally carry out the execution of those convicted by the courts.

In this regard, Ricardo Castilho asserts that "contradictorily, the two countries whose marketing strategy relies most on the image of democracy – the United States and Japan – are the only two democratic states that apply it" (Castilho, 2018, p. 379).

Following the classification adopted by Amnesty International[4], which monitors the situation of the death penalty around the world, Japan is a retentionist country, that is, it has the death penalty expressly provided for in its legal system and has carried out at least one implementation in the last ten years. It is, therefore, opposed to non-retentionist (or abolitionist) countries, which have already eliminated the death penalty from their legal system.[55].

Japanese Penal Code (Law Number: 45, dated April 24, 1907)[6] deals with punishments in its chapter II and establishes in article 9 the categories of penalties, establishing that "the main penalties are categorized as the death penalty, imprisonment with work, imprisonment without work, fine, detention and fine, with confiscation as a supplementary punishment"[7].

Next, in article 11, it specifically deals with the death penalty in two items: "(1) The death penalty will be carried out by hanging in a penal institution. (2) A person who has been sentenced to the death penalty shall be detained in a prison until his execution."[8].

As in most democratic countries, the Japanese criminal system observes proportionality between the severity of crimes and the types of punishment. This way, only crimes that harm or threaten to harm the most important legal assets carry capital punishment as a consequence.

It is important to note that the death penalty in Japan refers to crimes that may or may not result in the death of the victims. They are: - the homicide (article 199 of the Penal Code); - robbery followed by death (robbery) at the crime scene of the robbery (article 240 of the Penal Code); - Rape concomitant with robbery that causes death (article 241 of the Penal Code); - Pollution of public drinking water that causes the death of a person (article 146 of the Penal Code); - Causing the death of

a person by overturning or destroying a train or tram or during the capsizing of a vessel that causes the death of a person (article 126 of the Penal Code); - Dangerous driving, which leads to the overturning of a train or tram or capsizing of a vessel that causes the death of another person (articles 125-127 of the Penal Code); Participating in a duel that causes death (Special Law); - Crimes related to terrorism that result in death (Special Law); Hijacking a plane that causes death and destruction of aircraft that results in death (Special Law); - Crimes related to terrorism that do not result in death (Special Law); - Crimes related to terrorism that result in death; - Hijacking a plane that causes death and destruction of aircraft that results in death; - Crimes related to terrorism that do not result in death; - Destruction by explosives and illegal use of explosives (article 117 of the Penal Code); - Fire that does not result in death (article 108 of the Penal Code); - Setting fire to a building, train, tram, vessel or mine in which a person is staying, or which is used as a home (article 108 of the Penal Code); - Treason (articles 81, 82, 77(1)(i) of the Penal Code); - Instigating foreign aggression against Japan also carries the death penalty (article 81 of the Penal Code); - Assisting an enemy through direct military service or that, in some way, allows a military advantage (article 82 of the Criminal Code).

Leading an insurrection (article 77(1) (i) of the Penal Code); - Cause flooding that damages a building, train, tram or mine that is used as housing or where people are present (article 119 of the Penal Code); - Detonating an explosive and thus damaging a building, train, tram, vessel or mine that is used as a home or where other people are present (articles 108, 117(1) of the Penal Code); - Causing damage to a non-inhabited structure due to home invasion (article 119 of the Penal Code)[9].

Despite the large number of crimes punishable by death, in practice, the death penalty is used only in cases of homicide, robbery and rape followed by death, or, as highlighted by the United Nations Human Rights Committee: the death penalty is only applied for "crimes involving murder"[10].

This reduction in the number of cases in which a criminal sentence condemning the death penalty emerges reveals the country's evolution in terms of the protection of human rights within the perspective of international law. However, a more detailed analysis of the Japanese position towards the international community shows that although the country has restricted the possibilities of application, this does not mean that it intends to abolish this type of penalty.

To corroborate this argument, it can be observed that in 1979 Japan ratified, without reservation, the Covenant on Civil and Political Rights (1966). The ICCPR, in its article 6 (2) does not explicitly veto the death penalty, but stipulates that in countries that have not abolished it, its application must be made for the most serious crimes, in addition to providing criteria for the protection of deprivation of the right to life (article 6 (1)), through competent courts, stipulation of appeal procedures and mechanisms for the humane treatment of convicts. The article 6 (6), however, states that "no provision of this article may be invoked to delay or prevent the abolition of the death penalty by a State Party to the present Covenant".

On the other hand, Japan has not ratified the Second Optional Protocol to the International Covenant on Civil and Political Rights, adopted on December 15, 1989, by Resolution Number: 44/128 of the UN General Assembly, this instrument ostensibly intended for the abolition of death penalty. This way, he made his position very clear in favor of maintaining this type of sanction.

## THE LEGAL LIMITATIONS ON THE FORM OF EXECUTION OF JAPANESE CAPITAL PUNISHMENT

Currently, the form of execution of the death penalty in Japan is by hanging, as provided for in article 11 (1) of the Penal Code of 1907. The same provision, in its item (2), provides that the person who has been sentenced to the death penalty must be detained in a prison until his execution.

According to article 475 of the Japanese Code of Criminal Procedure (Law Number: 131, of July 10, 1948), executions are carried out with the authorization of the Minister of Justice, and he is also responsible for deciding the number of executions, as well as indicating the convicts who will be executed. Once the Minister of Justice orders the execution of the death penalty, it must be carried out within five days[11].

The article 477 of the Japanese Code of Criminal Procedure establishes that the execution must be carried out in the presence of the prosecutor and his assistant and a prison officer or his representative and that no other person may be present at the place of execution except when there is permission from the prosecutor or the prison guard[12]. The family is not even notified, only receiving the information after the execution has been completed.

It turns out that, in practice, executions do not have a specific date to take place, and can take months, years and even decades. This situation has been the target of much criticism in international society, such as in 2007, when the UN Committee Against Torture stated that Japan's death penalty law could allow torture and ill-treatment, noting in particular long solitary confinement. and the unnecessary secrecy surrounding execution dates. The CAT also expressed serious concern about the lack of a mandatory appeal system for capital cases, the fact that a new trial or pardon request does not lead to the suspension of the execution of the sentence, the large number of convictions based on confessions, the absence of a review mechanism to identify death row inmates who may be suffering from a mental illness, and the fact that there has been no commutation of a death sentence in the last thirty (30) years[13].

Executions take place in one of seven Detention Centers with execution chambers, which are located in the cities of Tokyo, Sapporo, Sendai, Nagoya, Osaka, Hiroshima and Fukuoka. According to article 36 of the Law on Criminal Detention Facilities and Treatment of Prisoners and Detainees (Law Number: 50, of May 25, 2005), inmates sentenced to death are kept in their individual rooms, day and night, except when consider it convenient to do it outside the room. In this environment, no prisoner sentenced to death may interact mutually with others, even outside the room, except when considered advantageous in light of the principle of treatment prescribed in article 32. Furthermore, during their stay on death row, condemned prisoners are restricted in your visits and correspondence[14].

Those condemned are only warned about the execution one hour before it takes place. At this time, they are instructed to clean their cells, are entitled to their last meal and are given paper and pen to write farewell notes to their family members.

Execution takes place in an execution room within a penal institution and cannot take place on a weekend or holiday, as provided for in the article 178 of the Law on Criminal Detention Facilities and Treatment of Prisoners and Detainees (Law Number: 50, of May 25, 2005)[15].This way of proceeding does not seem to be in line with the provisions of article 32 of the Law on Criminal Detention Facilities and Treatment of Prisoners and Detainees, as it establishes that when treating

inmates sentenced to death, attention must be paid to helping inmates maintain their peace of mind[16].

Afterwards, the condemned are blindfolded and taken to a room with a statue of a Buddhist deity, where they can say their final prayers. In the execution room, a small door is opened at the feet of the prisoner, who is blindfolded and tied to a rope around his neck. The opening is activated by a remote system in the next room, where there are three levers that are pressed simultaneously by the guards, so that it is not known who was responsible for activating the system and causing the condemned man to fall.[17]. According to article 179 of the Law on Criminal Detention Facilities and Treatment of Prisoners and Detainees, the noose will be untied after five minutes of confirming the death of the hanged man[18].

Although Japan is the target of constant criticism for alleged violations of the human rights of prisoners sentenced to death, including from large-scale international organizations such as the UN Committee Against Torture, the fact is that during the 2012 Universal Periodic Review, the position of the Japanese delegation remained practically the same. The country maintained that the idea of a moratorium on executions would be inappropriate, that it would continue its efforts to provide dignified treatment for inmates sentenced to death, and that solitary confinement of death row prisoners 24 hours a day, as stipulated by Japanese law, is not a violation of their human rights as it is imposed with the aim of ensuring the emotional stability of prisoners[19].

Thus, it appears that Japan maintains the death penalty in its legal system, and it must be noted that in some periods there is a type of suspension of execution, known as a moratorium, such as between November 1989 and March 1993, when Justice ministers failed to sign the documents necessary for the execution of those convicted, most of the time because they had a position contrary to such a sentence.

## THE CONSTITUTIONAL CONFIRMATION OF THE DEATH PENALTY BY THE JAPANESE SUPREME COURT

Given these internal and international discussions about the persistence of the death penalty in Japan, it is imperative to highlight that its constitutionality was discussed before the Japanese Supreme Court on some occasions. The first was shortly after the entry into force of the Japanese Constitution of 1946, when it was postulated that, according to the new constitution, the death penalty would have been abolished.

The request was based on article 36 of the Constitution promulgated in 1946, which prohibits cruel punishments. This article provides that: "The imposition of torture and cruel punishments by any public agent is absolutely prohibited".

In a decision handed down on March 12, 1948, the Japanese Supreme Court confirmed the constitutionality of the death penalty, in the following terms:

> Article 13 of the Constitution establishes that all individuals must have their right to life respected. This needs to be observed in public policies and legislation. However, the same article provides for a strict limitation that establishes that this right must be respected as long as it does not contradict the common good. Therefore, if the fundamental principle of the common good is disrespected, it is natural to understand that the right to life may suffer limitations. Furthermore, in accordance with article 31 of the Constitution, even if respect for life is provided for, in the procedure established by law, the sanction that may suppress it is explicitly provided for. In other words, the Constitution, as in several countries today, provides for the existence of the death penalty

> as a sanction [...] the defendant's defense was based on the argument that article 36 of the Constitution absolutely prohibits cruel punishments and that the death penalty would be a violation of the Constitution. However, it cannot be concluded that the death penalty as a sanction, in general, directly corresponds to a cruel punishment. Even the death penalty, similar to other penalties, has a form of execution from a humanitarian point of view [...] we would obviously recognize that it is a cruel penalty, if in the future, for example, a law was made that determined that The execution methods were burning, crucifixion, decapitation with exposure and boiling. In this case, this law would actually violate the provisions of article 36 of the Constitution (Yamamoto, 2019, p. 303-304)[20].

For the same Constitutional Court, life must be respected, as long as it does not harm other lives, and the death penalty does not necessarily imply cruelty. For the Supreme Court, the interpretation of cruelty is analyzed in the way the prisoners were executed. Thus, using examples of burning, crucifixion, beheading and boiling, the court argued that if these were methods of execution, the cruelty of the punishment could be recognized. Consequently, for the Japanese Court, hanging is considered a non-cruel execution (Yamamoto, 2019, p. 295).

Thus, the Japanese Supreme Court understood that the death penalty has a preventive function in promoting the common good, favoring the well-being of society through the preservation of public safety. Furthermore, it also established an interpretation that the form of execution would be the parameter to determine the possible cruelty of the sentence and cited execution methods prior to the Meiji era as cruel (Walker, 2017, p. 193-194). However, in this examination of the level of cruelty, it did not take into consideration, the waiting time between conviction and execution, as well as the fact that hanging can result in a slower death than other means (decapitation and lethal injection) (Yamamoto, 2015, p. 49).

In the same sense was the understanding expressed by the Supreme Court in a decision handed down on April 6, 1955, in which the gallows, as a form of execution, was not considered cruel when compared with other methods of execution practiced in other countries, such as strangulation, decapitation, shooting, electric chair and the gas chamber[21].

## THE JAPANESE MOVEMENT TO ESTABLISH LIMITS ON THE DEATH PENALTY RULES IN THE FACE OF THE EXPANSION OF HUMAN RIGHTS

To understand the Japanese movement to establish limits on the death penalty rules in the face of the expansion of human rights, it is necessary to compare the existing reasons for its maintenance (item 3.1) and those that concern its extinction (item 3.2).

Furthermore, it is necessary to analyze the influence of the expansion of international human rights law on the movement to restrict capital punishment (item 3.3), resulting in the limitations of the death penalty present in the application of the Nagayama Criterion (item 3.4).

### REASONS FOR MAINTAINING THE DEATH PENALTY IN JAPAN

Explaining the reasons for maintaining the death penalty in Japan, in the 21st century, is certainly not an easy task. This situation is aggravated because the numbers relating to death penalty executions in the country have been insignificant in recent years, raising the question about the real need and adequacy of maintaining such a penalty in the Japanese legal system.

For this reason, representatives of the international community, non-governmental

organizations, human rights defenders, members of universities and civil society groups have pressured the Japanese government to review its retentionist policy and abolish the death penalty.

However, the Japanese government maintains that public opinion polls carried out by the Prime Minister's Office indicate that the vast majority of the population is in favor of maintaining the death penalty. Surveys are carried out, on average, every 5 (five) years and the last, held in November 2019, showed 80.8% support for the death penalty, compared to9.0% who said it must be abolished[22].

On the other hand, another reason for defending the death penalty has been that the simple threat of this type of punishment would already serve to prevent crime, since human beings have the instinct to preserve their own lives and would not commit acts that could put her at risk. Despite the antiquity of this penalty, the justification for crime prevention is relatively recent. Before the need to justify it, the death penalty was imposed for a wide variety of crimes and its morality was not questioned. Prevention theory, therefore, emerged only in the last 2 (two) or 3 (three) centuries and societies were thus forced to create plausible justifications for its existence since corporal punishments were falling into disuse (Yamamoto, 2015 , p. 52).

Furthermore, for the death penalty to function as a preventive factor for the criminal's actions, it must be assumed that he knows exactly what penalties are applicable to his actions, which does not necessarily occur. Convicts tend to be unaware of which criminal types result in the death penalty or even whether the country in which they live has such a penalty. It would be necessary, therefore, for criminals to really know which criminal types are punishable by death (Yamamoto, 2015, p. 52-53).

Other factors that can contribute to crime prevention are the severity of the sentence, the certainty of the punishment and the speed of its application (Barreto, 1991, p. 88).

## REASONS FOR THE ABOLITION OF THE DEATH PENALTY IN JAPAN

Although reasons have been highlighted for maintaining the death penalty in Japan, these have to coexist with the arguments used by those who defend its abolition in that country.

Among the most expressive – and reasonable – is certainly that an error in sentencing is irreversible. This allegation, as André de Carvalho Ramos highlights, is the result of the undeniable harms of the death penalty, "since it does not allow for reparation for judicial error, as is obvious, in addition to other ills, such as the assumption of the impossibility of resocialization, the trivialization of life in an official murder" (Ramos, 2020, p. 425).

The statement that judicial errors can occur in any type of crime, subject to any type of sanction, cannot contradict the rationality of the argument set out above, since in cases of capital punishment, if the error is discovered before or after the sentence is executed, there is no monetary compensation capable of recovering the sentenced person or repairing his family.

A peremptory example of what can happen is described by Lilian Yamamoto. The author describes the case of Iwao Hakamada, a Japanese professional boxer who was sentenced to death for the murder of his former boss, wife and two children in 1966. Only after 48 years in prison was he granted the opportunity for a retrial, which occurred in 2014.

His defense proved that the DNA present in the blood that was on the clothes worn by the killer was not from Iwao, a fact that

exposed the error in the police investigation and also corroborated his version that he had made a confession under torture by the police. Therefore, Iwao Hakamada requested a new trial, which was granted in 2014 by the Shizuoka Prefectural Court, and was acquitted (Yamamoto, 2015, p. 53).

Another argument used for the death penalty to be dissolved from the Japanese legal system is related to the degree of reliability given to public opinion, through opinion polls carried out by the Japanese Ministry of Justice. This is because such surveys can be influenced in a variety of ways, such as gender, age, political orientation, the moment in which the opinion survey was carried out and the framing of the questions. The factors presented help to explain why research tends to produce results in favor of the death penalty. Furthermore, it has been noted that the Japanese government chooses to carry out research in times of great commotion, especially after emblematic crimes (Yamamoto, 2015, p. 53-54).

In order to endorse such assertions, it is necessary to highlight the results of comparative research that Mai Sato and Paul Bacon conducted on public opinion on the death penalty in Japan, where they found that government research is biased. While the 2019 Japanese government survey shows that 81% of the population was in favor of the death penalty when asked whether such a penalty is "inevitable in some cases," for example, only 38% of the population was in favor if the question was " Do you agree with the death penalty if life imprisonment without parole is introduced in Japan?"[23].

For these reasons, the reliability of the results of opinion polls is undermined and presents fragility as a justification for retaining the death penalty.

Another argument against maintaining the death penalty concerns the civilizational evolution of international human rights law, which will be the subject of the next item of this work. However, it is now possible to affirm that the result of this process is the recognition of a degree of minimum dignity, which is present in each person and is indispensable.

In this sense, Paulo Queiroz highlights:

> The unique and irreplaceable character of each human being, carrying its own value, demonstrated that the dignity of the person exists uniquely in every individual; and that, therefore, no justification of public utility or social disapproval can legitimize the death penalty. The voluntary homicide of the criminal by the State, even after a regular judicial process, is always an ethically unjustifiable act, and contemporary legal consciousness tends to consider it as such (Queiroz, 2015, p. 90).

It is from this perspective that Luigi Ferrajoli states that "above any utilitarian argument, the value of the human person imposes a fundamental limitation in relation to the quality and quantity of the sentence. This is the value on which the rejection of the death penalty, corporal punishment, infamous sentences and, on the other hand, life imprisonment and excessively long custodial sentences is irreducibly based". And he continues, concluding that "a State that kills, that tortures, that humiliates a citizen not only loses any legitimacy, but also contradicts its reason for being, placing itself at the level of the same criminals" (Ferrajoli, 2002, p. 318).

## THE INFLUENCE OF THE EXPANSION OF INTERNATIONAL HUMAN RIGHTS LAW ON THE MOVEMENT TO RESTRICT CAPITAL PUNISHMENT

International human rights law is a phenomenon that emerged after the end of the Second World War. Its development can be attributed to the monstrous human rights violations that occurred during that period and the belief that some of these violations

could be avoided if an effective system of international human rights protection existed (Piovesan, 2022, p. 219).

The internationalization and expansion of human rights is, therefore, an extremely recent movement in history, emerging post-war in response to the atrocities and horrors committed during Nazism and which were characterized by the State being the greatest violator of human rights.

The embryo that made possible the idea of universality in the protection of human rights was the creation of the UN, in 1945. After the creation of this intergovernmental organization, whose objective was the maintenance of peace and security, human rights began to be considered integrated into an international normative-positivist system (Teshima; Yamamoto, 2019, p. 25; Mazzuoli, 2019, p. 65-66).

There is no denying that this expansion of international human rights law occurs especially after the advent of the Universal Declaration of Human Rights (UDHR), on December 10, 1948, which constitutes a true milestone in the reconstruction of rights vilified in the war. It is in this scenario that the effort to rebuild human rights is concentrated, as a paradigm and ethical reference to guide the contemporary international order.

In this sense, one of the biggest concerns of this movement has been to transform human rights into a matter of interest to the international community, which

has implicated universalization and internationalization processes. These processes, in turn, led to the formation of an international normative system for the protection of human rights at a global and regional, as well as general and specific, level (Piovesan, 2022, p. 503- 504).

This universalization and expansion of international human rights law also results in the publication of several normative acts of international law that aim to abolish the death penalty throughout the world and put pressure on retentionist countries such as Japan.

One of the first international instruments that sought to restrict the application of the death penalty in the world was the International Covenant on Civil and Political Rights (ICCPR), approved by the UN General Assembly, in New York, on December 16, 1966. The pact does not explicitly veto the death penalty, but stipulates that in countries that have not abolished it, its application must be made to the most serious crimes, in addition to providing criteria for the protection of deprivation of the right to life (article 6 (1)), through competent courts, stipulation of appeal procedures and mechanisms for the humane treatment of condemned (Mazzuoli, 2021, p. 817-822).

It is still possible to note that the admission of the death penalty into the Covenant represented a kind of provisional compromise between the States that still maintained it and those that had already abolished it. The precisions and restrictions established in paragraphs 2 to 6 reveal that, for the authors of the Pact, capital punishment constitutes a remnant of a past in which criminal punishment exercised solely a retributive function, according to the exact correspondence between crime and punishment, typical of talion law (Comparato, 2015, p. 311).

Subsequently, as Valério de Oliveira Mazzuoli teaches, a Second Optional Protocol to the International Covenant on Civil and Political Rights was adopted, on December 15, 1989, by Resolution 44/128 of the UN General Assembly, aiming at the abolition of the death penalty, having entered into international force on June 11, 1991, after the deposit of the tenth instrument of ratification (Mazzuoli, 2021, p. 822-823).

In the special courts of the former

Yugoslavia and Rwanda, created by the UN Security Council in 1994, the rules of international human rights law were already strongly influenced, so that there was no provision for the application of the death penalty (Abe, 2019, p. 15; Mazzuoli, 2019).

Likewise, the UN has made every effort to eliminate the death penalty and in defense of human rights and humanitarian law. This can be seen in the institution of hybrid courts, with the involvement of the UN, as occurred, for example, in Kosovo, East Timor, Sierra Leone and Cambodia. In these courts, the maximum penalty did not consist of the death penalty (Abe, 2019, p. 15-16; Mazzuoli, 2019, p. 203-204).

It is also important to mention the Rome Statute, which created the International Criminal Court in 1998, which provides for life imprisonment as the maximum penalty. The instrument gave primacy to custodial sentences, divided into two categories:

(a) prison sentence for an indefinite number of years, up to a maximum of 30 years; or (b) a sentence of life imprisonment, if the high degree of illegality of the act and the personal conditions of the convicted person justify it. There was no provision, under any circumstances, for the death penalty, in honor of the achievements of international human rights law (Mazzuoli, 2021, p. 917).

In this north, the International Criminal Court itself, created to prosecute and judge people who committed the most serious crimes on the face of the Earth, such as genocide, crimes against humanity and war crimes, did not authorize the application of the death penalty (Abe, 2019, p. 16).

It is noteworthy that, on December 18, 2007, the UN General Assembly voted on a resolution (A/RE S/62/149) urging all Member States that still maintain the death penalty to institute a moratorium on executions, in view of its definitive abolition. The text declares that "the death penalty violates human dignity", and that "there is no irrefutable proof that it has a deterrent effect" (Comparato, 2015, p. 295).

In addition to this entire international normative spectrum of human rights protection, acting in favor of law and life and aiming for the extinction of capital punishment, it is still necessary to highlight the establishment of regional human rights protection systems, such as the inter-American, European and African, which are integrated into the global-international system supported by the UN.

And at this point, it is necessary to highlight the lesson of Marielle Teixeira da Silva Polli and Marcia Teshima, when they deal with Asia's relationship with the idea of universality of human rights. According to them:

> [...] its systematization comes from Western culture after the creation of the UN. Therefore, Asia did not support this idealism, considering that it can hardly be considered a homogeneous region, as this continent encompasses a great diversity of states, communities, religions, languages, cultures, etc. This position was established in the Bangkok Declaration (1993), in which Asia declared that contributions to the Vienna World Conference on Human Rights (1993) would be based on the diversity of Asian cultures and traditions, as well as on the values and duties of individuals in relation to the State and the community, permeated in the formation of Eastern society (Polli; Teshima, 2019, p. 46).

For all of the above, as can be seen, the expansion and universalization of international human rights law has increasingly put pressure on retentionist countries to eliminate capital punishment as a criminal sanction mechanism.

Japan, although it is a signatory to the International Covenant on Civil and Political Rights, has not signed the Second Optional Protocol of 1989, and has not instituted a

moratorium on executions, keeping intact its position for maintaining the death penalty and not revealing any indication that it could change this panorama.

## THE LIMITATIONS FOR THE IMPOSITION OF THE DEATH PENALTY PRESENT IN THE APPLICATION OF THE NAGAYAMA CRITERION

Although the Supreme Court of Japan continues to consider the death penalty constitutional, it is certain that its application became more restricted after the country signed the International Covenant on Civil and Political Rights, starting to be used only in cases of homicide, robbery and rape followed by death.

With the imposition of the so-called Nagayama Criterion, stipulated based on a judgment carried out by the Supreme Court in 1983, the hypotheses in which the death penalty must be applied suffered an even greater limitation.

Norio Nagayama was a death row convict who became known for the crimes he committed and also for becoming a writer during the period he was in prison. He was arrested after murdering four people, between October 11, 1968 and November 5, 1968. The first murder took place at the Prince Hotel in Tokyo when he shot the watchman, Kiminori Nakamura, twice in the head in a robbery attempt. In a second robbery attempt, on October 14, he killed another watchman, Tomejiro Kamitsu, near the Yasaka temple in Kyoto. The third crime occurred on October 27, in which he killed the taxi driver, Tetsuhiko Saito, in Hakodate. And finally, the last crime was committed on November 5th, in Nagoya, when another taxi driver, Masaki Ito, was killed during a robbery. This series of crimes gained so much repercussion that it constituted a new milestone for the establishment of criteria for the execution of those convicted (Yamamoto, 2015, p. 51).

Nagayama tried to defend himself by linking his motivation for the crimes with the poverty and ignorance he experienced in childhood, as narrated in his book ``Muchino namida`` (Tears of Ignorance, 1971).

His defense was considered in court, and caused the Nagayama case to undergo several twists and turns, as he was sentenced to death in the first instance in 1979, and the Tokyo High Court converted his sentence to life imprisonment in 1981, under the argument that "the government must have rescued the defendant from his miserable environment. It would be unfair to ignore the absence of appropriate welfare policies and hold him responsible for everything" (Yamamoto, 2019, p. 304).

His defense was successful in arguing that the poverty experienced by Nagayama in his childhood was the product of a State model incapable of meeting the social needs of the most excluded people and responsible for the misery of part of the population (Yamamoto, 2019, p. 295).

However, the Supreme Court reversed the decision back to the death penalty in 1983, and Nagayama was executed in 1997. The Nagayama criterion further restricted the imposition of the death penalty, establishing that the judiciary, when analyzing cases, must take into account: (a) the nature of the homicide; (b) motivation; (c) the method used in the homicide; (d) the number of people killed; (e) the feeling of the victim's family; (f) the magnitude of the social implications of the case; (g) the age of the defendant; (h) the criminal record of the defendant; and (i) whether the defendant demonstrated any remorse for what he did (Yamamoto, 2019. p. 296).

Thus, although Japan remains absolutely reticent about the possible abolition of the

death penalty in its legal system, the fact is that the Supreme Court's decision regarding the Nagayama Case further restricted the possibilities of applying the death penalty. In a way, it can be said that in a country with a culture and customs so different from those of the West, there has been some progress in the protection of human rights, given that, currently, only extremely serious cases lead to a sentence condemning the death penalty in Japan.

## CONCLUSION

The purpose of this work was to verify the movement to limit the death penalty in Japan caused by the expansion of human rights.

The first specific objective of this work was to understand the dynamics in the Japanese legal system of the death penalty. This result can be verified in item 2 of this article, when describing the constitutional dynamics of the death penalty in Japan's legal system.

Firstly, by detailing the legal legitimacy of its existence, including the forms of execution, and also through the study of its constitutional confirmation by the Japanese Supreme Court.

The second specific objective, in turn, sought to identify the Japanese movement to establish limits on the death penalty rules in the face of the expansion of human rights. This result can be verified in item 3 of this article, by comparing the existing reasons for its maintenance and those that concern its extinction, as well as by investigating the influence of the expansion of international human rights law on the restriction movement. of capital punishment, a fact that resulted in the limitations of the death penalty present in the application of the Nagayama Criterion.

Therefore, it can be observed that the Japanese legal system establishes public well-being as a limit to the right to life, freedom and the pursuit of individual happiness. Thus, Japanese law provides for the possibility of depriving a citizen of the right to life if his conduct violates the common good. This means a clear option for a humanitarian vision of the community, in preference to individual rights, that is, the Japanese State can protect the right to life of members of society (which currently translates into the legal good protected by the death penalty), depriving one of them, the individual deviating from the norm, from this right.

As seen throughout the work, although Japan receives enormous pressure from international society to abolish the death penalty, there is no indication of a possible change. And this also involves the fact that it is difficult to obtain an accurate diagnosis of the situation of this controversial punitive means in a country with a culture and customs so different from those of the West, just through the letter of the law.

As future studies in continuation of this work, an analysis of the controversial topic related to relativism and cultural universalism within the scope of international human rights law is proposed.

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[3] **Group of Seven (G7).** O G7 é um agrupamento informal de sete das economias avançadas do mundo, incluindo Canadá, França, Alemanha, Itália, Japão, Reino Unido e Estados Unidos, bem como a União Europeia. Disponível em: https://. Acesso em: 17 fev. 2024.

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[5] Por sua vez, o **Cornell Center on the Death Penalty Worldwide**, da Universidade Cornell, também agrega à esta classificação os países abolicionistas de fato, como sendo aqueles que não realizam execuções há mais de dez anos, mas mantêm a pena de morte e os países que são abolicionistas para crimes de direito comum, que possuem a previsão de aplicação da pena de morte, mas apenas em tempos de guerra ou outras circunstâncias extraordinárias. Disponível em: https://deathpenaltyworldwide.org/. Acesso em: 17 fev. 2024.

[6] Para nortear este artigo foi utilizada a tradução do Código Penal Japonês para o Inglês. Necessária a transcrição da advertência inicial: "This English translation of the Penal Code has been prepared (up to the revisions of Act Number: 36 of 2006 (Effective May 28, 2006) in compliance with the Standard Bilingual Dictionary (March 2006 edition). This is an unofficial translation. Only the original Japanese texts of laws and regulations have legal effect, and the translations are to be used solely as reference material to aid in the understanding of Japanese laws and regulations. The Government of Japan shall not be responsible for the accuracy, reliability or currency of the legislative material provided in this Website, or for any consequence resulting from use of the information in this Website. For all purposes of interpreting and applying law to any legal issue or dispute, users must consult the original Japanese texts published in the Official Gazette. Disponível em: https://irp.cdn- website.com/f6e36b8e/files/uploaded/CPjapon%C3%AAs.pdf. Acesso em: 17 fev. 2024.

[7] Tradução do autor.

[8] Tradução do autor.

[9] CORNELL CENTER ON THE DEATH PENALTY WORLDWIDE. **Banco de Dados de Pena de Morte - Japão.** Dados de pesquisas acadêmicas sobre leis, práticas e estatísticas da pena de morte para todos os países com pena de morte no mundo. Disponível em: https://deathpenaltyworldwide.org/database/#/results/country?id=36#fn-21493- T71T36O590249. Acesso em: 17 fev. 2024. (Cf. Yamamoto, 2015, p. 50).

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[21] Cf. **Japan Supreme Court.** Disponível em: https://. Acesso em: 17 fev. 2024.

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