

# Discussing the Constitutionality of the Death Penalty in Japan

## Toward More Humane Methods of Execution

Satoshi YOKODAIDO\*

- I. Introduction
- II. The Death Penalty in Japan
  1. Precedents of the Supreme Court
  2. International Requirement for Abolishing the Death Penalty and the Japanese Response
  3. Selecting the Death Penalty as a Punishment
  4. Process and Method of Execution
  5. The Constitutionality of Execution Methods
- III. Could the Execution Method be Unconstitutional in Japan?
  1. Public Opinion on the Death Penalty
  2. Public Opinion on the Execution Method
  3. Unnecessary Psychological and Physical Suffering
  4. Comparison with Other Methods
- IV. Conclusion

### I. INTRODUCTION

Japan employs the death penalty system.<sup>1</sup> There have been 98 executions in the country since 2000, with the last execution having occurred on 26 July

---

\* Professor of Constitutional Law, Keio University Law School, Japan.  
The provided links were last checked on 12 December 2022.

1 There are nineteen types of crimes for which the death penalty is a statutory penalty. Under the Penal Code (刑法 *Keihō*, Law No. 45/1907), the death penalty can be imposed for the following crimes: being the ringleader of an insurrection (Article 77 (1)1), instigation of foreign aggression (Article 81), providing assistance to the enemy (Article 82), arson of inhabited buildings (Article 108), detonation of explosives (Article 117(1)), damage to inhabited buildings by flood (Article 119), derailing trains and causing death thereby (Article 126(3)), endangering traffic by derailing a train and causing death thereby (Article 127 and Article 126(3)), pollution of water supplies with poisonous materials and causing death thereby (the second sentence of Article 146), homicide (Article 199), robbery causing death (the second sentence of Article 240), and rape at the scene of a robbery causing death (the second sentence of Article 241). Under other laws, the death penalty is applicable as regards Article 1 of the

2022. Based on a November 2019 survey conducted by the government,<sup>2</sup> only 9.0% of the respondents believed that “the death penalty should be abolished,” and 80.8% considered it to be “a necessary evil.” The top reasons for accepting the death penalty were as follows (multiple answers could be given): “The victims and their families cannot otherwise be pacified” (56.6%), “violent crimes must be atoned for with life” (53.6%), and “violent criminals may commit the same crime if they are kept alive” (47.4%).<sup>3</sup> Among those who answered that the death penalty is “a necessary evil,” 54.4% replied that “the death penalty should not be abolished in the future,” and 39.9% answered that “the death penalty could be abolished in the future if circumstances change.” Moreover, even if new life sentences without parole were introduced, 52.0% of all the respondents believed that “the death penalty should not be abolished.”<sup>4</sup> Hence, public support for the death penalty is strong in Japan.<sup>5</sup>

---

Criminal Regulations to Control Explosives (criminal use of explosives) (明治十七年太政官布告第三十二号 (爆発物取締罰則) *Meiji jūnana-nen tai-seikan fukoku dai-sanjūni-gō (Bakuhatsu-butsu torishimari bassoku)*), Penal Regulation of the Grand State Council No. 32/1884, Article 2(3) of the Act on Punishment of Acts to Endanger Aviation (plane crash causing death) (航空の危険を生じさせる行為等の処罰に関する法律 *Kōkū no kiken o shōji saseru kōi-tō no shobatsu ni kansuru hōritsu*) Law No. 87/1974, Article 2 of the Act on Punishment of Unlawful Seizure of Aircraft (unlawful seizure of aircraft causing death) (航空機の強取等の処罰に関する法律 *Kōkū-ki no kyōshu-tō no shobatsu ni kansuru hōritsu*), Law No. 68/1970, Article 4 of the Act on Punishment of Compulsion and Other Related Acts Committed by Those Having Taken Hostages (hostage murder) (人質による強要行為等の処罰に関する法律 *Hitojichi ni yoru kyōyō kōi-tō no shobatsu ni kansuru hōritsu*), Law No. 48/1978, Article 3 of the Act Relating to Dueling (duel causing death) (明治二十二年法律第三十四号 (決闘罪ニ関スル件) *Meiji nijūni-nen hōritsu dai-sanjūyon-gō (Kettō-zai ni kansuru ken)*), Law No. 34/1889, Articles 3(1) and 3(2) of the Act on Punishment of Organized Crimes and Control of Crime Proceeds (organized homicide) (組織的な犯罪の処罰及び犯罪収益の規制等に関する法律 *Soshikiteki na hanzai no shobatsu oyobi hanzai shūeki no kisei-tō ni kansuru hōritsu*), Law No. 136/1999, and Article 4 of the Act on Punishment of Piracy and Treatment of Piracy (piracy causing death) (海賊行為の処罰及び海賊行為への対処に関する法律 *Kaizoku kōi no shobatsu oyobi kaizoku kōi e no taisho ni kansuru hōritsu*), Law No. 55/2009.

- 2 NAIKAKU-FU DAIJIN KANBŌ SEIFU KŌHŌ-SHITSU [Public Relations Department of the Minister’s Secretariat of the Cabinet Office, *Kihonteki hō-seido ni kansuru yoron chōsa* [Public Opinion Survey on the Basic Legal System] (January 2020), available at <https://survey.gov-online.go.jp/r01/r01-houseido/2-2.html>.
- 3 Conversely, the leading reasons given for abolition of the death penalty (with multiple answers possible) were “if there is a mistake in the trial, it cannot be undone” (50.7%), followed by “it is better to let them live to atone for their crimes” (42.3%).
- 4 Specifically, 35.1% replied, “the death penalty should be abolished,” and 10.8% answered “not sure/no opinion” in response to this question.
- 5 The strength of this opinion is, however, debatable. See M. SATO, *The Death Penalty in Japan: Will the Public Tolerate Abolition?* (2014).

Regardless of the support for the death penalty as expressed in Japanese public opinion, the global trend is clearly moving in the direction of its abolishment. According to Amnesty International, by the end of 2021, more than two-thirds of the world's countries had abolished the death penalty in law or practice: 108 countries had abolished the death penalty in law for all crimes and 144 countries had abolished the death penalty in law or practice. Only 55 countries still retain the death penalty.<sup>6</sup> As this data shows, abolishing the death penalty has clearly become a global trend.

The United States is often considered representative of those nations retaining the death penalty. However, because it is a federal state, maintaining or abolishing the death penalty is the sole decision of each individual state; thus, the situation is not monolithic. According to the Death Penalty Information Center, as of the end of 2021, 27 of the 50 US states retain the practice (as does the federal government and the military; three states, however, are under gubernatorial moratoria) and 23 (as well as the District of Columbia) have abolished it.<sup>7</sup>

Indeed, even if there is a global trend to abolish the death penalty, Japan has no immediate *legal* obligation to end the practice.<sup>8</sup> Conversely, if the Constitution of Japan, the supreme law of the nation,<sup>9</sup> were to forbid the death penalty, it would have to be abolished regardless of whether the majority of the public was in favor of the practice. Thus, one must ask: What is the stance of the Constitution on the death penalty? As we will see,<sup>10</sup> the death penalty's constitutionality rests on stable precedent of the Supreme Court of Japan (SC). Consequently, for those arguing for the abolishment of the death penalty, the question becomes: Is there no room to make the death penalty unconstitutional? In this article, I discuss the possibility of arguing for the unconstitutionality of the death penalty, even if we accept the SC's reasoning and the decisions by lower courts.

Section II provides basic information about the death penalty in Japan and the SC's stance toward it. Section III presents a way of discussing the

---

6 See AMNESTY INTERNATIONAL, *Death Penalty 2021: Facts and Figures* (2022), <https://www.amnesty.org/en/latest/news/2022/05/death-penalty-2021-facts-and-figures/#:~:text=108%20countries%2C%20a%20majority%20of,penalty%20in%20law%20or%20practice>.

7 See DEATH PENALTY INFORMATION CENTER, [Statistics 2023] *State by State*, <http://www.deathpenaltyinfo.org/states-and-without-death-penalty>.

8 See *infra* II.2.

9 日本国憲法 *Nihon-koku kenpō* (hereafter: *Kenpō*) [Constitution], Art. 98 para. 1: This Constitution shall be the supreme law of the nation and no law, ordinance, imperial rescript or other act of government, or part thereof, contrary to the provisions hereof, shall have legal force or validity.

10 See *infra* II.1.

unconstitutionality of the death penalty – not by criticizing the court’s decisions, but by accepting its reasoning. This does not necessarily mean that the SC’s explanation of the constitutionality of the death penalty is persuasive; rather, this could be a more promising direction leading toward abolition of the death penalty in Japan.

## II. THE DEATH PENALTY IN JAPAN

### 1. *Precedents of the Supreme Court*

The most relevant text on the death penalty is found in Article 36 of the Constitution, which states that “cruel punishments are absolutely forbidden.”<sup>11</sup> If the death penalty is a cruel punishment, its abolition is unavoidable because that would be a constitutional requirement. However, soon after the enactment of the current Constitution, the SC ruled in 1948 that the death penalty was *not* unconstitutional.<sup>12</sup> Since then, the SC’s stance has remained unchanged. In that early case, the SC asked, “What is the new Constitution’s attitude toward the death penalty in general? Is the provision of the death penalty in the Penal Code, as defense counsel claims, ineffective as a violation of the Constitution?” The SC replied “no,” based on the reasons provided below:

- a) Article 13 of the Constitution states: “All the people shall be respected as individuals. 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.”<sup>13</sup> Thus, when the public welfare is at stake, although the people have a right to life, the Constitution clearly presumes that the legislation could limit or deprive that right.
- b) Article 31 of the Constitution states: “No person shall be deprived of *life* or liberty, nor shall any other criminal penalty be imposed, except according to the procedure established by law.”<sup>14</sup> Thus, regardless of the value of individuals’ lives, the Constitution clearly supposes that a life-ending criminal penalty could be imposed through the proper proce-

---

11 *Kenpō*, Art. 36.

12 Supreme Court, 12 March 1948, 刑集 Keishū 2(3), 191 (Grand bench judgment). In this case, the defendant murdered his mother and sister with a hammer for selfish reasons and abandoned the dead bodies in disused wells. The case was translated by MAKI in J. M. MAKI, *Court and Constitution in Japan: Selected Supreme Court Decisions, 1948–1960* (1948) 156.

13 *Kenpō*, Art. 13 (emphasis added).

14 *Kenpō*, Art. 31 (emphasis added).

- dures. This can be interpreted as an endorsement of the necessity of the continuation of the death penalty for society's welfare.
- c) Therefore, although Article 36 of the Constitution "absolutely" forbids "cruel punishments,"<sup>15</sup> the death penalty itself is not considered a cruel punishment under the Article. "The Constitution should be understood to assume that the death penalty is preserved as a criminal penalty, as in many modern civilized nations, and to endorse its use."<sup>16</sup>
- d) The substantial reason behind the interpretation is explained in that "the death penalty is intended to protect society by using its intimidating power for the general prevention of crime and eradicating the root of particular social evil by adopting the death penalty. It is also understood that prioritizing the humanitarian view of society over the humanitarian view of the individual and the necessity of the continuation of the death penalty is ultimately beneficial for the public welfare of society."<sup>17</sup>

At the time of enactment of the Constitution in 1946, the framers did not think that the death penalty was unconstitutional or a cruel punishment.<sup>18</sup> Further, although the unconstitutionality of the death penalty has been asserted many times,<sup>19</sup> the SC customarily dismisses such claims by citing the

---

15 *Kenpō*, Art. 36.

16 Supreme Court, 12 March 1948, 刑集 Keishū 2(3), 191, at 193–194.

17 *Id.* at 194. These quoted sentences could be read as saying that the Constitution *requires* the existence of the death penalty. If so, abolishing the death penalty system would be unconstitutional unless done by resorting to constitutional amendments. However, even those who support a system featuring execution as a punishment do not endorse this interpretation. Therefore, we can say that the Japanese Constitution does not *require* the death penalty but *allows* its existence.

18 Interestingly, we can find a similar argument for the death penalty in the decision of the Indian Supreme Court. In *Bachan Singh v State of Punjab*, (1980) 2 SCC 684, para. 136, the Indian Supreme Court held that, among other things, "the Founding Fathers recognized the right of the State to deprive a person of his life or personal liberty in accordance with fair, just, and reasonable procedure established by a valid law," since Article 21 of the Indian Constitution stipulates "No person shall be deprived of his *life* or personal liberty except according to procedure established by law."

19 One of the reasons why the unconstitutionality of the death penalty has often been argued before the Supreme Court is that Article 405 of the Code of Criminal Procedure limits the final appeal to the Supreme Court, in principle, to only those cases where (i) there is a violation of the Constitution or an error in its interpretation; (ii) a determination has been rendered that conflicts with a Supreme Court precedent, or (iii) in the event that there is no Supreme court precedent, a determination has been rendered that conflicts with a precedent of the former Supreme Court or a high court that was the final appellate instance, or that conflicts with a precedent of a high court that was the court of second instance at a time after the enforcement date

1948 precedent and other related cases.<sup>20</sup> In this sense, the 1948 ruling has become a stable precedent, and many constitutional law scholars predict that there is little or no chance that the SC's interpretation will change in the near future.

## 2. *International Requirement for Abolishing the Death Penalty and the Japanese Response*

Article 98(2) of the Japanese Constitution requires that “treaties concluded by Japan and established laws of nations shall be faithfully observed.”<sup>21</sup> If these treaties or these laws require the abolishment of the death penalty, Japan has a *legal* obligation to do so.

Japan ratified the International Covenant on Civil and Political Rights in 1979, which provides in Article 6(2) that “in countries which have not abolished the death penalty, [the] 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 to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court”<sup>22</sup>. This provision does not impose an immediate obligation to abolish the death penalty. While the Second Optional Protocol to the International Covenant on Civil and Political Rights, adopted in 1989, aiming at the abolition of the death penalty,<sup>23</sup> imposes a concrete obligation to abolish it, Japan has not ratified this protocol.

Article 40(1) of the Covenant requires that all states party to the Covenant should submit reports to the Human Rights Committee on progress made in the enjoyment of civil and political rights in their state.<sup>24</sup> Japan has received multiple recommendations to abolish the death penalty or introduce a mora-

---

of this Act. 刑事訴訟法 *Keiji soshō-hō* [Code of Criminal Procedure, hereafter: *Keiso-hō*], Law No. 131/1948.

20 For example, the SC rejected the contentions that the death penalty violates Article 9 and/or Article 24 of the Constitution, citing the 1948 ruling. *See* Supreme Court, 18 April 1951, 刑集 Keishū 5(5), 923 (Grand bench judgment); Supreme Court, 10 April 1958, 刑集 Keishū 12(5), 839 (First petty bench judgment). A recent example is the Supreme Court judgment of 23 February 2016, 集刑 Shūkei 319, 1 (Third petty bench judgment). We will discuss this decision below.

21 *Kenpō*, Art. 98, para. 2.

22 UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, 171.

23 UN General Assembly, Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty, 15 December 1989, A/RES/44/128. Currently, 90 nations are parties to the Second Optional Protocol.

torium. For example, the latest concluding observations on the sixth periodic report of Japan said, among other things: “Give due consideration to the abolition of [the] death penalty or, in the alternative, reduce the number of eligible crimes for capital punishment to the most serious crimes that result in the loss of life” and “Consider acceding to the Second Optional Protocol to the Covenant, aiming at the abolition of the death penalty.”<sup>25</sup> In response, the Japanese government stated: “The majority of citizens in Japan consider that the death penalty is unavoidable for extremely malicious/brutal crimes. In light of the current situation, which shows no sign of decline in brutal crimes, it is unavoidable to impose the death penalty on persons who have committed extremely brutal crimes and bear heavy criminal responsibility, and therefore abolishing the death penalty is not appropriate.” It added, “the Government of Japan considers that it is inappropriate to abolish the death penalty, and with respect to the conclusion of the Second Optional Protocol to the Covenant, [this] requires careful examination.”<sup>26</sup>

The General Assembly of the United Nations (UN) has adopted several resolutions for a moratorium on the use of the death penalty since 2007. Still, these resolutions are not legally binding on member states. The Universal Periodic Review, which was established when the Human Rights Council was created on 15 March 2006 by the UN General Assembly in Resolution 60/251, reviews the human rights records of all UN member states and provides each state with the opportunity to declare the actions they have taken to improve human rights in their countries and to fulfill their human rights obligations. In the Report of the Working Group on the Universal Periodic Review to Japan in the third cycle in 2018, many countries recommended abolishing the death penalty and/or introducing a mora-

---

24 Article 40(2) of the International Covenant on Civil and Political Rights: The States Parties to the present Covenant undertake to submit reports on the measures they have adopted, which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights: (a) Within one year of the entry into force of the present Covenant for the States Parties concerned; (b) Thereafter, whenever the Committee so requests.

25 CCPR/C/JPN/CO/6 of 20 August 2014, *paras.* 13(a) and (f). Currently, the seventh periodic review is ongoing, and it has been reported that “[d]uring the dialogue, the most salient issues included the remaining use of the death penalty in Japan, the treatment of prisoners in detention facilities, and the lack of redress for ‘comfort women’ and for the victims of the Fukushima nuclear disaster.” CENTER FOR CIVIL AND HUMAN RIGHTS, Japan: Remaining use of the death penalty and treatment of prisoners considered as ill treatment by the Human Rights Committee, 17 October 2022, available at <https://ccprcentre.org/ccprpages/japan-remaining-use-of-the-death-penalty-and-treatment-of-prisoners-considered-by-the-human-rights-committee>.

26 Comments by the government of Japan on the Concluding Observations of the Human Rights Committee (CCPR/C/JPN/CO/6).

torium.<sup>27</sup> However, the Japanese government rejected all such recommendations, stating,

“Japan believe[s] that each sovereign country should be allowed to make decisions on the issue of the death penalty independently. Domestic public opinion, the existence of extremely vicious crimes and other factors made it inappropriate to abolish the death penalty. A moratorium was also inappropriate, since the final judgment must be executed impartially and thoroughly under the rule of law.”<sup>28</sup>

It concluded that

“Japan’s position on the issue of the death penalty is that this should be examined based on domestic public opinion. The majority of the Japanese people consider the death penalty to be unavoidable in the case of extremely heinous crimes and therefore Japan currently does not have any plans to establish a forum to discuss the death penalty system.”<sup>29</sup>

The “established laws of nations” of Article 98(2) of the Japanese Constitution means customary international law, which is listed as “international custom, as evidence of a general practice accepted as law” in Article 38 (1)(b) of the Statute of the International Court of Justice (ICJ). In the *North Sea Continental Shelf* cases the ICJ described customary international law as “by [its] very nature, [something that] must have equal force for all members of the international community, and [that] cannot therefore be the subject of any right of unilateral exclusion exercisable at will by any [state] in its own favour.”<sup>30</sup> The prohibition or abolishment of the death penalty is not customary international law in this sense.

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. Similarly, there are many treaties and foreign laws that

---

27 A/HRC/37/15 of 4 January 2018, *paras.* 161.3 (Slovenia), 161.4 (Argentina), 161.5 (Montenegro, Spain, Sweden, Togo), 161.6 (Croatia, Germany), 161.7 (Mongolia), 161.8 (Uruguay), 161.9 (Guatemala), 161.95 (Cyprus, Italy), 161.96 (Republic of Moldova), 161.97 (Norway, Rwanda), 161.98 (Bolivarian Republic of Venezuela), 161.99 (New Zealand, France, Mexico), 161.100 (Iceland, Belgium, Sweden, Finland, Spain, Brazil, Netherlands, Denmark, Australia), 161.101 (United Kingdom), 161.102 (Timor-Leste), 161.103 (Liechtenstein), 161.104 (Colombia), 161.105 (Paraguay, Portugal), 161.106 (Panama), 161.197 (Switzerland), 161.108 (France), 161.109 (Austria), and 161.110 (Canada).

28 *Id.* para. 147.

29 Human Rights Council, Report of the Working Group on the Universal Periodic Review, Japan; Addendum: Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review, A/HRC/37/15/Add.1 of 1 March 2018.

30 *North Sea Continental Shelf*, Judgment, I.C.J. Reports 1969, 38–39.

prohibit the imposition of capital punishment. However, unlike Article 39 of the Constitution of the Republic of South Africa, which prescribes,

“When interpreting the Bill of Rights, a court, tribunal or forum (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law,”

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. In addition, the SC has been reluctant to use such international materials when they interpret the Constitution.<sup>31</sup> The Japanese government has also refused to accept these requirements and recommendations. Thus, Japan has demonstrated a strong desire to retain the death penalty.

### 3. *Selecting the Death Penalty as a Punishment*

Article 31 of the Constitution requires that the deprivation of life must be “according to the procedure established by law.” This raises the question of the procedure that the court must follow to sentence a criminal to capital punishment. As David Johnson pointed out, “[i]n Japan, everyone associated with capital punishment—prosecutors, judges, lay judges, defense lawyers, Ministers of Justice, the media, politicians, and victims and survivors—acknowledges that life-and-death decisions should be made as ‘carefully’ as possible (*shincho ni* [慎重に]), but the institutional and procedural reality is that capital cases are treated much the same as other criminal cases. In reality, death is not different in Japan.”<sup>32</sup>

By contrast, United States laws require what has been referred to as “super due process” for death penalty cases.<sup>33</sup> The concept of super due process is not clearly defined, but the essence is clear: since the guarantee of regular due process is insufficient for cases involving capital punishment, the US Constitution requires heightened procedural guarantees for death penalty cases. The usual guarantee is insufficient because

“the penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabili-

---

31 See A. EJIMA, Use of Foreign and Comparative Law by the Supreme Court of Japan, in: Ferrari (ed.), *Judicial Cosmopolitanism: The Use of Foreign Law in Contemporary Constitutional Systems* (2019) 800.

32 D. T. JOHNSON, *The Culture of Capital Punishment in Japan* (2020) 21, available at [https://doi.org/10.1007/978-3-030-32086-7\\_2](https://doi.org/10.1007/978-3-030-32086-7_2).

33 The term “super due process” was said to be coined by M. J. RADIN, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, *Southern California Law Review* 55 (1980) 1143.

tation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity.”<sup>34</sup>

One component of super due process is the prohibition of arbitrary sentencing. In his concurring opinion in *Furman v. Georgia*, Justice Potter Stewart famously said,

“these death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed. [...] I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.”<sup>35</sup>

How has the death penalty been chosen as a punishment in Japan? One SC judgment in 1983 stated the following:

“[U]nder the current legal system in which the death penalty is recognized, selection of the death penalty must be allowed in cases where it is deemed that there is no alternative from the standpoint of balancing the crime with the punishment and from the standpoint of general prevention, when criminal liability is extremely grave taking account of any and all extenuations including the nature of the crime, the motive, its features and in particular the tenacity and cruelty employed in carrying out the murder, the gravity of its consequences as reflected especially in the number of victims killed, the feelings of the bereaved family, the impact of the crime on society, the age of the perpetrator, his criminal record, and grounds for leniency after the crime has been committed.”<sup>36</sup>

This is the so-called “*Nagayama* standard,” which retains de facto binding power in courts as a precedent.<sup>37</sup> In a recent 2015 case,<sup>38</sup> the SC reiterated that

---

34 *Furman v. Georgia*, 408 U.S. 238, 306 (1972) (Stewart, J., concurring).

35 *Id.* at 309–310.

36 Supreme Court, 8 July 1983, 刑集 Keishū 37(6), 609 (Second petty bench judgment). An English translation of the entire decision is available at [https://www.courts.go.jp/app/hanrei\\_en/detail?id=74](https://www.courts.go.jp/app/hanrei_en/detail?id=74).

37 The standard was indicated in the case of Norio NAGAYAMA, a 19-year-old boy who shot and killed four men (two security guards and two taxi drivers) using a handgun stolen from the US Navy’s Yokosuka Naval Facility in Japan. He was sentenced to capital punishment in 1983 and executed in 1997.

38 Supreme Court, 3 February 2015, 刑集 Keishū 69(1), 1 (Second petty bench judgment), and Supreme Court, 3 February 2015, 刑集 Keishū 69(1), 99 (Second petty bench judgment). Both are decisions concerning a case wherein the court affirmed the judgment at prior instance in which the court of prior instance had quashed the death sentence handed down by the court of first instance and sentenced the accused to life imprisonment with required labor on the grounds that the sentence determined by the court of first instance through proceedings featuring the participa-

“the death penalty is the ultimate punishment that is the severest of all criminal penalties and should be imposed only when it is truly an inevitable choice because it results in depriving the accused of his or her life forever. Therefore, as indicated in the 1983 Judgment and followed by this court’s subsequent judgments, the death penalty should be applied with utmost care.”<sup>39</sup>

The SC went on to say,

“[F]rom the perspective that the death penalty is the ultimate punishment and should be applied with utmost care and the perspective of ensuring fairness, it is absolutely necessary to examine in advance the factors to consider when choosing the death penalty and the degree of and grounds for the importance attached to each factor based on an accumulation of court decisions handed down in past cases through careful examination from the same perspectives, and in the process of deliberation, it is also absolutely necessary for the trial body to share the results of such examination as a common understanding and deliberate on the case with these results as the starting point. This equally applies to both a trial by a panel composed only of professional judges and a trial by a panel composed with the participation of *saiban-in* (lay judges).”<sup>40</sup>

Finally, it stated,

“In the course of reaching a conclusion on the case, it is necessary to make a comprehensive assessment in light of the degree of and grounds for the importance attached to each factor, and deepen the discussion as to whether or not the death penalty is found to be a truly inevitable choice, from the perspective that the death penalty should be applied with utmost care and the perspective of ensuring fairness.”<sup>41</sup>

Therefore, if imposition of the death penalty does not follow the *Nagayama* standard, it would be treated as a violation of precedent. Hence, the *Nagayama* standard helps prevent the death penalty from being wantonly and freakishly imposed. In this sense, the *Nagayama* standard could potentially be used as a mechanism of super due process in Japan.<sup>42</sup>

---

tion of *saiban-in* (lay judges) was inappropriate. English translations of the decisions in their entirety are available at [https://www.courts.go.jp/app/hanrei\\_en/detail?id=1339](https://www.courts.go.jp/app/hanrei_en/detail?id=1339), and [https://www.courts.go.jp/app/hanrei\\_en/detail?id=1340](https://www.courts.go.jp/app/hanrei_en/detail?id=1340).

39 Supreme Court, 3 February 2015, 刑集 Keishū 69(1), 1, at 4, and Supreme Court, 3 February 2015, 刑集 Keishū 69(1), 99, at 103-104.

40 Supreme Court, 3 February 2015, 刑集 Keishū 69(1), 1, at 5, and Supreme Court, 3 February 2015, 刑集 Keishū 69(1), 99, at 104.

41 Supreme Court, 3 February 2015, 刑集 Keishū 69(1), 1, at 5, and Supreme Court, 3 February 2015, 刑集 Keishū 69(1), 99, at 104.

42 However, JOHNSON criticized the *Nagayama* standard: “The *Nagayama* precedent also provides no direction about how to weigh the various factors, leaving life-and-death decision-making largely ungoverned by rules of law.” JOHNSON, *supra* note 32, at 26. If super due process requires some special *legal* provisions that treat the death penalty differently, the *Nagayama* standard cannot become the mechanism of super due process.

Where does this standard come from? Although it is not mentioned in the Constitution, the *Nagayama* standard is a requirement of the Constitution because Articles 31 and/or 36 have been interpreted as requiring application of the principle of proportionality of crimes and punishments.<sup>43</sup> If, for example, Article 235 of the Penal Code was changed from “[a] person who steals the property of another person commits the crime of theft and is punished by imprisonment for not more than ten years or a fine of not more than 500,000 yen” to “[...] is punished by the death penalty or imprisonment for life or for a definite term of not less than five years,” it would be unconstitutional based on the principle of proportionality of crimes and punishments.<sup>44</sup> Although this principle does not have the power to render existing statutes stipulating the death penalty<sup>45</sup> unconstitutional, there is a possibility of finding that an individual case represents an unconstitutional

---

43 Based on the conventional understanding in Japan, Article 31 of the Japanese Constitution calls for the principle of *nulla poena sine lege*, which includes the requirement of proportionality between crimes and punishments. See, e.g., K. SATŌ, *Nihon-koku kenpō-ron* [Japanese Constitutional Law] (2<sup>nd</sup> ed., 2020) 370; Y. HIGUCHI, *Kenpō* [Constitutional Law] (4<sup>th</sup> ed., 2021) 265.

44 Or it would be found to be a violation of Article 14(1) of the Constitution, which stipulates: “All of the people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin.” The SC decided that Article 200 of the Penal Code, providing that a person who kills one of his or her own or his or her spouse’s lineal ascendants shall be punished with death or with imprisonment and forced labor for life, violates Article 14(1) of the Constitution and is therefore unconstitutional. Supreme Court, 4 April 1973, 刑集 Keishū 27(3), 265 (Grand bench judgment). English translation of the entire decision is available at [https://www.courts.go.jp/app/hanrei\\_en/detail?id=38](https://www.courts.go.jp/app/hanrei_en/detail?id=38). The SC held that “[a]lthough creating a special crime of killing an ascendant beside an ordinary homicide and providing an aggravating penalty for it is not necessarily unconstitutional in itself, the reasonableness of such a provision may still be denied because of the degree of the aggravation. In other words, when we find no grounds for justification for the aggravation being so extreme as to lose the balance as a measure to achieve the said legislative purpose, the discrimination is unacceptably unreasonable, and the provision is invalid in violation of Article 14, paragraph 1, of the Constitution.” Further, “the provided punishments for killing an ascendant should be held too severe in that it is limited only to death or life term imprisonment—the heaviest [punishment] with the exception of the punishment for inducement of foreign aggression—and it cannot be fully explained by the aforementioned legislative purpose, namely, the esteem and the maintenance of such spontaneous affections or universal ethics as respect and gratitude toward ascendants; thus, it cannot be justified at all as discrimination based upon reasonable grounds.” This case was the first in which the SC declared a law to be unconstitutional.

45 See *supra* note 1.

or illegal *application* of the death penalty. For example, although those who commit the offense of arson of inhabited buildings could be subject to the death penalty under Article 108 of the Penal Code, a death sentence that was handed down despite there being no victims and with minimum damage to the buildings would be an unconstitutional application because of the disproportionality of the crime and the punishment.

#### 4. *Process and Method of Execution*

Although the death penalty is not *immediately* and obviously a cruel punishment, as described in Article 36, the *manner* or *method* by which it is carried out may determine whether it falls into that category. The death penalty in Japan is carried out using the following procedure:

- a) Death row inmates are, in principle, confined to a single-inmate cell all day and night. They are not permitted any mutual contact outside the room.<sup>46</sup>
- b) The order of execution by the Minister of Justice “shall be rendered within six months from the date when the judgment becomes final and binding.”<sup>47</sup>
- c) “When the Minister of Justice orders execution of the death penalty, it shall be executed within five days.”<sup>48</sup>
- d) Based on the order to impose the death penalty, a public prosecutor directs the head of the penal institution to conduct the procedure.<sup>49</sup>
- e) A staff member who receives the order from the warden of the penal institution carries out the death penalty inside the penal institution by hanging,<sup>50</sup> with the public prosecutor, the public prosecutor’s assistant

46 刑事収容施設及び被収容者等に関する法律（刑事収容施設法）*Keiji shūyō shisetsu oyobi hi-shūyō-sha-tō no shogū ni kansuru hōritsu [Keiji shūyō shisetsu-hō]* [Act on Penal Detention Facilities and the Treatment of Inmates and Detainees], Law No. 50/2005, Art. 36: (1) The handling of an inmate sentenced to death shall be conducted in an inmate cell throughout the day and night, except where it is deemed appropriate to conduct handling outside the inmate’s room, (2) Inmates sentenced to death are to be held in single-person rooms, and (3) No inmates sentenced to death shall be permitted to engage in mutual contact even outside the inmate’s room, except where deemed advantageous in light of the principle of treatment prescribed in Paragraph (1) of Article 32 (*see infra* note 55).

47 *Keiso-hō*, Art. 475, para. 2.

48 *Keiso-hō*, Art. 476.

49 *Keiso-hō*, Art. 472, para. 1, and 執行事務規定 *Shikkō jimu kitei* [Operational Rules for Law Enforcement], 法務省刑事局総務課訓令 *Hōmu-shō keiji-kyoku sōmu-ka kunrei* [Instruction of General Affairs Division, Criminal Investigation Department, Ministry of Justice], No. 6/2019.

50 *Keiso-hō*, Art. 11, para. 1, and *Keiji shūyō shisetsu-hō*, Art. 178, para. 1.

officer, and the warden of the penal institution or their representative in attendance.<sup>51</sup>

f) The noose is unfastened five minutes after confirmation of death.<sup>52</sup>

I will add some extra information about this process. First, concerning (a), the imposition of solitary confinement for death row inmates has been criticized as a cruel, inhumane, or degrading treatment or punishment.<sup>53</sup> However, the Japanese government's position is that this treatment is necessary to maintain the inmate's peace of mind. Since the Act stipulates that a death row inmate may be allowed to have contact with other inmates on death row if this is deemed beneficial to their emotional stability,<sup>54</sup> such treatment is not considered to violate their human rights. Moreover, to prevent that inmates sentenced to death suffer from isolation, penal institutions have arranged activities such as counseling and religious teaching that is provided by nongovernmental volunteers, consultation by staff members, and, if necessary, the watching of television programs to help inmates maintain their peace of mind.<sup>55</sup>

Second, concerning (b), despite prescribing that the order of execution by the Minister of Justice "shall be rendered *within six months*," the Tōkyō District Court has stated that Article 475(2) of the Code of Criminal Procedure is equivalent to "a legally nonbinding instruction."<sup>56</sup> The govern-

---

51 *Keiso-hō*, Art. 477, para. 1. The death penalty shall not be carried out on Saturdays, Sundays or public holidays. *Keiji shūyō shisetsu-hō*, Art. 178, para. 2.

52 *Keiji shūyō shisetsu-hō*, Art. 179.

53 See e.g., A/HRC/37/15 of 4 January 2018. As another example, the UN Committee against Torture, which was established by Article 17 of the Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85), adopted a report in respect of Japan stating: "The Committee is deeply concerned about the conditions of detention of prisoners on death row in the State party, in particular with respect to [...] [t]he use of solitary confinement for persons sentenced to death, often for extended periods of time, even exceeding 30 years in some cases, and limited contact with the outside." UN Committee Against Torture (CAT), Concluding observations on the second periodic report of Japan, para. 15, 28 June 2013, CAT/C/JPN/CO/2, available at <https://www.refworld.org/docid/51dfe6614.html>.

54 See *supra* note 46.

55 *Keiji shūyō shisetsu-hō*, Art. 32: (1) In terms of the treatment of an inmate sentenced to death, attention shall be paid to help him/her maintain peace of mind, and (2) Measures such as counseling or lectures, which may contribute to help the inmate sentenced to death maintain peace of mind, shall be taken by obtaining cooperation from nongovernmental volunteers.

56 Tōkyō District Court, 20 March 1998, 判例タイムズ Hanrei Taimuzu 938, 223 (judgment).

ment's interpretation also adopts the same position.<sup>57</sup> How does the Minister of Justice then decide when its order of execution will be carried out? The government replied to this question from one member of the House of Councilors, stating, “[i]n general terms, when ordering a death sentence, the Minister of Justice shall thoroughly examine the relevant records in each case, carefully consider whether there are grounds to suspend the execution, order a retrial or allow an emergency appeal, consider the presence of circumstances that warrant a pardon, and only issue an order of execution if they find no such grounds.”<sup>58</sup> There are few legal controls on the discretion of the Minister of Justice.<sup>59</sup> Article 471 of the Code of Criminal Procedure specifies situations where the execution is prohibited. Section 1 of this article stipulates: “Where the person who has been sentenced to death is in a state of insanity, the execution shall be suspended by order of the Minister of Justice.” Moreover, Section 2 states: “Where a woman who is sentenced to death is pregnant, the execution shall be suspended by order of the Minister of Justice.” Here, a “state of insanity” refers to a state of incapacity such that one cannot recognize that one’s life will be terminated based on the death sentence.<sup>60</sup> Therefore, the death penalty must be carried out after the death row inmate returns to a state of sanity; likewise, a pregnant inmate is to be executed after having given birth.<sup>61</sup>

57 For example, *Sangi-in gi'in Mizuno Ken'ichi-kun teishutsu, shikei shikkō ni kansuru shitsumon ni taisuru tōben-sho* [Written Answers to Questions on the Carrying Out of the Death Penalty submitted by Ken'ichi MIZUNO, a member of the House of Councilors], Written Answer No. 212, 31 July 2015, available at <https://www.sangiin.go.jp/japanese/joho1/kousei/syuisyo/189/touh/t189212.htm>.

58 *Sangi-in gi'in Fukushima Mizuho-kun teishutsu, shikei seido ni okeru tetsuzukiteki mondai ni kansuru shitsumon ni taisuru tōben-sho* [Written answers to questions on procedural issues in the death penalty system, submitted by Mizuho FUKUSHIMA, a member of the House of Councilors], Written Answer No. 205, 27 July 2018, available at <https://www.sangiin.go.jp/japanese/joho1/kousei/syuisyo/196/touh/t196205.htm>. At a press conference following the most recent execution on 26 July 2022, the Minister of Justice stated: “For those who were executed in the ten years from 2012 to 2021, the average time between the confirmation of the death sentence and its execution was approximately seven years and nine months.”, available at [https://www.moj.go.jp/hisho/kouhou/hisho08\\_00322.html](https://www.moj.go.jp/hisho/kouhou/hisho08_00322.html).

59 The long waiting time for execution may itself be considered cruel and unusual punishment, but this argument is rarely made by opponents of the death penalty because it may encourage earlier executions.

60 See *supra* note 58.

61 *Keiso-hō*, Art. 471, para. 3, provides that “In cases where execution of the death penalty has been suspended pursuant to the provisions of the preceding two paragraphs, the death penalty shall not be executed without an order from the Minister of Justice after the person has returned to a state of sanity or after such a woman has given birth.”

Third, concerning (c), the government explains that executions are carried out within five days of the Minister of Justice's execution order following the provisions of Article 476 of the Code of Criminal Procedure, although a few cases did not follow the Code shortly after it came into force.<sup>62</sup>

Fourth, concerning (d) and (e), death row inmates are notified of their execution just one or two hours beforehand.<sup>63</sup> Up until the 1970s, they were notified at least one day in advance. However, this practice was changed after one capital inmate committed suicide owing to a significant disturbance of his emotional stability.<sup>64</sup> Recently, two death row inmates sued the government for confirmation and sought a court declaration that they are not obliged to accept the death penalty on the day of notification; they also demanded compensation for emotional distress, claiming that the practice of notification just before execution is unconstitutional.<sup>65</sup>

Fifth, concerning (e) and (f), only one decree stipulates the specific method of hanging: the Drawings of Equipment for Execution by Hanging,<sup>66</sup> issued in 1873 before the promulgation of the Imperial Japanese Constitution<sup>67</sup> in 1889 (see the figure below). Even now, this decree is recognized by the SC as being effective as a law enacted by the legislature,<sup>68</sup> and implementation of the death penalty is carried out based on it.<sup>69</sup>

62 *Shūgi-in gi'in Hosaka Nobuto-kun teishutsu, zangyaku na keibatsu ni kansuru shitsumon ni taisuru tōben-sho* [Written answers to questions on cruel punishment, submitted by Nobuto HOSAKA, a member of the House of Representatives], Written Answer No. 5, 6 March 1999, available at [https://www.shugiin.go.jp/internet/itdb\\_shitsumona.nsf/html/shitsumon/b145005.htm](https://www.shugiin.go.jp/internet/itdb_shitsumona.nsf/html/shitsumon/b145005.htm).

63 S. MATSUURA, *Shikei zenjitsu ni tsugetara jishi 'tōjitsu kokuchi ni aratameta' soshō de kunigawa setsumei* [Suicide of a man who was notified of his execution the day before it was to take place]: "We have now changed the notification to the day of the execution," explained the government in the lawsuit, *Asahi Shinbun*, 22 December 2022, available at [https://digital.asahi.com/articles/ASQDQ5KK6QDQPTIL00H.html?iref=pc\\_rellink\\_04](https://digital.asahi.com/articles/ASQDQ5KK6QDQPTIL00H.html?iref=pc_rellink_04).

64 *Id.*

65 Y. YONEDA, *Inmates sue state over executions imposed on day of notification*, *Asahi Shinbun*, 5 November 2021, available at <https://www.asahi.com/ajw/articles/14475725>.

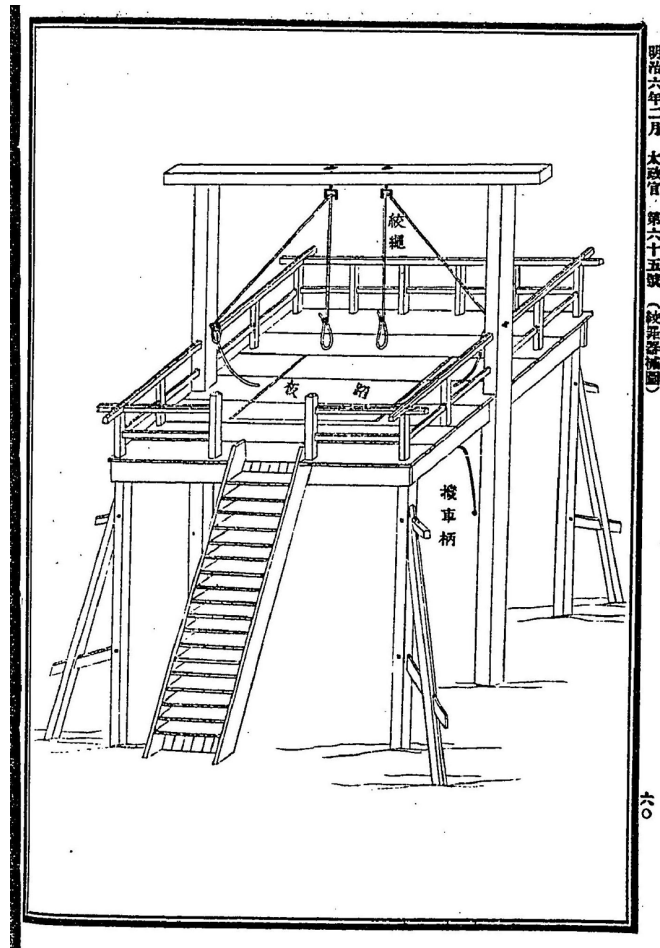
66 太政官布告 *Dajō-kan fukoku* (Decree issued by the Grand Council of State) No. 65/1873, 香西機械図式 *Kōzai kikai zushiki* (Drawings of Equipment for Execution by Hanging), No. 65/1873.

67 大日本帝国憲法 *Dai-nihon teikoku kenpō* (also known as *Meiji Kenpō*), Law No. 103/1889.

68 Supreme Court, 19 July 1961, 刑集 *Keishū* 15(7), 1106 (Grand bench judgment).

69 In the following drawing, the equipment for hanging is set on the ground and the death row inmates must go upstairs. However, the current mode of execution is an underground restraint system in which the hanging is carried out on a flat area with a

Figure: Drawings of Equipment for Execution by Hanging<sup>70</sup>



trapdoor opened by the executor, allowing the death row inmate's body to drop into the basement. Regarding this procedure, the supplementary opinion of Kenichi OKUNO from the 1961 SC judgment (*supra* note 68) stated that "the execution method of the underground restraint system reduces the emotional distress of inmates compared with the figure found in the decree by the Grand Council of State No. 65, and it rationally furthers the transition from public executions to execution done in secrecy. Therefore, it cannot be said that it does not comply with the aforementioned decree."

70 *Naikaku kanpō-kyoku* 内閣官報局, 法令全書 明治 6 年 [Statutes and Regulations of 1873], 1889, 60, available at <https://dl.ndl.go.jp/pid/787953/1/105>.

### 5. *The Constitutionality of Execution Methods*

Under what circumstances is an execution method deemed a cruel punishment according to Article 36 of the Japanese Constitution? Regarding this point, one SC ruling defines a cruel punishment as a “punishment that entails unnecessary psychological and physical suffering and is judged cruel from a humanitarian point of view.”<sup>71</sup> Is this applicable to Japanese executions using the method of hanging?

Regarding the method of execution, the 1948 SC decision,<sup>72</sup> as mentioned earlier, goes on to state that “for the death penalty, as for any other form of punishment, if the method of execution is deemed cruel by the standards of the situation and the times from a humanitarian perspective, the punishment shall be deemed cruel. If, in the future, laws are enacted that provide for executions through cruel methods such as burning at the stake, crucifixion, gibbeting a head, and boiling alive, such laws would certainly go against Article 36 of the Constitution.”<sup>73</sup> However, execution by hanging is not in violation of this standard.<sup>74</sup> A 1955 SC decision<sup>75</sup> further states that “methods of executions employed internationally include hanging, slashing by a sword, firing squad, electric chair, gas, and others, and although there are criticisms of the advantages and disadvantages of these various methods, compared with other such forms of punishment, our country’s use of hanging cannot be deemed an especially cruel form of punishment from a humanitarian viewpoint. Hence, there is no reason to consider that hanging violates Article 36 of the Constitution.”<sup>76</sup> Based on this SC decision, hanging has not yet been recognized as a cruel punishment under the Constitution.

### III. COULD THE EXECUTION METHOD BE UNCONSTITUTIONAL IN JAPAN?

As seen in Section II.1., the SC has definitively ruled that the death penalty is constitutional. Unconstitutionality might be argued based on the method of execution; however, as seen in Section II.5., the Supreme Court has ruled that hanging is not a cruel punishment. Given this opinion, it is understandable that some constitutional law scholars would conclude that “rather than focusing on building a theory of unconstitutionality targeted at judicial solutions, [...] it is more practical to work on the construction and dissemination

---

71 Supreme Court, 23 June 1948, 刑集 Keishū 2(7), 777 (Grand bench judgment).

72 Supreme Court, 12 March 1948, 刑集 Keishū 2(3), 191.

73 *Id.* at 194.

74 *Id.*

75 Supreme Court, 6 April 1955, 刑集 Keishū 9(4), 663 (Grand bench judgment).

76 *Id.* at 675.

of a theory of abolition of the death penalty as a policy and legislative argument.<sup>77</sup> Is this the only way to abolish the death penalty in Japan? Is there no room to dispute its constitutionality? In this section, I point out that, notwithstanding these SC rulings, we could argue for the unconstitutionality of the death penalty based on the logic of the SC rulings.

### 1. *Public Opinion on the Death Penalty*

Is it possible to decide whether the death penalty constitutes a cruel punishment according to public opinion or national sentiment? The supplementary opinion of four SC Justices in the previously mentioned SC 1948 ruling<sup>78</sup> stated that “the Constitution only made such provisions [Article 31] by reflecting national sentiment at the time of its enactment, and it cannot be considered as a permanent endorsement of the death penalty. Whether a punishment is cruel is a matter *determined by public sentiment*. Therefore, what was not considered as cruel and inhumane at one time may be judged to be cruel and inhumane at a later time. Therefore, if the national culture develops to an extent where a peaceful society based on justice and order is realized and the threat of the death penalty is considered unnecessary to deter crime for public welfare, *public sentiment* would certainly turn against the death penalty as a cruel punishment. Under such circumstances, Article 31 of the Constitution would be *reinterpreted* and the death penalty would be found to be unconstitutional as a cruel punishment and abolished.”<sup>79</sup>

Within academia, however, it has been pointed out that “such a perspective seems rather far-fetched as a constitutional interpretation.”<sup>80</sup> On this point, the decision of the Supreme Court of the Republic of South Africa is suggestive. In *S v Makwanyane*,<sup>81</sup> which declared the death penalty unconstitutional under the interim Constitution of 1993, the Supreme Court of South Africa said that although “[t]he Attorney General argued that what is cruel, inhuman or degrading depends to a large extent upon contemporary attitudes within society, and that South African society does not regard the death sentence for extreme cases of murder as a cruel, inhuman or degrading form of punishment,” “[t]he question before us, however, is not what the majority of South Africans believe a proper sentence for murder should be. It is whether the Constitution allows the sentence.” “Public opinion may have some relevance to the inquiry, but in itself, it is no substitute for the

---

77 See, e.g., Y. OKUDAIRA, *Kenpō III: Kenpō ga hoshō suru kenri* [Constitutional Law III: Rights Guaranteed by the Constitution] (1993) 389.

78 Supreme Court, 12 March 1948, 刑集 Keishū 2(3), 191.

79 *Id.* at 196 (emphasis added).

80 SATŌ, *supra* note 43, at 377.

81 *S v Makwanyane*, (CCT3/94) [1995] ZACC 3.

duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favor. If public opinion were to be decisive there would be no need for constitutional adjudication.”<sup>82</sup> Similarly, as the Indian Supreme Court said in *Chhannu Lal Verma vs. The State of Chhattisgarh*,<sup>83</sup> “[t]he Court’s duty to be constitutionally correct even when its view is counter-majoritarian is also a factor which should weigh with the Court when it deals with the collective conscience of the people or public opinion. After all, society’s perspective is generally formed by emotionally charged narratives. Such narratives need not necessarily be legally correct, properly informed, or procedurally proper.”<sup>84</sup>

I agree with the criticisms of resorting to public opinion to decide the death penalty’s constitutionality. Still, because this article aims to discuss the unconstitutionality of the death penalty based on the logic of the Supreme Court ruling, it suffices to point out that resorting to public opinion on the death penalty to vindicate its unconstitutionality would be difficult in Japan.<sup>85</sup>

## 2. *Public Opinion on the Execution Method*

Here, we can focus on the SC’s decision that four alternative methods of execution—burning at the stake, crucifixion, gibbeting a head, and boiling alive—constitute cruel punishments. Of these four, burning at the stake, crucifixion, and boiling alive undoubtedly involve “unnecessary psychological and physical suffering.” However, gibbeting a head, meaning the display of a severed head, is different from the other three in that it merely involves the treatment of the prisoner’s body *after* the execution is carried out.<sup>86</sup> Its inclusion in the list of cruel punishments could imply that deter-

---

82 *Id.* paras. 87–88.

83 *Chhannu Verma v. State of Chhattisgarh*, 2018 SCC OnLine SC 2570.

84 *Id.* para. 24.

85 The “standard of public sentiment” in Japan, which decides whether the death penalty is constitutional, relies on public sentiment, making it similar to the idea that the cruelty or unusualness in the Eighth Amendment of the US Constitution, which provides that “excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted,” is decided by “evolving standards of decency that mark the progress of a maturing society.” This “evolving standards of decency” criterion was established by *Trop v. Dulles*, 356 U.S. 86, 101 (1958), a non-death penalty case, and has been used since then in *Furman v. Georgia*, 408 U.S. 238 (1972), *Gregg v. Georgia*, 428 U.S. 153, 156 (1976), and other cases. In *Gregg v. Georgia*, the US Supreme Court used this standard in rejecting the unconstitutionality of the death penalty.

86 The US Supreme Court, *in re Kemmler*, 136 U.S. 436, 446–447 (1890), decided that “if the punishment prescribed for an offense against the laws of the state were man-

mining what is cruel involves the probable suffering of the person being executed *and* the general public's standpoint.<sup>87</sup> In line with this interpretation, the 2011 ruling of the Ōsaka District Court held that “a method of execution should be considered to be a ‘cruel punishment’ only in a limited case when it is so impersonal and inhumane that *it shocks a person with ordinary emotions*.”<sup>88</sup> This statement reflects the acceptance of judging a punishment's cruelty from the standpoint of the executed *and* the general public.

Based on these considerations, it may be possible to argue that hanging is cruel under the Constitution from the public's standpoint. However, in that case, Japan's secrecy about implementing the death penalty becomes an issue. In the past, information on whether executions took place was not made public to avoid causing any disadvantage or emotional distress to death row inmates or to related people and possibly undermining the emotional stability of other inmates sentenced to death. For the first time in 1998, the facts and the number of executions were made public on the day of execution.<sup>89</sup> In 2007, soon after the execution of three people, their names, the crimes committed, and the place of execution were made public for the first time to give notice of the executions.<sup>90</sup> In 2010, the “execution sites” within prisons were made public to the media for the first time. These

---

ifestly cruel and unusual as burning at the stake, crucifixion, breaking on the wheel, or the like, it would be the duty of the courts to adjudge such penalties to be within the constitutional prohibition. And we think this equally true of the Eight Amendment, in its application to Congress [...] Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel within the meaning of that word as used in the Constitution. It implies something inhumane and barbarous – something more than the mere extinguishment of life.” This understanding is similar to that of the SC, but it did not include a garrotted head as an example of a manifest cruel punishment.

- 87 T. TSUCHIMOTO, *Kōshu-kei no zangyaku-sei* [Brutality of Hanging], *Sōsa Kenkyū* 726 (2011) 115.
- 88 Ōsaka District Court, 31 October 2011, 判例タイムズ Hanrei Taimuzu 1897, 104 (judgment) (emphasis added). Using this standard, however, the Ōsaka District Court held that hanging is *not* a cruel punishment. See *infra* III.4.
- 89 Prior to this, the number of death sentences carried out each year was published in the Annual Report of the Prosecutor's Statistics. *Shūgi-in gi'in Hosaka Nobuto-kun teishutsu, shikei shikkō to hōmu-shō ni kansuru shitsumon ni taisuru tōben-sho* [Written Answers to Questions on the Execution of the Death Penalty and Department of Justice submitted by Nobuto HOSAKA, a member of the House of Representatives], Written Answer No. 1, 26 January 1999, available at [https://www.shugiin.go.jp/internet/itdb\\_shitsumona.nsf/html/shitsumon/b144001.htm](https://www.shugiin.go.jp/internet/itdb_shitsumona.nsf/html/shitsumon/b144001.htm).
- 90 SHŪGI-IN CHŌSA-KYOKU HŌMU CHŌSA SHITSU [House of Representatives Research Bureau, Legal Research Division], *Shikei seido ni kansuru shiryō* [Materials on the Death Penalty], June 2008, 11.

facts demonstrate Japan's secretive nature about the death penalty.<sup>91</sup> If the cruelty of the method of execution is determined by the general public's standpoint, the availability of adequate information is a prerequisite for taking public opinion into consideration. The cruelty of executions cannot be discussed under a veil of secrecy, as the 2006 report of the special rapporteur of the UN Commission on Human Rights pointed out:

"Informed public debate about capital punishment is possible only with transparency regarding its administration. There is an obvious inconsistency when a State invokes public opinion on the one hand, while on the other hand deliberately withholds relevant information on the use of the death penalty from the public. How can the public be said to favour a practice about which it knows next to nothing? If public opinion really is an important consideration for a country, it would seem that the Government should facilitate access to the relevant information so as to make this opinion as informed as possible. It is unacceptable for a Government to insist on a principled defence of the death penalty but to refuse to divulge to its own population the extent to which, and the reasons for which, it is being applied."<sup>92</sup>

### 3. *Unnecessary Psychological and Physical Suffering*

Another way to determine whether hanging is cruel would be to argue that it inflicts unnecessary physical suffering according to *modern medical standards*. In Japan, hanging has not been considered as inflicting unnecessary physical suffering based on a 1952 opinion written by forensic scientist and medical doctor Tanemoto FURUHATA (the "Furuhata appraisal report").<sup>93</sup> FURUHATA argued in his report, based on the medical standards of that time, that "strangulation, when carried out in the most ideal way, is superior to other methods in that it does not damage the corpse, does not cause pain to the individual who is sentenced to death (except for psychological pain), and does not leave an impression of cruelty after death." Although FURUHATA said that "it is common knowledge in forensic medicine that [...] death by hanging is the most painless and easy way to die," modern medical standards now consider the possibility that hanging does inflict physical suffering.<sup>94</sup> Hence, it could be considered an execution method

---

91 'Shikei no keijō hōdō kikan ni hajimete kōkai' [Place of execution opened to the press for the first time], Yomiuri Shinbun, 27 August 2010.

92 UN Commission on Human Rights, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions: Transparency and the Imposition of the Death Penalty, 24 March 2006, para. 21, E/CN.4/2006/53/Add.3, available at <https://www.refworld.org/docid/45377b310.html>.

93 The Furuhata appraisal report is contained in: T. MUKAE, *Shikei haishi-ron no kenkyū* [Studies on the Abolition of Capital Punishment] (1960) 424.

94 DEFENSE COUNSEL TEAM FOR NAKAGAWA TOMOMASA AND WALTER LUBBLE (eds.), *Kōshu-kei wa zangyaku na keibatsu dewa nai no ka: Shinbun to hō-igaku ga*

that “inflicts *unnecessary* psychological and physical suffering” and argued to be a cruel punishment banned by Article 36 of the Constitution.

However, the 2011 Ōsaka District Court ruled in a jury trial that hanging is constitutional.<sup>95</sup> Although it acknowledged that hanging might cause physical suffering, the court denied that it constitutes a cruel punishment. The Ōsaka District Court conceded that “in many cases of hanging, *the inmate may suffer continuous pain* until the loss of consciousness that takes at the least 5–8 seconds or, depending on how the neck is squeezed, may take up to two minutes or more. Moreover, under some conditions, hanging may be accompanied by decapitation and, in particular, may sever the internal structures of the neck. When judicial hanging is carried out, we cannot reliably predict how the inmate dies.” Nevertheless, the court side-stepped the issue of unconstitutionality by arguing that,

“The death penalty is a system that forces condemned inmates to atone for their crimes; it does so by taking their life against their will. *The death penalty inevitably inflicts mental and physical pain on the inmate and involves brutality to some extent.* As the Constitution allows the death penalty to be retained, it evidently considers such pain to be *unavoidable and inevitable.* Therefore, an execution method constitutes a ‘cruel punishment,’ which is prohibited by Article 36 of the Constitution, *only when it is especially brutal among the possible execution methods.* Indeed, an execution method that inflicts *unnecessary pain* on an inmate, dishonors, or insults them shall never be permitted. However, it is obviously not required that an execution method shall relieve the mental and physical pain of the inmate to the utmost extent and keep them to the minimum as if execution is a medical treatment. *An execution method should be considered a ‘cruel punishment’ only when it is so impersonal and inhumane that it shocks a person with ordinary emotions.*”<sup>96</sup>

The appellate court, while recognizing that inmates may experience suffering, held that “the method of punishment does not inflict unnecessary psychological and physical pain, or significant physical injury, to a degree that could be considered to be cruel.”<sup>97</sup>

---

*kataru shinjitsu* [Is Hanging Not a Cruel Punishment? The Truth Newspapers and Forensic Medicine Exposes] (2011).

95 In the case at issue, the defendant set fire to a pachinko parlor after pouring gasoline inside it during business hours, thereby burning to death five of the parlor’s customers and employees and injuring ten others. This became the first case in which a lay judge (裁判員 *saiban-in*) took part in considering the death penalty’s constitutionality.

96 See *supra* note 88 (emphasis added).

97 Ōsaka High Court, 31 July 2013, 判例タイムズ Hanrei Taimuzu 1417, 174 (judgment).

#### 4. Comparison with Other Methods

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.” Hence, there is room for doubt about the ruling’s compatibility with Supreme Court precedents. However, the final appeal to the SC, based on a violation of the Constitution or an error in its interpretation, was dismissed.<sup>98</sup> Nonetheless, the consideration of whether hanging causes “unnecessary and/or intentional psychological and physical suffering” could still make the method of hanging unconstitutional. As one US Supreme Court decision stated, if capital punishment is constitutional,<sup>99</sup>

“[i]t necessarily follows that there must be a means of carrying it out. Some risk of pain is inherent in any method of execution – no matter how humane – if only from the prospect of error in following the required procedure. Clearly, the Constitution does not demand the avoidance of all risk of pain in carrying out executions.”<sup>100</sup>

However, if an execution method could cause the executed some pain, we must examine whether that pain is necessary or not. This examination requires a *comparison* with other methods, because whether the execution method in question imposes unnecessary pain depends on the availability of less painful methods. If other methods would cause less pain than hanging, the continued use hanging as an execution method could then be evaluated as an *intentional* imposition of *unnecessary* pain.

Here, reference to precedents in the United States, which carries out many more executions than Japan, is helpful.<sup>101</sup> In the United States, hanging was primarily the sole execution method until the mid-19<sup>th</sup> century.<sup>102</sup> However, in 1888, New York introduced electric chair executions based on the recommendation of a commission empaneled by the governor to find the most humane and practical method known to modern science for executing inmates.<sup>103</sup> New York thus became the first state to authorize elec-

---

98 Supreme Court, 23 February 2016, 集刑 Shūkei 319, 1 (Third petty bench judgment).

99 Here the US Supreme cited its decision *Gregg v. Georgia*, 428 U.S. 153, 177 (1976).

100 *Baze v. Rees*, 553 U.S. 35, 47 (2008).

101 For a brief overview, see *id.* at 41–42. For a detailed overview of the history, see, e.g., R. PATERNOSTER/R. BRAME/S. BACON, *The Death Penalty America’s Experience with Capital Punishment* (2007) part I.

102 D. W. DENNO, *Getting to Death: Are Executions Constitutional?*, *Iowa Law Review* 82 (1997) 319, 364.

103 *Id.* at 373. D. W. DENNO, *Is Electrocutation an Unconstitutional Method of Execution? The Engineering of Death over the Century?*, *William & Mary Law Review* 35 (1994) 551, 566–577.

trocution as a form of capital punishment. Soon after, the U.S. Supreme Court decided that the electrocution was not unconstitutional,<sup>104</sup> and the electric chair became the leading method for implementing the death penalty in the U.S.<sup>105</sup> In the 20<sup>th</sup> century, execution by firing squad and the gas chamber were occasionally used alongside hanging; however, electrocutions were the predominant choice for the death penalty. In the mid-1970s, state legislatures began to re-examine electrocution as a means of ensuring a humane death. In 1977, after consulting with the head of the anesthesiology department at the College of Medicine at the University of Oklahoma, Oklahoma introduced execution through lethal injection for the first time. Lethal injection, *if administered properly*, is an execution method that could inflict *no* suffering on the inmate.<sup>106</sup> Accordingly, the states presently imposing the death penalty have adopted injection as the sole or the first-choice method of execution, and this method has become standard.<sup>107</sup> Indeed, the US Supreme Court has held that lethal injection is not a cruel or an unusual punishment.<sup>108</sup>

As the history of execution in the United States demonstrates, the country actively considers a humane execution method as one that involves the least suffering.<sup>109</sup> This is notably different from Japan, which continues to adhere to a practice based on a decree published approximately 140 years ago, as mentioned in Section II-4. Because other execution methods can reduce “unnecessary psychological and physical suffering” to the utmost limit, 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”

---

104 *In re Kemmler*, 136 U.S. 436 (1890).

105 P. R. NUGENT, Pulling the Plug on the Electric Chair: The Unconstitutionality of Electrocution, *William & Mary Bill of Rights Journal* 2 (1993) 185, 195.

106 *In Baze v. Rees*, even petitioners who asserted the unconstitutionality of the lethal injection protocol in Kentucky conceded that if performed properly, an execution carried out under Kentucky’s procedures would be humane and constitutional. *Baze*, 553 U.S. at 41, 49. There are, however, some objections to such a conclusion from a medical science perspective. *See e.g.*, L. G. KONIARIS et al., Inadequate Anaesthesia in Lethal Injection for Execution, *Lancet* 365 (2005) 1412.

107 Death Penalty Information Center, *Methods of Execution*, available at <https://deathpenaltyinfo.org/executions/methods-of-execution>.

108 *Baze*, 553 U.S.; *Glossip v. Gross*, 135 S. Ct. 2726 (2015); *Bucklew v. Precythe*, 135 S. Ct. 2726 (2019).

109 Behind this principle there lie, however, many “botched executions.” *See* A. SARAT, *Grotesque Spectacles: Botched Executions and America’s Death Penalty* (2014).

mental and physical suffering on the executed.<sup>110</sup> In *Bucklew v. Precythe*,<sup>111</sup> the latest decision affirming the constitutionality of lethal injection, the US Supreme Court held, citing previous decisions,<sup>112</sup> that in order to establish that “the State’s chosen method of execution cruelly superadds pain to the death sentence, a prisoner must show a feasible and readily implemented alternative method of execution that would significantly reduce a substantial risk of severe pain and that the State has refused to adopt without a legitimate penological reason.”<sup>113</sup> If Japan were to employ this standard, it would be possible to demonstrate the unconstitutionality of hanging as a method of execution. Currently, three death row inmates in Japan are seeking an injunction against execution by hanging, claiming its cruelty.<sup>114</sup> The outcome of this litigation is unclear, but if the Japanese courts use the standard of “unnecessary psychological and physical suffering” properly, they should not ignore execution methods introduced in other countries that may minimize suffering.

Some issues about the usage of lethal injection remain.<sup>115</sup> For example, in the United States, drug companies face difficulties in supplying the necessary drugs because of the negative reactions they face given their products’ use in the deaths of inmates. Furthermore, it is difficult to secure physicians to administer drug injections, and there have been cases of mishandling at the time of execution. Because of these factors, in May 2021 South Carolina reintroduced executions by electrocution and firing squad,<sup>116</sup> becoming the only state thus far to use these methods as default means of execution. If these problems were to materialize in Japan, replacing hanging with lethal injection would become unrealistic, and hanging would not be considered a cruel punishment, since the assessment of cruel derives

---

110 If lethal injection was scientifically proven to cause unnecessary psychological and physical suffering, hanging could not be said to impose “unnecessary” or/and “intentional” mental and physical suffering as compared with lethal injection.

111 *Bucklew v. Precythe*, 135 S. Ct. 2726 (2019).

112 *Baze*, 553 U.S. at 52; *Glossip*, 135 S. Ct. at 2732–2738.

113 *Bucklew*, 135 S. Ct. at 1125.

114 “Japan death-row inmates seek end to hanging”, Japan Times, 29 November 2022, available at <https://www.japantimes.co.jp/news/2022/11/29/national/crime-legal/osaka-death-row-inmates-end-hanging/>.

115 See generally D. W. DENNO, *Lethal Injection Chaos Post-Baze*, Georgetown Law Journal 102 (2014) 1331, 1360–1376.

116 See C. M. MARCOS, *South Carolina: New law makes inmates choose firing squad or electric chair*, The Guardian, 17 May 2021, available at <https://www.theguardian.com/us-news/2021/may/17/south-carolina-law-death-row-inmates-firing-squad-electric-chair>.

from the fact that there are other less cruel methods de facto available and that they are intentionally disregarded.

#### IV. CONCLUSION

In this article, I have reasoned from the viewpoint of the interpretation of the Constitution that, although it is difficult to argue for the unconstitutionality of the death penalty based on the SC's firm precedent, an argument could be made that the practice of hanging is not in accordance with other precedents and is thus unconstitutional. Since this argument implicitly allows for an execution method that eliminates "unnecessary and/or intentional psychological and physical suffering," such as lethal injection, it may be rejected by those calling for the complete abolition of the death penalty system. However, this path is, at the least, more realistic than continuing to argue for the general unconstitutionality of the death penalty, an argument which has no chance of being accepted by the SC. This article has shed light on the death penalty, the current method, and its level of cruelty compared with the supposedly most humane method, lethal injection; it has as well offered some evidence that might change public opinion on the death penalty. Such arguments could be the first step in the thousand-mile journey that ends with the abolition of the death penalty in Japan.

#### SUMMARY

*Japan employs the death penalty as part of its criminal justice system, and a majority of the Japanese people support the use of the death penalty. While there is a clear global trend to abolish the death penalty, Japan has no legal obligation to obey the trend. The constitutionality of the death penalty rests on stable precedent issued by the Supreme Court of Japan (SC). Although many constitutional law academics have criticized the reasoning behind the constitutionality of the death penalty as stated by the SC, there is little possibility that their claims will be accepted by the SC. There is no prospect of the death penalty being abolished in the near future. However, in this article, I present a way to raise the unconstitutionality of the death penalty, not by criticizing the court's decisions, but by accepting its reasoning and instead focusing on the cruelty of the method of execution in Japan, namely hanging. Article 36 of the Japanese Constitution prohibits the imposition of "cruel punishment," and courts think an execution method should be considered a "cruel punishment" when it causes unnecessary and/or intentional psychological and physical suffering. Based on modern medical standards and comparison to other, more humane methods of execution, such as lethal injection, this article argues that*

*hanging could be found unconstitutional in the future even if we accept the SC's current body of rulings. This argument may be rejected by those calling for the complete abolition of the death penalty system. However, this path is, at the least, more realistic than continuing to argue for the unconstitutionality of the death penalty, a position which has no chance of being accepted by the SC. Such an argument could be the first step in the thousand-mile journey that ends with the abolition of the death penalty in Japan.*

#### ZUSAMMENFASSUNG

*In Japan gibt es die Todesstrafe und ihre Existenz wird von der Mehrheit der japanischen Bevölkerung befürwortet. Auch wenn es weltweit einen klaren Trend zur Abschaffung der Todesstrafe gibt, ist Japan rechtlich nicht verpflichtet, diesem Trend zu folgen. Die Verfassungsmäßigkeit der Todesstrafe ist ständige Rechtsprechung des Obersten Gerichtshofs Japans (OGH). Obwohl die Begründung des OGH für die Verfassungsmäßigkeit der Todesstrafe von vielen Verfassungsrechtlern kritisiert wird, ist es unwahrscheinlich, dass diese Stimmen beim OGH Gehör finden werden. Es ist nicht ersichtlich, dass die Todesstrafe in naher Zukunft abgeschafft werden wird. In diesem Artikel wählt der Autor einen anderen Ansatz, die Verfassungswidrigkeit der Todesstrafe zu erörtern. Dabei akzeptiert er die ständige Rechtsprechung und widmet sich stattdessen der Frage, inwiefern die konkrete Hinrichtungsmethode grausam ist. Artikel 36 der japanischen Verfassung verbietet die Verhängung einer „grausamen Strafe“. Nach der Rechtsprechung ist eine Hinrichtungsmethode dann als „grausame Strafe“ zu betrachten, wenn sie unnötiges und/oder absichtliches psychisches und physisches Leid verursacht. Auf der Grundlage moderner medizinischer Standards und unter Heranziehung anderer humanerer Hinrichtungsmethoden, wie bspw. der Giftspritze, wird in diesem Artikel argumentiert, dass die Hinrichtung durch den Strang zukünftig als verfassungswidrig erklärt werden könnte, selbst wenn die Rechtsprechung des OGH bezüglich der Verfassungsmäßigkeit der Todesstrafe allgemein bestehen bliebe. Der Autor argumentiert, dass diese Argumentation vor dem Hintergrund der Haltung des OGH erfolversprechender sei als die Forderung einer vollständigen Abschaffung der Todesstrafe, auch wenn dieses Vorgehen für diejenigen, die sich für Abschaffung der Todesstrafe einsetzen, unbefriedigend sein könnte. Seine Argumentation könnte stattdessen den ersten Schritt darstellen, auf einem tausend Meilen langen Weg zur Abschaffung der Todesstrafe in Japan.*

*(Die Redaktion)*