



DEATH PENALTY AND MENTAL HEALTH

Factsheet for Parliamentarians

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”. However, “The real difficulty with the safeguard lies not in its formal recognition but in its implementation. (...) 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.”¹

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 provides concrete examples of what can be done to address this risk, including by ensuring that all states have laws that embed international protections in their domestic legislation and by extending protection to those with [serious] mental illness not covered by existing proscriptions against executing persons affected by “insanity”.**

Death Penalty and Mental Health: the role of Parliamentarians

As of the 25th April 2014, 140 countries have abolished the death penalty in law or in practice; a clear majority of countries throughout the world. 98 have rejected it completely in all circumstances. The reasons for this trend are many. Abolition of the death penalty has moved in step with an increase in parliamentary democracy in many parts of the world which itself has been accompanied by a vastly increased concern about human rights. More specifically, it has been put forward² that arguments over capital punishment have shifted beyond a question of a nation’s sovereignty over its criminal justice system to a growing acceptance that no matter how it is administered, the death penalty contravenes universal agreements on human rights such as embodied in the International Covenant on Civil and Political Rights.

Parliamentarians are essential to the process of abolition in several ways. They are central to law-making in their own countries and within regional and global government entities. Even when not in

¹ 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.

² Eg. address by Prof. Roger Hood to the UK Inner Temple, 21st January 2010: Towards Global Abolition of the Death Penalty – Progress and Prospects

government they can lead and influence policy and public opinion. In terms of government scrutiny they can expose flaws in the national criminal justice system which highlights what a dangerous and irretrievable instrument the death penalty is. They can also identify and signpost better ways to protect victims and improve security. In the long term, they can play a role in campaigning and influencing parties and individuals who may form future governments.

For parliamentarians in countries where the death penalty is still being imposed, working for abolition can be more difficult because of hostile public opinion. Even so, parliamentarians can play a role short of advocating outright abolition. For example, they can raise public awareness of the growing international movement against executions, work to introduce legislation to reduce the number of offences which carry the death penalty or to protect the mentally ill and intellectually disabled, and carry out parliamentary enquiries to ensure that all trials for capital offences follow the highest standards.³

Checklist for parliamentarians

How I can help ensure that the requirement in human rights standards that persons with serious mental illness or intellectual disabilities should not face the death penalty is embedded in domestic legislation:⁴

- Ensure that the supreme law of the land (constitution or basic law) protects and recognizes the civil, cultural, economic, political and social rights of persons with disabilities.
- Ensure that existing legislation comply with the “insanity” provision.
- Check if protection for persons with serious mental illness or intellectual disabilities not to face the death penalty is embedded in existing legislation.

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

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”.⁵

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".⁶ 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**

³ World Coalition Against the Death Penalty: Parliamentarians and the Abolition of the Death Penalty – A Resource. To be published in 2014.

⁴ Inspired from the Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities and its Optional Protocol: From Exclusion to Equality Realizing the rights of persons with disabilities. United Nations Office of the High Commissioner for Human Rights and Inter-Parliamentary Union, 2007, p. 75. Available at: <http://www.un.org/disabilities/default.asp?id=212>

⁵ UN Commission on Human Rights resolution 2005/59, adopted on 20 April 2005, Question of the Death Penalty.

⁶ Extrajudicial, summary or arbitrary executions: Report by the Special Rapporteur..., UN document E/CN.4/1994/7, 7 December 1993, para.686.

adoption of special laws to protect the mentally retarded [intellectually disabled], incorporating existing international standards.”⁷

Checklist for parliamentarians:

How I can raise awareness about international standards on mental illness and the death penalty to pass legislation:⁸

- Raise issues relating to mental illness in parliament.
- Review draft legislation to assess conformity with the international standards.
- Liaise with civil society groups, including organizations representing persons with disabilities and human rights organizations.
- Ensure that persons with disabilities and their organizations are consulted during the law-making process.
- Discuss the international standards in meetings and visits to local electorates, local schools, in party meetings, etc.
- Discuss the international standards in speeches to public gatherings, particularly on the International Day for Disabled Persons (3 December) and World Day Against the Death Penalty (10 October).
- Organize meetings with parliamentarians to discuss the international standards.
- Organize television and radio interviews on the international standards.
- Write articles on the international standards for newspapers, journals, magazines and other publications.
- Advocate for the establishment of a parliamentary committee on human rights and the death penalty, and ensure that it is linked to the issue of disability.
- Hold parliamentary hearings on the rights of persons with disabilities and the death penalty.
- Make use of parliamentary procedures such as:
 - >Oral and written questions;
 - >Submission of bills; and
 - >Parliamentary debate.
- Raise awareness about the rights of persons with disabilities through:
 - >Debate within your political party;
 - >Alliances with other parliamentarians, to strengthen your lobbying capacity;
 - >Partnerships with organizations of persons with disabilities; and
 - >Public-information campaigns.

Selected domestic 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.

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

⁷ Extrajudicial, summary or arbitrary executions: Report by the Special Rapporteur..., UN document E/CN.4/1998/68, 23 December 1997, witpara.117.

⁸ Inspired from the Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities and its Optional Protocol: From Exclusion to Equality Realizing the rights of persons with disabilities. United Nations Office of the High Commissioner for Human Rights and Inter-Parliamentary Union, 2007, p. 23. Available at: <http://www.un.org/disabilities/default.asp?id=212>

incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law.”⁹

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.¹⁰ 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.¹¹

Legislation is enacted but people with mental illness are still sentenced to death and executed

According to UN studies in the 1960s, all states surveyed have some form of provision to exempt “insane” prisoners from the death penalty.¹² Yet, prisons still hold prisoners under sentence of death who are suffering serious mental disorders, and states continue to execute some of them.

Parliamentary oversight¹³

In addition to voting new laws, parliament, through its oversight function, plays a key role in ensuring respect for the human rights of persons with disabilities. Some of the most prominent oversight tools:

- **Parliamentary committees:** Systematic oversight of the executive is usually carried out by parliamentary committees. They track the work of individual government departments and ministries, and conduct investigations into particularly important aspects of their policy and administration. Effective oversight requires that committees are able to set their own agendas and have the power to oblige ministers and civil servants to appear and answer questions.
- **Commissions of inquiry:** Whenever an issue of major public concern arises, it might be best to appoint a commission of inquiry to address it. This is particularly useful when the issue is not within the purview of a single parliamentary committee or is not the responsibility of a single government department.
- **Direct questioning of ministers:** In countries where ministers are also members of the legislature, an important oversight mechanism is the regular questioning of ministers, both orally and in writing, by parliament. Such direct questioning helps maintain Government accountability.
- **Oversight over non-governmental public agencies:** Parliament also monitors independent agencies to which the Government may have devolved public functions, such as regulatory activities or the delivery of front-line services. These include regulatory bodies for health and safety, service-delivery agencies, public utilities and other agencies whose activities might have a direct impact on the rights of persons with disabilities.

⁹ Indian Penal Code. Act No. 45 of 1860; <http://districtcourtallahabad.up.nic.in/articles/IPC.pdf>

¹⁰ Code pénal (promulgué par Dahir n° 1-59-413 du 26 novembre 1962 (28 jourmada 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>

¹¹ Report of the Secretary General, 2009. para.92.

¹² Hood R, Hoyle C. *The Death Penalty: A Worldwide Perspective*. Fourth Edition, Oxford University Press, 2008.

¹³ Inspired from the Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities and its Optional Protocol: From Exclusion to Equality Realizing the rights of persons with disabilities. United Nations Office of the High Commissioner for Human Rights and Inter-Parliamentary Union, 2007, pp. 105-107. Available at:

<http://www.un.org/disabilities/default.asp?id=212>

Key definitions

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.”**¹⁴ By contrast, mental ill-health or mental disorder comprises various conditions characterized by impairment of cognitive, emotional, or social 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.

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 functioning¹⁵; (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.¹⁶
- **Mental retardation / 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.¹⁷ 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

¹⁴ WHO. Strengthening mental health promotion. Geneva, World Health Organization, 2001: Fact sheet, No. 220.

¹⁵ National Alliance on Mental Illness. What is mental illness? http://www.nami.org/Template.cfm?Section=By_Illness

¹⁶ World Network of Users and Survivors of Psychiatry, 2008, Implementation Manual for the UN Convention on the Rights of Persons with Disabilities.

¹⁷ 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).

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.

Increasingly, since the adoption of the Convention on the Rights of Persons with Disabilities¹⁸ 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.

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)

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Full Factsheet available here: www.worldcoalition.org/worldday

¹⁸ 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>.