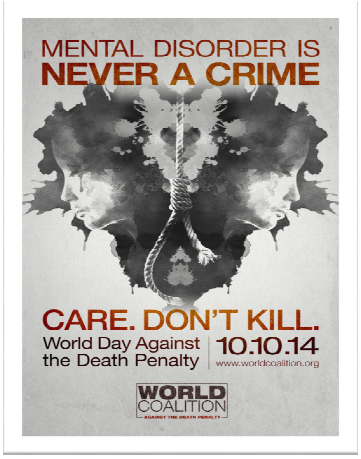
WORLD COALITION AGAINST THE DEATH PENALTY

DEATH PENALTY AND MENTAL HEALTH

Detailed factsheet

12th World Day Against the Death Penalty



On 10 October 2014, the World Coalition Against the Death Penalty and other abolitionists worldwide will mark the 12th World Day Against the Death Penalty by drawing attention to the special concerns faced by accused and condemned prisoners with mental health problems. While opposing the death penalty absolutely, abolitionists are also concerned to see existing protections implemented. Among these is the requirement in human rights standards that persons with serious mental illness or intellectual disabilities should not face the death penalty.

Background

The death penalty, where it is provided for in law, is required to be reserved for the most serious offenders (the "worst of the worst") and to offer the highest level of protection for those subject to it. International standards provide protection for specific populations who should never be subject to execution: children, pregnant women and "the insane".

Between 2010 and 2013, only 31 countries carried out executions.[1] The overwhelming majority of states in the world – more than 160 – did not resort to the death penalty in the same period. The decades-long trend towards abolition continues.[2] However, while the death penalty remains, persons with mental disabilities are at risk of being sentenced to death and executed in breach of international standards. This briefing paper shows why such executions must end.

What is mental health?

The World Health Organization (WHO) defines health not only in terms of physical health but also with respect to *mental* health. According to the WHO, good mental health refers to "a state of well-being in which the individual realizes his or her own abilities, can cope with the normal stresses of life, can work productively and fruitfully, and is able to make a contribution to his or her community." [3] By contrast, mental ill-health or mental disorder comprises various conditions characterized by impairment of cognitive, emotional, or social

[1] Amnesty International data. www.amnesty.org. The number of countries carrying out executions each year from 2010-2013 was, respectively, 23, 20, 21, and 22.

[2] Amnesty International. Death sentences and executions in 2013. Available at www.amnesty.org

[3] WHO. Strengthening mental health promotion. Geneva, World Health Organization, 2001: Fact sheet, No. 220.

functioning caused by psychosocial or biological factors. In other cases, impairments of intellectual capacity occurs as a result of developmental disorders.

Both types of impairments and disorders affect behaviour, decision-making and culpability for actions and for this reason are widely considered in legal processes including capital trials. Mental illness can often be alleviated by treatment and is generally not related to intellectual capacity, while intellectual disability (called mental retardation in legal and medical texts) which starts before the age of 18, is generally lifelong, and is manifested by sub-average intellectual capacity (see below).

Convention on the Rights of Persons with Disabilities (2007)

States Parties shall ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of this Convention… Article 14(2)

Increasingly, since the adoption of the Convention on the Rights of Persons with Disabilities (2006)[4] the concepts and language of "mental illness" have been challenged by a disability perspective reflecting the core values of non-discrimination and equal rights. The term "psychosocial disabilities" is emerging as an alternative to "mental illness", to underline both psychological and social components and to focus on the disabling effect of the disorder and the relevance of the CRPD.

What are mental disabilities?

The language of disability is rapidly changing. Terms from the medical and legal fields such as mental illness and mental retardation are being supplemented by terms from the disability advocacy movement such as psychosocial disability (rather than mental illness) and intellectual disability (rather than mental retardation). However most death penalty laws retain earlier terminology and for that reason it is hard to avoid the existing legal terms.

- "Insanity". This term which still appears within legal and legislative terminology refers to persons' capacity to understand "the nature and quality" of their acts or, if they did understand it, not to know of the wrongness of their action. "Insanity" is not found in psychiatric diagnostic manuals – it is a legal term.

- Mental illness / Psychosocial disability. These terms refer to: (i) a medical or psychological condition that disrupts a person's thinking, feeling, mood, ability to relate to others and daily functioning"[5]; (ii) the interaction between psychological and social/cultural components of … disability. The psychological component refers to ways of thinking and processing… experiences and…perceptions of the world…The social/ cultural component refers to societal and cultural limits for behaviour that interact with those psychological differences/madness as well as the stigma that society attaches to …[the]…label …of… disabled.[6]

[4] The Convention on the Rights of Persons with Disabilities. UN Doc**.** A/61/611, 6 December 2006, http://www.un.org/esa/socdev/enable/rights/convtexte.htm.

[5] National Alliance on Mental Illness. What is mental illness? http://www.nami.org/Template.cfm?Section=By_Illness

[6] World Network of Users and Survivors of Psychiatry, 2008, Implementation Manual for the UN Convention on the Rights of Persons with Disabilities.

- Mental retardation / Intellectual disability. Intellectual Disability (Intellectual Developmental Disorder) is a disorder with onset during the developmental period that includes both intellectual and adaptive deficits in in conceptual, social and practical domains.[7] With appropriate support, people with intellectual disability can function semi-independently, but will always have significant deficits and support needs.

- Organic brain injury. This refers to injury to the brain caused by a variety of traumatic events such as blows to the head, car accidents, or falls, or events such as asphyxiation, stroke, and substance abuse. The impact of these events is to decrease the capacity of the brain to function effectively leading to cognitive impairments which may (depending on the age at which the injury occurred, and the existence of sufficient adaptive deficits), to also cause the individual to be diagnosed with intellectual disability.

- Degenerative brain disorders. These include dementia and usually occur in later life, causing limits to intellectual functioning.

2. Why are mental and intellectual disabilities an issue in the death penalty?

For centuries, there has been a widespread understanding that persons committing crimes while affected at the time or subsequently by "insanity" should be exempt from the death penalty based on the view that such persons lacked understanding of their action and thus had a lesser level of culpability.

In Japan, the legal code Youro Ritsuryo, introduced in the eighth century, reduced the punishment applicable to people affected by insanity.[8]

According to the 13th century English jurist Bracton, "...a crime is not committed unless the intention to injure exists, as may be said of a child or a madman, since the absence of intention protects the one and the unkindness of fate excuses the other."[9]

In those countries influenced by English common law, legal thinking was guided by opinion of eminent jurists such as Sir Edward Coke who wrote in 1680 that it was the intention of the law that an execution should be an example to the public, but that when a "mad man" is executed, *"[it] should be a miserable spectacle, both against Law, and of extreme inhumanity and cruelty, and can be no example to others."*

A century later William Blackstone asserted that:

"[I]f a man in his sound memory commits a capital offence, and before arraignment for it, he becomes mad, he ought not to be arraigned for it . . . . And if, after he has pleaded, the prisoner becomes mad, he shall not be tried; for how can he make his defence?

[7] The principal US organization on intellectual disability—the American Association on Intellectual and Developmental Disabilities -- changed terminology from "mental retardation" to "intellectual disability" in 2005. The American Psychiatric Association has adopted the term "Intellectual Disability (Intellectual Developmental Disorder)" in its most recent diagnostic manual (DSM-5 Guidebook, p. 34). The WHO is expected to do likewise in the forthcoming edition of its diagnostic manual (ICD-11).

[8] G. Hiruta, Criminal responsibility and confinement of the insane from antiquity to early modern Japan, Seishin Shinkeigaku Zasshi, 2003;105(2):187-93. Cited in Amnesty International. Hanging by a Thread: Mental Health and the Death Penalty in Japan. ASA 22/05/2009.

[9] Bracton Online: Bracton: De Legibus et Consuetudinibus Angliæ (Bracton on the Laws and Customs of England, attributed to Henry of Bratton, c. 1210-1268) Vol 2, p.384. Available at Harvard Law School Library: http://hlsl5.law.harvard.edu/bracton/Common/calendar.htm.

If, after he be tried and found guilty, he loses his senses before judgment, judgment shall not be pronounced; and if, after judgment, he becomes of nonsane memory, execution shall be stayed."[10]

In the 19th century, the landmark ruling in the British House of Lords in the case of M'Naughten -- the so-called M'Naughten Rules of 1843 -- stated that to acquit an accused for reasons of insanity, "it must be clearly proved that, at the time of committing the act, the part accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or if he did know it, that he did not know that what he was doing was wrong".[11]

By the late 20th century, the US Supreme Court echoed these earlier observations concluding (in the case of *Ford v Wainwright*) that "the reasons at common law for not condoning the execution of the insane -- that such an execution has questionable retributive value, presents no example to others, and thus has no deterrence value, and simply offends humanity -- find enforcement in the Eighth Amendment [against cruel and unusual punishment]."[12] Since that ruling in 1986, it has been unconstitutional to execute persons who "are unaware of the punishment they are about to suffer and why they are to suffer it." However, in practice, it has provided weak protection for those with serious mental conditions.[13]

In Japan, the Code of Criminal Procedure[14] provides that "If a person condemned to death is in a state of insanity, the execution shall be stayed by order of the Minister of Justice".

In fact, according to UN studies in the 1960s, all states surveyed have some form of provision to exempt "insane" prisoners from the death penalty.[15] Yet, prisons still hold prisoners under sentence of death who are suffering serious mental disorders, and states continue to execute some of them.

2.1 Lack of availability of treatment can represent a missed opportunity

As commentators have noted, prisons are becoming the mental institutions of the 21st century.[16] This reflects, at least in part, the failure of societies to provide adequate care and support to people with mental and intellectual disabilities. It is important to stress that people with mental disabilities do not, in general, pose a higher risk of violence than the general population[17] though there is considerable evidence that they are at greater risk of *becoming* victims of violence than average.[18] However, there are numerous cases of people who were in

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[10] William Blackstone, Commentaries on the Laws of England 24-25 (1st English ed. 1769).

[11] See Daniel M'Naghten's Case, 8 ER 718, 1843 (UKHL J16). Available: http://www.bailii.org/uk/cases/UKHL/1843/J16.html

[12] *Ford v Wainwright* 477 U.S. 399, at 400.

[13] Amnesty International. USA: The execution of mentally ill offenders, AMR 51/03/2006.

[14] Code of Criminal Procedure (Act 131), Article 479(1), cited in Amnesty International. Hanging by a Thread: Mental Health and the Death Penalty in Japan. ASA 22/05/2009.

[15] Hood R, Hoyle C. The Death Penalty: A Worldwide Perspective. Fourth Edition, Oxford University Press, 2008.

[16] White P, Whiteford H. Prisons: mental health institutions of the 21st century? *Medical Journal of Australia* 2006; 185 (6): 302-303.

[17] There is an increased risk of violence in cases of persons with serious mental illness and concurrent substance misuse problems though the linkages are complex. (see, eg, Elbogen EB, Johnson SC. The Intricate Link between Violence and Mental Disorder…. *Archives of General Psychiatry* 2009;66(2):152-161; http://archpsyc.jamanetwork.com/article.aspx?articleid=210191; and Fazel S, Gulati G, Linsell L, Geddes JR, Grann M. Schizophrenia and violence: systematic review and meta-analysis. PLoS Med 2009;6:e1000120; http://www.plosmedicine.org/article/info%3Adoi%2F10.1371%2Fjournal.pmed.1000120)

[18] See, for example, Crump C et al. Mental disorders and vulnerability to homicidal death: Swedish nationwide cohort study. *British Medical Journal* 2013;346:

need of mental health care which they did not receive – and they then went on to commit acts of violence.

Morris Mason, Virginia, USA, 1985
Morris Mason committed a murder after having unsuccessfully asked his parole officer twice in the previous week for help for his alcohol and drug abuse problem. On the day before the murder, he had asked to be placed in a halfway house but no place was available. Mason had a long history of mental illness, including paranoid schizophrenia, and had spent time in three different state mental institutions. Also, in the eight years before his 1978 trial, three different psychiatrists had independently diagnosed Mason with paranoid schizophrenia, but he was nevertheless executed in 1985. [19]

Dalton Prejean, Louisiana, USA, 1990
Dalton Prejean was a black defendant convicted by an all-white jury of the murder of a white police officer committed when Prejean was 17. Before the murder, he had been confined in various institutions between 1972 and 1976, during which time he was diagnosed as suffering from various mental conditions, including schizophrenia and depression. His IQ was indicative of intellectual disabilities. At the age of 14, he was convicted as a juvenile for killing a taxi driver. Medical specialists at that time said that he would require "long-term in-patient hospitalization" under strict supervision and that he would benefit from a secure and controlled environment. However, he was released in 1976 without supervision because no state funding was available for further institutional care. Tests carried out in 1984 revealed that he suffered from organic brain damage, which impaired his capacity to control his behaviour. He was executed under the standards that permitted the application of the death penalty to juvenile offenders. He was executed in 1990 at the age of 30.[20]

Larry Robison, Texas, USA, 2000
Larry Robison was executed in Texas on 21 January 2000, for the 1982 murder of five people in Fort Worth. He always maintained that the lethal events of that day resulted from hallucinations brought on by his mental illness. He was first diagnosed as suffering from paranoid schizophrenia in 1979, three years before the murders, but the Texas mental health care services repeatedly said that they did not have the resources to treat him unless he became violent. In the year before his execution, Robison's mother, Lois, said, "If Larry had got the treatment that we begged for years, five people would be alive today and Larry wouldn't be on death row."[21]

One critic of US mental health services expressed his frustration at the current priorities for spending in the USA: "I am outraged that states are willing to put money and effort into medicating someone so they are competent enough to be executed, but not willing to put money into medication earlier, when they could help the person become well and avoid a senseless murder."[22]

2.2 Vulnerability of people with mental disabilities to manipulation at the time of a crime and during police interrogation

[19] AI. USA: The execution of mentally ill offenders, AMR 51/03/2006, p.170.

[20] Ibid, p.172.

[21] Ibid. pp.56-7.

[22] Earley P. Foreword, in: *Double Tragedy: Victims Speak Out Against the Death Penalty For People with Severe Mental Illness*. Murder Victims' Families for Human Rights and the National Alliance on Mental Illness, 2009.

According to Human Rights Watch, the disproportionate number of persons with intellectual disability in the US prison population probably reflects the fact that such people who break the law are more likely to be caught, are more likely to confess and be convicted, and are less likely to be paroled. They suggest that some of the people with intellectual disabilities who are serving prison sentences may be innocent, but that "they confessed to crimes they did not commit because of their characteristic suggestibility and desire to please authority figures."[23] A study on US prisoners released from prison after DNA evidence exonerated them lends weight to concerns about the vulnerability of people with intellectual disabilities to giving false confessions. It found that approximately two-thirds of intellectually disabled exonerated prisoners had been convicted on the basis of confession compared to around 8% among total exonerees. [24]

Blume and colleagues categorised the vulnerabilities as falling into several groups, three of which were identified in the *Atkins v Virginia* ruling -- false confessions; diminished ability to assist counsel; and inappropriate demeanor -- to which they add "exploitation by co-defendants and snitches [informers]" -- at the time of the crime, at arrest, in detention, or at plea bargaining.[25]

They identify elements of the experience of police interrogation as placing intellectually disabled detainees at particular risk of a miscarriage of justice: mixed threats, deception, expressions of "sympathy", directive suggestions, prolonged questioning and failure to protect the right to a lawyer.

2.3 Competence for trial: assisting in own defence

In many jurisdictions, there is a lack of skilled legal advocates available to work with poor defendants facing capital charges. It is therefore additionally troubling when defendants with serious mental health problems are put on trial without adequate support or lack a mechanism to delay trial or seek alternative measures when they are unable to participate effectively in their own defence.

US court decisions relevant to mental health in death penalty cases

Decisions taken about the death penalty in national courts can have an influence well beyond national borders. The following cases have established legal principle in the jurisdictions in which they were decided and have contributed to a wider international discussion. Within the USA, they have been seen as failing to offer substantial protection to prisoners facing death row.

US: *Ford v Wainwright* (1986).[26] The Court ruled that executing the "insane" is incompatible with the Eighth Amendment prohibiting cruel and unusual punishment. Additionally, a hearing of competency is necessary.

[23] Human Rights Watch. *Beyond Reason: The Death Penalty and Offenders with Mental Retardation*. March 2001, p.15.

[24] Gross SR, Jacoby K, Matheson DJ et al., Exonerations in the United States 1989 Through 2003, 95 *Journal of Criminal Law and Criminology* 523-545 (2005). Roughly the same proportion was seen among mentally ill exonerees.

[25] Blume JH, Johnson SL, Millor SE. Convicting Lennie: mental retardation, wrongful convictions, and the right to a fair trial. *New York Law School Law Journal* 56 | 2011/12, 943-953.

[26] *Ford v. Wainwright*, 477 U.S. 399.

US: *Atkins v Virginia* (2002).[27] The Court decided that executing a prisoner with mental retardation [intellectual disabilities] would be in breach of the US Constitutional bar against cruel and unusual punishment (Eighth Amendment). The Court did not specify how mental retardation was to be assessed.

2.4 Demeanour in court

A defendant with mental, psychosocial or intellectual disabilities can prejudice his or her own interests by unconventional behaviour in court. Actions such as verbal outbursts, threats or physical menace are clearly prejudicial but minor actions such as smiling or smirking at inappropriate moments (such as when the crime is being described) can appear to indicate lack of remorse or disrespect for the court.

The US Supreme Court in its ruling in the case of *Atkins v Virginia* cited the vulnerabilities of those with intellectual disabilities:

"*…mentally retarded [intellectually disabled] defendants in the aggregate face a special risk of wrongful execution because of the possibility that they will unwittingly confess to crimes they did not commit, their lesser ability to give their counsel meaningful assistance, and the facts that they are typically poor witnesses and that their demeanor may create an unwarranted impression of lack of remorse for their crimes*".[28]

Others have described how persons with intellectual disabilities can face difficulties in court:

"[Defendant demeanor] remains a significant obstacle for lawyers representing persons with mental retardation [intellectual disability], some of whom may gesture inappropriately, grimace, giggle, or manifest other behaviors that jurors may translate into meaning 'I don't care'. A person with mental retardation [intellectual disability] may not understand the consequences of the proceedings; consequently, he may alienate the jury by 'sleeping, smiling, or staring at nothing while in court', possibly conveying a 'false impression of a lack of remorse or compassion for the victim'.[29]

2.5 Mental health issues during sentencing phase

After a determination of fact by the court – that the defendant was responsible for the crime with which he or she has been charged – there is a sentencing phase. If the convicted prisoner is represented by an effective counsel, they may wish to introduce both character evidence and also mitigating evidence of mental disorders or disabilities. However, in many courts, evidence bearing on mental health is not presented. This may reflect choices made or opportunities not taken by the defendant's lawyer. Or it may reflect the lack of mental health expertise available to prepare assessments. When evidence is submitted to the court in mitigation of the crime, there is a risk that it may be perceived by a jury or a judge as constituting evidence that the convicted prisoner may pose a risk of danger in the future. One court ruled that the prosecution can introduce evidence of mental illness as an aggravating factor.[30] In the USA, some jurisdictions apply a test of "future dangerousness" which, if met,

[27] *Atkins v. Virginia*, 536 U.S. 304.

[28] *Atkins v Virginia* 536 U. S. 304 (2002) at 305.

[29] Perlin M. *Mental Disability and the Death Penalty: the Shame of States*. Rowman and Littlefield, 2013, p.56.

[30] Fluent T, Guyer M. Defendant's illness can be used by the prosecutor as an aggravating factor in capital sentencing. Journal of the American Academy of Law and Psychiatry 2006; 34, Number 1): 110-1.

results in the imposition of the death penalty. Mental health factors can play a part in such assessments.

Court judgments in Caribbean cases

Inter-American Court of Human Rights judgement, 2009
The Court, in its judgment in the case of Tyrone DaCosta Cadogan (Barbados) ruled that the appellant was denied a fair trial as his mental health at the time of the offence was never fully evaluated by mental health professionals and concluded that:

"the State shall ensure that all persons accused of a crime whose sanction is the mandatory death penalty are duly informed, at the initiation of the criminal proceedings against them, of the right to obtain a psychiatric evaluation carried out by a state-employed psychiatrist."[31]

Eastern Caribbean Court of Appeal, 2012

Sheldon Isaac was sentenced to death for murder in Saint Kitts and Nevis in January 2008. As part of his appeal, a clinical psychologist and forensic psychiatrist were asked by the London-based NGO, the Death Penalty Project, to visit Saint Kitts to assess his situation (and also that of other death row inmates). Subsequently, applications for permission to appeal and applications to introduce new evidence were filed in the Privy Council. The cases were heard by the Privy Council in May 2010, and his appeal was remitted back to the Court of Appeal for further hearing and the determination of all the issues. The assessment showed that Sheldon Isaac was severely brain damaged as a result of being shot in the head prior to his conviction. In March 2012, the Eastern Caribbean Court of Appeal acquitted Sheldon Isaac, concluding that he was unfit to stand trial in the first place, and should never have been sentenced to death.[32]

2.6 Conditions on death row

Being held under sentence of death is stressful even if the carrying out of the sentence is unlikely. In Ghana – a country that has not carried out an execution under the criminal law for decades – death row prisoners told Amnesty International of the "weight" of the death sentence and their wish to have their sentences commuted.[33] In countries where executions are carried out, sometimes after an extended period under sentence of death, the effect on prisoners can be profound.

In Japan, prisoners are given little notice of an execution so can spend years knowing that each day may be their last. This practice has been condemned by the UN and others.[34]

[31] Inter-American Court of Human Rights, para 105. Case of Dacosta Cadogan V. Barbados. Judgment of September 2 4, 2009. http://www.corteidh.or.cr/docs/casos/articulos/seriec_204_ing.pdf

[32] Death Penalty Project. Eastern Caribbean Court of Appeal Rule on Right to Appeal in Capital Cases in St Kitts and Nevis and Order Acquittal for Death Row Prisoner and Quash Three Other Death Sentences [press release], 8 May 2012; http://www.deathpenaltyproject.org/news/1172/eastern-caribbean-court-of-appeal-rule-on-right-to-appeal-in-capital-cases/

[33] Amnesty International. 'Prisoners are bottom of the pile': The human rights of inmates in Ghana. London, AFR 28/002/2012, 2012. http://www.amnesty.org/en/library/info/AFR28/002/2012/en

[34] See report UN Human Rights Committee. Concluding Observations. Japan. UN Doc CCPR/C/JPN/CO/5, 18 December 2008; Japan Federation of Bar Associations. Recommendations on the Capital Punishment System. Tokyo: JFBA, November 2002; Federation Internationale des Ligues des Droits de l'Homme. The Death

Japanese prisoner Hakamada Iwao was arrested in 1966 for the murder of four people. He was convicted on the basis of a confession he gave after continuous interrogation over 20 days by police officers in the absence of contact with a lawyer or even his family. He later retracted the confession. Conditions on death row were harsh – solitary confinement, little exercise and little access to stimulation. After his death sentence was confirmed by the High Court of Japan in 1980, his mental health deteriorated. His supporters campaigned for a re-trial citing flaws in forensic evidence. An independent medical assessment carried out in 2008 concluded that he was mentally ill and fell within the scope of Article 479 of the Code of Criminal Procedure which barred the execution of persons affected by insanity.[35] Over recent years there were reports that his mental state was further deteriorating. However little progress was made to his circumstances until March 2014 when a re-trial was ordered and Hakamada was released pending the retrial. He needed immediate hospital treatment.

In 1993, in the case of *Pratt and Morgan*,[36] the UK Privy Council held that to keep a person under sentence of death for five years presumptively amounted to inhuman treatment; the Privy Council substituted sentences of life imprisonment for the death penalty which had been imposed on the two men on whom notices of execution had previously been served three times. The judgment reviewed existing judicial opinions which made reference to the suffering caused by extended periods under sentence of death.

2.7 Competence or fitness

Executions of prisoners with mental disabilities

Florida, USA, 2013

John Ferguson was executed by lethal injection on 5 August 2013, despite his long history of mental illness. He was first diagnosed with schizophrenia in 1971. In 1975, a court-appointed psychiatrist concluded that Ferguson's severe mental illness rendered him dangerous and meant that he "should not be released under any circumstances" from a maximum security mental hospital. He was released, however, and within three years was on death row for eight murders. While on death row, he was again diagnosed as suffering serious mental illness, including by prison doctors. Despite a 40-year history of serious mental illness, he was executed nevertheless.[37]

Texas, USA, 2014

Ramiro Hernandez Llanas was put to death by lethal injection on 9 April 2014 in Texas. His execution occurred despite evidence that his intellectual disability, as assessed in six different IQ tests over the past decade, rendered his death sentence unconstitutional. In tests conducted over the past decade, Ramiro Hernandez Llanas had been assessed as having an IQ in the 50s or 60s. In addition, a clemency petition contained detailed evidence of his adaptive functioning deficits across a range of skill areas including linguistic, academic, conceptual, social, work and domestic. He thus would appear to have

Penalty in Japan, a Practice Unworthy of a Democracy, Paris, May 2003, Amnesty International, "Will this day be my last?" The death penalty in Japan, Index: ASA 22/006/2006, London, 2006.

[35] Amnesty International. Hanging by a thread. 2009.

[36] Judicial Committee of the Privy Council. Case of Pratt and Morgan. From the Court of Appeal in Jamaica, 1993. http://www.bailii.org/uk/cases/UKPC/1993/1993_37.html

[37] AI. Death sentences and executions in 2013. Index: ACT 50/001/2014 2014, March 2014.

fallen within the ban on the execution of people with "mental retardation" [intellectual disabilities] passed by the US Supreme Court in 2002 in the case of Atkins v Virginia. On 10 April 2014, the Government of Mexico condemned the execution.[38]

Given the widespread (if not always observed) principle that "insane" prisoners should not be executed, the state is obliged to determine the "competence" or fitness for execution of those whose lives it wishes to take. One writer rephrased this in the form of a question: "When is someone sane enough to die?"[39]

"…mental illness warps the machinery of our criminal law and challenges its most cherished assumptions about free will, decisional competence, and culpability." - Michael Mello

2.8 Medicating to allow execution

For decades there has been a debate in the USA about medicating prisoners under sentence of death in order to make them competent to be executed.[40] Medical professionals have opposed this role as an abuse of ethics and doctors are not permitted by national medical ethics to do this unless the death sentence is commuted.[41] Nevertheless courts have been more willing to approve forcible treatment in order to achieve an execution. Charles Singleton, awaiting execution in a Louisiana prison and under treatment for schizophrenia, appealed against continued medical treatment after an execution date was set as it was against his medical interests. The Appeal Court ruled that "eligibility for execution is the only unwanted consequence of the medication"[42] – and Singleton was put to death in January 2004. Such procedures have not been reported in other retentionist countries.

2.9 "Volunteering" for execution

In the USA, prisoners who await execution while appeals proceed through the court system sometimes withdraw or terminate their appeals. This has the effect of removing the barrier to execution and can hasten their death. Many of those who have "volunteered" for execution have mental disabilities that could conceivably account for the decision that will probably result in their demise. One study examined the prevalence of significant mental disorder among the 106 prisoners who have volunteered for execution in the USA. It found that 14 of the "volunteers" had recorded diagnoses of schizophrenia, 23 had recorded diagnoses of depression or bipolar disorder, 10 had records of PTSD [post-traumatic stress disorder], 4 had diagnoses of borderline personality disorder and 2 had been diagnosed with multiple personality disorder. Another 12 individuals had unspecified histories of "mental illness."[43]

3. Medical ethics, mental health and the death penalty

[38] Amnesty International. Mexican national executed in Texas. AMR 51/023/2014, 10 April 2014.

[39] Mello M. Executing the mentally ill. When is someone sane enough to die? Criminal Justice,22(3), Fall 2007.

[40] See, for example, Radelet ML Barnard GW. Treating those found incompetent for execution: ethical chaos with only one solution. *Bulletin of the American Academy of Psychiatry and Law* 1988;16(4):297-308.

[41] AMA. Opinion 2.06 Capital punishment,

[42] *Singleton v Norris* 2003. US Court of Appeals for the Eighth Circuit. Available: http://caselaw.findlaw.com/us-8th-circuit/1213175.html.

[43] Blume J. Killing the willing: "volunteers," suicide and competency, 103 Michigan Law Review 939, 940 (2005)

The existence of mental health issues among prisoners facing capital charges or a death sentence immediately raises problems of medical ethics among those responsible for medico-legal assessments and medical care for such persons. The most extensive debate of the ethics of execution within the medical profession happened in the USA following the introduction of lethal injection executions in 1977.[44] While the initial concern focused on the issue of active participation by doctors in executions, the question of "competence" or fitness for execution was also on the agenda. The question could simply be stated: given the doctor's commitment to the well-being of patients is it ethical for a doctor to assist the state to execute a prisoner? There is a consensus among international medical professional bodies against such a role (see box) even though states still appear to want medical assistance in the death penalty, from medical testimony in the court case through to presence at the execution. At the national level, a significant number of medical associations oppose a doctor's participation in the death penalty. The American Medical Association has the most detailed policy as to what is unethical and what is acceptable.[45]

Position of international medical, nursing and psychiatric bodies on the death penalty

World Medical Association: "it is unethical for physicians to participate in capital punishment, in any way, or during any step of the execution process…" [46]

International Council of Nurses: "Participation by nurses, either directly or indirectly, in the preparation for and the implementation of executions is a violation of nursing's ethical code".[47]

World Psychiatric Association: (i) "Conscious that psychiatrists may be called on to participate in any action connected to executions, declares that the participation of psychiatrists in any such action is a violation of professional ethics"; and (ii) "Under no circumstances should psychiatrists participate in legally authorized executions nor participate in assessments of competency to be executed."[48]

*4. What are the relevant international standards on mental health and capital punishment***?**

4.1 Human rights law

Human rights law refers to the body of international treaties agreed by states within a framework of the United Nations or regional bodies such as the African Union, the Organization of American States or the Council of Europe. At least since the adoption of the International Covenant on Civil and Political Rights (ICCPR) in 1966, the use of the death penalty has been seen in international human rights law as requiring restriction and control,

[44] The first such execution did not take place until 1982 – in Texas -- by which time both the American and World Medical Associations had adopted initial statements against doctors' participation in the death penalty.

[45] American Medical Association. 2.06 Capital Punishment. http://www.ama-assn.org//ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion206.page

[46] WMA. Resolution on Physician Participation in Capital Punishment. Available at: http://www.wma.net/en/30publications/10policies/c1/

[47] ICN. Torture, Death Penalty and Participation by Nurses in Executions. Geneva, 1998. http://www.icn.ch/publications/position-statements/

[48] World Psychiatric Association. (i) Declaration on the participation of psychiatrists in the death penalty, 1989; http://www.wpanet.org/detail.php?section_id=5&content_id=25; (ii) Madrid Declaration on Ethical Standards for Psychiatric Practice, 1996, http://www.wpanet.org/detail.php?section_id=5&content_id=48

with abolition seen as something to be encouraged in the short term and realized as soon as practicable.[49]

4.2 UN bodies

The Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, adopted by the UN Economic and Social Council in 1984, states at Safeguard 3: "Persons below 18 years of age at the time of the commission of the crime shall not be sentenced to death, nor shall the death penalty be carried out on pregnant women, or on new mothers, or on persons who have become insane."

In Resolution 1989/64, adopted on 24 May 1989, the UN Economic and Social Council recommended that UN member states eliminate the death penalty "for persons suffering from mental retardation or extremely limited mental competence, whether at the stage of sentence or execution".

In Resolution 2005/59, adopted on 20 April 2005, the UN Commission on Human Rights urged all states that still maintain the death penalty “to exclude pregnant women and mothers with dependent infants from capital punishment” and “not to impose the death penalty on a person suffering from any mental or intellectual disabilities or to execute any such person”.[50]

The UN Special Rapporteur on extrajudicial, summary or arbitrary executions has stated that "international law prohibits the capital punishment of mentally retarded [intellectually disabled] or insane persons, pregnant women and mothers of young children".[51] The Special Rapporteur subsequently urged that governments that continue to enforce capital punishment legislation "with respect to minors and the mentally ill are particularly called upon to bring their domestic legislation into conformity with international legal standards. States should consider the adoption of special laws to protect the mentally retarded [intellectually disabled], incorporating existing international standards."[52]

Commenting on the abolition of the death penalty for women in a state party to the International Covenant on Civil and Political Rights, the UN Human Rights Committee called upon the state to "ensure equality by abolishing the death penalty for all persons".[53] Extending this argument to other categories arguably could suggest that the spirit of equality and non-discrimination embodied in the Convention of the Rights of Persons with Disabilities is best met by ending the use of the death penalty against *all* persons.

4.3 Customary practice

[49] ICCPR, article 6. In 1982 Human Rights Committee that monitors and interprets the ICCPR commented that under article 6 of the Covenant, governments "are obliged to limit …use [of the death penalty] and, in particular, to abolish it for other than the most serious crimes. Accordingly, they ought to consider reviewing their criminal laws in this light. The article also refers generally to abolition in terms which strongly suggest… that abolition is desirable." General Comment No. 6: The right to life (art. 6); 30 April 1982.

[50] UN Commission on Human Rights resolution 2005/59, adopted on 20 April 2005, Question of the Death Penalty.

[51] Extrajudicial, summary or arbitrary executions: Report by the Special Rapporteur..., UN document E/CN.4/1994/7, 7 December 1993, para.686.

[52] Extrajudicial, summary or arbitrary executions: Report by the Special Rapporteur..., UN document E/CN.4/1998/68, 23 December 1997, witpara.117.

[53] Concluding observations of the Human Rights Committee: Kyrgyzstan, UN document CCPR/CO/69/KGZ, 24 July 2000, para. 8.

There is a widespread custom not to execute prisoners showing clear signs of "insanity".[54] This does not mean however that such executions do not take place, in part because of lack of clarity on what constitutes "insanity", and unfair trial procedures.

4.4 Regional bodies

Both the Council of Europe and the Organization of American States place limits on the use of the death penalty in their respective regions. The Council of Europe proscribes the use of the death penalty in all circumstances and all member states are abolitionist by will or by constraint. Moreover, the European Union, a political union within the Council of Europe region, actively opposes executions wherever they occur and regularly sends appeals to states that intend to execute prisoners. The EU calls for states not to execute "[p]ersons suffering from any mental illness or having an intellectual disability".[55]

4.5 Court judgments

Apart from statutory regulation, courts play an important role in interpreting law and setting new standards. In the USA, the Supreme Court has proscribed the execution of "insane" prisoners in the case of *Ford v Wainwright* (1986) even though the ruling has been described as offering minimal protection, and hundreds of prisoners with mental disorders are at risk of execution or have indeed been executed.[56] In the case of *Atkins v Virginia* (2002),[57] the court ruled that prisoners with mental retardation [intellectual disabilities] cannot be executed though it did not specify benchmarks for mental retardation [intellectual disabilities] and left it to states to determine "appropriate ways to enforce the constitutional restriction upon its execution of sentence". The execution of Marvin Wilson in Texas in 2012 illustrates the manner in which the *Atkins* decision can be ignored by states (see box).

Execution of Marvin Wilson, Texas, August 2012

Marvin Wilson, a 54-year old African-American man with an IQ of 61 and an assessment of intellectual disabilities by a court-appointed doctor, was executed by lethal injection on 7 August 2012. The reason that the state of Texas could so clearly ignore the spirit of the *Atkins v Virginia* ruling was that this Supreme Court decision left it to states to devise their own procedures to establish whether or not intellectual disability was a factor in the case. The Texas procedure differs from other states in the approach to "adaptive functioning," the second of the two legal prongs (the others being intellectual functioning and age of onset). Most other states, in line with American Association of Intellectual and Developmental Disabilities (AAIDD) and Diagnostic and Statistical Manual of Mental Disorders (DSM) standards, appreciate that intellectual disability can be somewhat hidden and that people with the disorder can have areas of strength and competence. The Texas high court, without scientific justification, has devised the so-called "Briseño factors," or seven activities (such as ability to carry on a conversation or exhibit some planning) which if exhibited, could be used to rule out a finding of intellectual disability. The court explicitly stated that they meant to limit Atkins eligibility to the most severely affected sub-set of people, even those who would be found to have intellectual disability by their own state's developmental disability agency. In an editorial published before the

[54] Hood R, Hoyle C. *The Death Penalty: A Worldwide Perspective*. Fourth Edition, Oxford University Press, 2008.

[55] Council of the European Union. EU Guidelines on Death Penalty, III (iv), 12 April 2013. Available at: http://eeas.europa.eu/human_rights/guidelines/death_penalty/docs/guidelines_death_penalty_st08416_en.pdf

[56] Amnesty International. USA: The execution of mentally ill offenders, AMR 51/03/2006.

[57] Court ruling is available at: http://www.law.cornell.edu/supct/html/00-8452.ZS.html

execution, the *New York Times* said "The court must stop this cruel and unconstitutional execution of a mentally retarded man."[58] Wilson's submission to the Court of Appeals failed, however, and the execution proceeded.[59]

A bigger source of variability in Atkins decisions across states and courts reflects the extent and nature of reliance on IQ ceiling scores. In line with clinical standards laid out in AAIDD and DSM manuals, most statutes and guiding court decisions insert the word "approximately" before a particular number or statistical unit, as in "IQ below *approximately* 70-75", or "a score *approximately* two standard deviations below the mean" to provide some flexibility in assessment. Some states however, such as Florida and Alabama, use what is termed a "bright line" approach, meaning at 70, a person meets the first test prong, but at 71, a person does not. Such a "bright line" test applies regardless of the obsolescence of the test norms, the effect of repeated administrations, or the natural variability and unreliability of any test performance.

Reliance on a rigid IQ bright line approach to IQ is not only scientifically invalid, but it also means that a person with an IQ of say 72 could be executed in one state but might not be in a neighboring state. The possible illegality of using rigid bright lines in Atkins determinations was recently argued before the US Supreme Court in *Hall v Florida*. In a May 2014 landmark decision described as a "sea change," the court stated that "intellectual disability is a condition, not a number." It overturned the use of IQ bright lines (whether 70 or higher), prohibited states from ignoring the clinical science of intellectual disability, and asserted that the dignity and humanity of people facing the death penalty requires that they be allowed to present all evidence pertaining to a claim of intellectual disability rather than (as in Hall) having the claim dismissed automatically because of an IQ score over some arbitrary cut-off. In addition to Florida, this ruling also affects Atkins cases in eight other US states which codify a bright line interpretation either in statutes or court decisions.[60]

The Hall decision supports the view that one should never use an IQ score, no matter how high or how flexibly determined, to rule out intellectual disability. (That is the high court's position in California, where the first successful Atkins petitioner, Jorge Junior Vidal, had an IQ score above 80). In fact, the Diagnostic and Statistical Manual of Mental Disorders emphasizes that neuropsychological measures of "executive functioning" (such as consequential thinking or self-regulation) are better indicators of prong one than the outdated concept of full-scale IQ. In particular, where developmental brain damage (such as from fetal exposure to alcohol) is noted, one should: a) examine various other indicators of cognitive functioning besides IQ, and b) place more emphasis on prong two (adaptive functioning), particularly social-cognitive deficits (such as gullibility) and unawareness of risk (including criminal risk) when making a diagnosis.[61]

4.6 Human rights organizations

[58] *New York Times*. Mentally retarded and on death row. 3 August 2012. www.nytimes.com/2012/08/04/opinion/mentally-retarded-and-on-death-row.html

[59] See Cohen A. Of mice and men: the execution of Marvin Wilson. *The Atlantic*, 8 August 2012: http://www.theatlantic.com/national/archive/2012/08/of-mice-and-men-the-execution-of-marvin-wilson/260713/

[60] Court ruling is available at: http://www.law.cornell.edu/supremecourt/text/12-10882

[61] Haydt, N., Greenspan, S. & Agharkar, S. (2014). Advantages of DSM-5 in the diagnosis of intellectual disability: Reduced reliance on IQ ceilings in *Atkins* (death penalty) cases. *UMKC Law Review, 82 (2), 359-388.* Greenspan, S. & Woods, G. (2014). Intellectual Disability as a disorder of judgment and reasoning: The gradual move away from intelligence quotient-ceilings. *Current Opinion in Psychiatry, 27* (2), 110-116.

While the views of human rights organizations such as Amnesty International, Human Rights Watch and the International Federation of Human Rights do not establish legally binding standards, they do contribute to the process of standard-setting. Within human rights organizations, there is virtual unanimity against the death penalty and advocacy of protective measures for groups such as children, pregnant women and those with serious mental disabilities.

4.7 The voice of disability organizations

Some disability groups oppose the insanity defence because, they argue, it is incompatible with the Convention of the Rights of Persons with Disabilities.[62] The Office of the High Commissioner for Human Rights has argued that submissions in mitigation in criminal cases have to be based on reasons other than the existence of mental disability.[63] Other disability groups oppose the use of the death penalty against people with disabilities precisely *because* of the failure of the court to adequately take into account the existence of disabilities (see box). Whatever differing positions are held by disability groups, it remains overwhelmingly the case that the law provides for mental status, capacity and behaviour to be taken into account during the legal process and that certain people with disabilities should not be executed.

Policy of mental health advocacy organizations (extracts)

Mental Health America[64]

Mental health conditions should be taken into account during all phases of a death penalty case. This includes the execution itself. No legitimate government purpose is served by the execution of someone who is not competent at the time of the execution… MHA is opposed to the practice of having a psychiatrist or other mental health professional treat a person in order to restore competency solely to permit the state to execute that person…[65]

National Alliance on Mental Illness
NAMI opposes the death penalty for persons with serious mental illnesses [and] urges jurisdictions that impose capital punishment not to execute persons with mental disabilities in cases where they [lack competency][66]

4.8 What do legal and medical bodies say?

A wide range of international and national health professional bodies oppose either the death penalty as such (e.g. International Council of Nurses) or professional participation in aspects of the penalty (World Medical Association, World Psychiatric Association; see box).

In the USA, the widest range of health professional bodies encompassing doctors, nurses, psychologists, psychiatrists, public health physicians, emergency technicians and

[62] International Disabilities Alliance. Position Paper on the Convention on the Rights of Persons with Disabilities (CRPD) and Other Instruments, 2008.
http://www.wnusp.net/documents/IDAPositionPaperOnTheConvention.doc.

[63] OHCHR. 2009. A/HRC/10/48, 26 January 2009. The OHCHR calls for "abolishing a defence based on negation of responsibility because of [mental disabilities]" (p.15)

[64] Formerly known as the National Committee for Mental Hygiene and the National Mental Health Association.

[65] Mental Health America. Position Statement 54: Death Penalty and People with Mental Illnesses.
http://www.mentalhealthamerica.net/positions/death-penalty

[66] NAMI. Public Policy: 10. Criminal Justice and Forensic Issues, Policy 10.9 Death penalty, and 10.10 Insanity defence. Available at www.nami.org

anaesthesiologists all oppose some or all aspects of the death penalty. The American Medical Association (AMA) has the most detailed review of ethical aspects of capital punishment and sets out in their ethics guidelines a detailed analysis of the role of the physician faced with a death penalty case.[67]

The American Psychiatric Association (APA) (2008) and the American Board of Anesthesiologists (2010) have incorporated the AMA policy E-2.06 (adopted in 1980) on the death penalty, with the APA earlier in 2000 approving a "Moratorium on Capital Punishment," citing the "weaknesses and deficiencies of the current capital sentencing process including considerations in regard to the mentally ill and developmentally disabled."[68]

The World Psychiatric Association declared in 1989 that participation by psychiatrists in the death penalty was unethical[69] and, in 1996, that psychiatrists should not participate in executions or in assessments of competence to be executed.[70]

The International Commission of Jurists (ICJ) opposes the death penalty under any circumstances, and considers its use to constitute a violation of the right to life and freedom from cruel, inhuman or degrading punishment.[71]

The Human Rights Institute of the International Bar Association resolved in 2008 that, taking account of various factors, including "the increasing emergence of customary limitations on the death penalty, including the prohibition of the execution of the mentally ill … all countries throughout the world should take steps towards the complete abolition of the death penalty". It further recommended that "until such abolition takes place, those countries retaining the death penalty at the current time should ensure that it is applied strictly in accordance with international standards and in particular within the limits laid down in Article 6 of the International Covenant on Civil and Political Rights".

UN view on existing protections for those with mental disabilities

"The real difficulty with the [Economic and Social Council (ECOSOC)] safeguard lies not in its formal recognition but in its implementation. Whereas with juvenile offenders or pregnant women, the determination that a person belongs to the protected category is relatively straightforward, there is an enormous degree of subjectivity involved when assessing such concepts as insanity, limited mental competence and 'any form of mental disorder'. The expression 'any form of mental disorder' probably applies to a large number of people sentenced to death."[72]

[67] AMA. Opinion 2.06 Capital punishment. http://www.ama-assn.org//ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion206.page

[68] 2000 APA resolution: "American Psychiatric Association. Position Statement on Moratorium on Capital Punishment in the United States, Approved by the Board of Trustees, October 2000. Available at: http://www.psych.org/File Library/Advocacy and Newsroom/Position Statements/ps2000_CapitalPunishmentMoratorium.pdf."

[69] World Psychiatric Association (WPA). Declaration on the Participation of Psychiatrists in the Death Penalty (1989).

[70] WPA. Madrid Declaration on Ethical Standards for Psychiatric Practice,

[71] Submission of the International Commission of Jurists (ICJ) to the UN Secretary-General in view of his Forthcoming Report on the Question of the Death Penalty to the 27th Session Of The Human Rights Council, September 2014. Submitted March 2014, Paragraph 3.

[72] Capital punishment and implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty, Report of the Secretary-General. UN Doc. E/2010/10, December 2009.

5. What needs to be done

A number of actions by governments are needed to address the risk that persons with mental and intellectual disabilities will be sent to death row and possibly executed.

- Immediate implementation of *existing standards* barring the imposition of death sentences or executions on those with intellectual disabilities and those who are "insane". The practice of executing such persons should cease immediately.

- Renewed efforts to (i) ensure that all states have laws that embed international protections in their domestic legislation; (ii) extend protection to those with [serious] mental illness not covered by existing proscriptions against executing persons affected by "insanity"

- Adoption by national medical and legal professional bodies of codes of conduct ensuring that professionals do not act unethically or unprofessionally in capital cases.

- Ensure that adequate mental health expertise is available for defendants in capital cases in which mental or intellectual disabilities are claimed as a factor.

- Work towards the reduction of stigma against persons with mental or intellectual disabilities, particularly where media reports promote inaccurate public beliefs about risks posed by such persons

APPENDIX

Selected legislation

The following selection does not purport to be representative but illustrates the varying laws in place in selected countries either to deal with mental disabilities in the criminal law in general or specifically with respect to the death penalty.

1 China

China's Criminal Law, Article 18, provides: If a mental patient causes harmful consequences at a time when he is unable to recognize or control his own conduct, upon verification and confirmation through legal procedure, he shall not bear criminal responsibility, but his family members or guardian shall be ordered to keep him under strict watch and control and arrange for his medical treatment. When necessary, the government may compel him to receive medical treatment.

Any person whose mental illness is of an intermittent nature shall bear criminal responsibility if he commits a crime when he is in a normal mental state.

If a mental patient who has not completely lost the ability of recognizing or controlling his own conduct commits a crime, he shall bear criminal responsibility; however, he may be given a lighter or mitigated punishment.[73]

2 Democratic Republic of Congo

The Penal Code provides as follows:

Article 6: The condemned prisoner shall be executed by the method determined by the President of the Republic.[74]

Article 18: If there are mitigating circumstances, the death penalty can be commuted to life imprisonment or imprisonment for a period decided by the judge.[75]

The Penal Code does not define what such mitigating circumstances might be.

3 India

Indian Penal Code of 1860, Article 84: "Act of a person of unsound mind. Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law."[76]

4 Iraq

Paragraph 60: "Any person who, at the time of the commission of the offence, is suffering from a loss of reason or volition due to insanity or infirmity of mind or because he is in a

[73] http://www.npc.gov.cn/englishnpc/Law/2007-12/13/content_1384075.htm. Articles 48-51 on the death penalty make no mention of mental disability as a grounds for lesser punishment.

[74] Democratic Republic of Congo. Penal Code (2004), Article 6. [[Article 6 : Le condamné à mort est exécuté suivant le mode déterminé par le Président de la République.] Several articles in the Penal Code define crimes which merit the death penalty. http://www.wipo.int/wipolex/en/text.jsp?file_id=194348

[75] Ibid. Article 18. [[Article 18: S'il existe des circonstances atténuantes, la peine de mort pourra être remplacée par la servitude pénale à perpétuité ou par une servitude pénale dont le juge déterminera la durée. Les peines de servitude pénale et d'amendepourront être réduite dans la mesure déterminée par le juge.]

[76] Indian Penal Code. Act No. 45 of 1860; http://districtcourtallahabad.up.nic.in/articles/IPC.pdf

state of intoxication or under the influence of drugs resulting from the consumption of intoxicating or narcotic substances given to him against his will or without his knowledge or due to any other reason which leads one to believe that he has lost his reason or volition is not criminally liable. However, if he is not suffering from any infirmity of mind nor is under the influence of intoxicating, narcotic or other substances but only from a defect of reason or volition at the time of the commission of the offence, then it is considered a mitigating circumstance."[77]

Paragraphs 128-134 deal with mitigating circumstances though do not identify mental health issues specifically.

5 Japan

The Japanese Penal Code[78] provides:

Article 11. (Death Penalty):

(1) The death penalty shall be executed by hanging at a penal institution.

(2) A person who has been sentenced to the death penalty shall be detained in a jail until its execution.

Article 14. (Limit of Aggravation and Mitigation)

(1) In cases where the death penalty, or imprisonment with or without work for life shall be reduced to imprisonment with or without work for a definite term, its maximum term shall be 30 years.

Article 39. (Insanity and Diminished Capacity)

(1) An act of insanity is not punishable.

(2) An act of diminished capacity shall lead to the punishment being reduced.

Code of Criminal Procedure (Act 131), Article 479:[79]

1. If a person condemned to death is in a state of insanity, the execution shall be stayed by order of the Minister of Justice. […]

3. When the execution of the death penalty has been stayed … the penalty shall not be executed unless an order is given by the Minister of Justice subsequent to recovery from the state of insanity or delivery.…

Information on mental status in Japanese death penalty cases is difficult to obtain. An Amnesty International report in 2009 stated, "Because of the stringent isolation placed on prisoners, the secrecy regarding prison conditions and prisoners' health, and the lack of scrutiny by independent mental health professionals, it is necessary to rely substantially on secondary testimony and documentation to adjudge the mental state of those on death row."[80]

Amnesty International suggested that was a strong presumption of mental illness in the

[77] Iraqi Criminal Code (1969). The 1969 code remains the basis for contemporary Iraqi criminal law. http://law.case.edu/saddamtrial/documents/Iraqi_Penal_Code_1969.pdf

[78] http://www.cas.go.jp/jp/seisaku/hourei/data/PC.pdf

[79] Cited in Amnesty International. Hanging by a thread. Mental Health and the Death Penalty in Japan. Index: ASA 22/005/2009.

[80] AI. Hanging by a Thread. Mental Health and the Death Penalty in Japan.

cases of Mukai Shinji (executed 2003), Fujima Seiha (executed 2007) and Miyazaki Tsutomu (executed 2008).[81] Others currently awaiting execution may also have mental disorders. In a reply to a questionnaire sent in connection with the Eighth Quinquennial Report on the Death Penalty, Japan said that it did not execute insane prisoners but postponed executions in such cases.[82] If true, this risks extremely long imprisonment in harsh conditions for anyone found to be insane.

6 Morocco

The Moroccan Penal Code sets out provisions for crimes involving mental disability in articles 75-82. In summary, these provide for the detention in a mental institution of a presumed offender with a mental illness at the time of the crime or at the time of trial (troubles de ses facultés mentales) and renders them non-culpable.[83] In a contribution to the Seventh Quinquennial report to the UN on the death penalty in 2006, Morocco said that persons with mental disabilities are exempted from the death penalty and committed to care institutions. In Eighth Quinquennial report on the death penalty (2010), Morocco said that the prohibitions against executing the insane also applied to anyone with mental illness.[84]

7 Trinidad and Tobago

1. Offences against the Person Act[85]

4. Every person convicted of murder shall suffer death.
4a. (1) Where a person kills or is a party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing.

(2) On a charge of murder, it shall be for the defence to prove that the person charged is by virtue of this section not liable to be convicted of murder.

2. Criminal Procedure Act[86]

64. If any accused person appears, on arraignment, to be insane, the Court may order a jury to be empanelled to try the sanity of such person, and the jury shall thereupon, after hearing evidence for that purpose, find whether such person is or is not insane and unfit to take his trial.

65. (1) If, during the trial of an accused person, such person appears, after the hearing of evidence to that effect or otherwise, to the jury before whom he is tried, to be insane, the Court shall in such case direct the jury to … return a verdict that such person is insane.

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[81] Ibid.

[82] Capital punishment and implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty, Report of the Secretary-General. UN Doc. E 2010/10, December 2009.

[83] Code pénal (promulgué par Dahir n° 1-59-413 du 26 novembre 1962 (28 joumada II 1382)).
For the relevant legal provisions see articles 75-82 of the Code available here:
http://adala.justice.gov.ma/production/legislation/fr/penal/Code%20Penal.htm

[84] Report of the Secretary General, 2009. para.92.

[85] Laws of Trinidad and Tobago. Chapter 11.08: Offences against the Person Act. Available at:
http://rgd.legalaffairs.gov.tt/laws2/alphabetical_list/lawspdfs/11.08.pdf

[86] Laws of Trinidad and Tobago. Chapter 12.02. Criminal Procedure Act,
http://rgd.legalaffairs.gov.tt/laws2/alphabetical_list/lawspdfs/12.02.pdf

[See also paragraphs 66-68 and paragraph 63(2) referring to the case of the death of a child under 12 months alleged to be due to the action of a mother where the “the balance of her mind was disturbed”]

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