



# 2014 WORLD DAY AGAINST THE DEATH PENALTY: PROTECTING PEOPLE WITH MENTAL AND INTELLECTUAL DISABILITIES FROM THE USE OF THE DEATH PENALTY

## 1. Introduction

International law and standards prohibit the use of the death penalty against people with mental and intellectual disabilities. This restriction, however, is not yet fully reflected in the laws and practices of States that still retain the death penalty in their legislation.

While there has been some recognition, in laws of retentionist countries, of the fact that people suffering from mental disabilities (mental illnesses or psychosocial disability) cannot be subjected to capital punishment, protection for those with intellectual disabilities is not codified in the laws of all UN Member States where people may be sentenced to death.

This document provides an overview of the main issues relating to the use of the death penalty against people with mental or intellectual disabilities. Amnesty International opposes the death penalty in all cases without exception, regardless of the nature or circumstances of the crime, the guilt, innocence or other characteristics of the offender, or the method used by the state to carry out the execution. The death penalty violates the right to life and is the ultimate cruel, inhuman and degrading punishment.

## 2. Mental and intellectual disabilities: criminal responsibility and other factors

International law recognizes that certain factors must be taken into consideration when an individual is tried, convicted and sentenced for a criminal act.

Mental and intellectual disabilities can constitute grounds for excluding criminal responsibility if the disability destroys the defendant's capacity "to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law".<sup>1</sup>

Mental and intellectual disabilities also may affect the capacity of a person to stand trial, assist their legal counsel, decide on appeal and understand the nature of the punishment imposed on them. Mental or intellectual disabilities

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<sup>1</sup> Article 31.1(a) of the Rome Statute of the International Criminal Court.



can leave defendants more vulnerable at all stages of the criminal justice process, from arrest to sentencing. At all stages of the process it is the responsibility of the criminal justice system to determine if an individual is disadvantaged because of their disability, and ensure they get assistance and treatment as needed.

In this document the following terms are used:

1. The term *mental disabilities*, which generally encompasses a wide range of mental health issues, is used to refer to serious mental disabilities which are relevant in connection to the criminal justice system.
2. *Mental illness* (also sometimes called psychosocial disability), which refers to the presence of disorders of thought, mood or behaviour that may impede the affected person's capacity to behave rationally and in conformity with the law.
3. *Intellectual disability* is a condition in which a person's mental capacity has not developed during childhood and adolescence, leaving the person less able than average to adapt to independent life and decision-making.<sup>2</sup>

### **3. International law and standards on the use of the death penalty and concerns about their implementation**

International law and standards on the use of capital punishment clearly state that the death penalty should not be imposed or carried out on people with mental or intellectual disabilities. This applies whether the disability was relevant at the time of their alleged commission of the crime or developed after the person was sentenced to death.

The restriction was first stipulated 30 years ago by the UN Economic and Social Council (ECOSOC) in its Safeguards guaranteeing protection of the rights of those facing the death penalty, which stated that “the death sentence shall not be carried out on [...] persons who have become insane.”<sup>3</sup> The standard was elaborated further in 1989, when ECOSOC 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”<sup>4</sup>, and through the subsequent work of other UN bodies and mechanisms. The former UN Commission on Human Rights in its resolution 2005/59 urged States not to impose capital punishment on or execute “a person suffering from any mental or intellectual disabilities”.<sup>5</sup>

The restriction, however, is not yet fully reflected in the laws and practices of States that still retain the death penalty in their legislation.

Furthermore, in the case of both mental and intellectual disabilities, national laws provide little or no guidance as to how legal restrictions are to be applied as safeguards in practice.

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<sup>2</sup> See World Health Organization. ICD-10: International Classification of Mental and Behavioural Disorders. Geneva. Mental illness, intellectual disability and personality disorders can be known collectively as mental disorders or mental disabilities.

<sup>3</sup> UN Economic and Social Council, Resolution 1984/50 adopted on 25 May 1984, and endorsed by the UN General Assembly in resolution 39/118, adopted without a vote on 14 December 1984, paragraph 3.

<sup>4</sup> UN Economic and Social Council, Resolution 1989/64 adopted on 24 May 1989, paragraph 1(d).

<sup>5</sup> UN Commission on Human Rights, Commission on Human Rights Resolutions 2005/59: Question of the Death Penalty, 20 April 2005.



In a report to the Economic and Social Council in 2010 the UN Secretary-General noted that “This issue is often confused with the related but different questions of responsibility for the crime itself and application of an insanity defence, and of fitness to stand trial, where a person is unable to participate in the trial for mental health reasons. The norm protecting insane and mentally disabled persons from execution applies even when there is no question of competency at the time the crime was committed or at trial. It is not uncommon for a person to become insane subsequent to conviction and sentence of death, and in such cases execution is forbidden by the third safeguard [guaranteeing protection of the rights of those facing the death penalty].” The UN Secretary-General stated that the difficulty with the third 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”.<sup>6</sup>

In 1986 in *Ford v. Wainwright*<sup>7</sup> the US Supreme Court of the **United States of America** stated that the execution of the “insane” violates the US Constitution’s Eighth Amendment ban on “cruel and unusual punishments”. However, the *Ford* ruling neither defined competence for execution, nor mandated specific procedures that were to be followed to determine whether a person was competent for execution.

Lack of clarity in the definition of competence, together with inadequate legal representation, the mandatory imposition of the death penalty and lack of resources for independent medical assessments before and after sentencing means that – often – persons with mental and intellectual disabilities have been sentenced to death and, in some cases, executed.

#### 4. Mental and intellectual disabilities and the death penalty

In order to identify the relevance of mental or intellectual disabilities in the criminal justice system, defendants need to be assessed regularly from the time of arrest. However, such assessment of people charged with crimes carrying the death penalty is not a regular practice in the great majority of countries that still retain capital punishment.

Stephen Robinson was sentenced to death on 12 March 2009 for the murder of a security guard, Anson John, in **Trinidad and Tobago** in January 2002. At the trial, two psychiatrists provided evidence that Stephen Robinson suffered from schizophrenia. One psychiatrist examined him four months after the incident, the other four and half years after Anson John’s death. The records of St Ann’s Hospital, to which both psychiatrists were attached, revealed that Stephen Robinson had been admitted on many occasions between 1985 and 2000, and suggested a diagnosis of schizophrenia.

In cross-examination the first psychiatrist stated that it was possible that Stephen Robinson was acting perfectly rationally at the time of the offence, but in his opinion this was not the case. The second psychiatrist testified that a break in treatment of schizophrenic patients is likely to result in a relapse. Hospital records show that Stephen Robinson last attended the clinic in December 2000, more than a year before the incident. Despite the available medical evidence to support it, the jury rejected the claim that at the time of the offence Stephen Robinson was suffering an “abnormality of mind that substantially impaired his responsibility for his actions”.

As a consequence, Stephen Robinson was convicted of murder and sentenced to death. Although the Court of

<sup>6</sup> Economic and Social Council, *Report by the Secretary General: Capital punishment and implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty*, UN Document E/2010/10, 18 December 2009, para C (4), (<http://www.un.org/en/ecosoc/docs/report2010.asp>). Accessed on 15 August 2014.

<sup>7</sup> *Ford v. Wainwright*, No. 85-5542, U.S. Supreme Court, Jun. 26, 1986.



Appeal dismissed his appeal in July 2010, it concluded: "it is unfortunate that the application of clear legal principles should result in the imposition of the death penalty on an individual who, on the evidence, has a long outstanding mental disability. The apparent harshness of the result of our decision might best be ameliorated, not by a distortion of the law, but rather by petitioning the appropriate authorities, that is, the Mercy Committee."<sup>8</sup> The case was before the Judicial Committee of the Privy Council at the time of writing.

### *Mandatory death penalty*

Mandatory imposition of the death penalty, which applies in some jurisdictions, can be a threat to respect for the prohibition on the use of the death penalty against people with mental or intellectual disabilities. The respect for the prohibition on the use of the death penalty against people with mental or intellectual disabilities is under greater threat in jurisdictions where there is mandatory imposition of the death penalty. The UN Human Rights Committee has stated that "the automatic and mandatory imposition of the death penalty constitutes an arbitrary deprivation of life, in violation of article 6, paragraph 1, of the [International] Covenant [on Civil and Political Rights], in circumstances where the death penalty is imposed without any possibility of taking into account the defendant's personal circumstances or the circumstances of the particular offence".<sup>9</sup>

The mandatory imposition of the death penalty means that, in cases in which the defendant has been deemed competent to fit trial, mental or intellectual disabilities cannot be raised as a mitigating factor to reduce the sentence.

In **Malaysia**, Nigerian national Osariakhi Ernest Obayangbonis<sup>10</sup> was due to be executed on Friday 14 March 2014 after he was mandatorily sentenced to death after conviction for a murder 18 years ago. He had been diagnosed as suffering from schizophrenia before his appeal in 2007 and has been receiving treatment for his mental illness since then. His execution was temporarily stayed only hours before the scheduled time and he currently remains detained on death row in Kajang Prison in Selangor state.

### *Mental and intellectual disabilities developed while on death row*

Once a defendant has been recognized as competent to stand trial and be sentenced to death, in the great majority of countries that still retain the death penalty no regular mental health assessments are carried out unless a disability has been identified by the prison guards.

The impact of the conditions of detention while on death row on the mental health of prisoners has been widely recognized. Lack of stimulus, lack of access to fresh air and light, limitation on visits, threat of disciplinary punishments, and the prolonged period of detention, together with the knowledge of impending execution, have all been identified as contributing to the development of mental illnesses.

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<sup>8</sup> For more detail on this case, see sentence of the Court of Appeal, available at [http://webopac.ttlawcourts.org/LibraryJud/Judgments/coa/2009/weekes/CrA\\_09\\_12DD29jul2010.pdf](http://webopac.ttlawcourts.org/LibraryJud/Judgments/coa/2009/weekes/CrA_09_12DD29jul2010.pdf)

<sup>9</sup> *Pagdayawon Rolando v. Philippines*, Views of the Human Rights Committee... Communication No. 1110/2002, UN document CCPR/C/82/D/1110/2002, 8 December 2004, para. 5.2. Article 6(1) of the International Covenant on Civil and Political Rights proclaims the right to life and forbids the arbitrary deprivation of life.

<sup>10</sup> Amnesty International, "Malaysia: Halt imminent execution of man suffering from mental illness", 13 March 2014. Osariakhi Ernest Obayangbonis was convicted under the name of Philip Michael, based on the British passport that was found on him at the time of arrest.



In his 2012 interim report to the UN General Assembly, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment stated that “death row prisoners constantly face unimaginable anxiety over their own imminent death.” In some countries such as Belarus, Indonesia, Japan, Malaysia, prisoners were not given notice in advance of their scheduled execution, deepening the levels of mental anguish experienced.

Additional circumstances, including lack of notice as to the date of the execution, public executions and mistakes in administering the execution increase the mental trauma of persons sentenced to death” and concluded that the so-called death row phenomenon “is a violation of article 7 of the International Covenant on Civil and Political Rights [affirming the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment], and of article 1 or article 16 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, depending on the length of isolation and severity of conditions. [...] A prolonged stay on death row, along with the accompanying conditions, constitutes a violation of the prohibition of torture itself.”<sup>11</sup>

Prison conditions experienced by those under sentence of death in **Japan** are harsh and breach Japan’s obligations under the International Covenant on Civil and Political Rights.

Prisoners are prohibited from talking to other prisoners -- a restriction enforced by strict isolation. Contact with the outside world is limited to infrequent and supervised visits from family, lawyers or other approved visitors. Visits can last from five to 30 minutes at the discretion of the Prison Director. A guard is always present during visits. Prisoners may send one letter of up to seven pages per day. In principle, prisoners may receive letters from any source but supportive letters from the public will not be delivered. Both outgoing and incoming correspondence are subject to censorship. Death row prisoners are not allowed to watch television or to undertake personal projects or activities, though they can undertake work voluntarily.

Prisoners are reportedly allowed three books, subject to approval. Exercise is limited to two short (30 minute) sessions per week outside their cells in summer and three per week in winter. A prison staff member observes these exercise periods during which the prisoner is alone. Apart from this and toilet visits, prisoners are not allowed to move around their cell but must remain seated. Prisoners’ opportunities for social contact are limited not only by the strict rules but, in many cases, by families ceasing or restricting their visits.

Executions in Japan remain shrouded in secrecy, with prisoners typically given only a few hours’ notice. Some may be given no warning at all. Their families are usually notified about the execution only after it has taken place.

Because of the vulnerability of prisoners to violations of their human rights, there is a need both for a strict application of the rule of law and for transparency and accountability in the procedures taking place within places of detention.

Transparency on the application of the death penalty is among the fundamental due process safeguards to prevent the arbitrary deprivation of life. Transparency includes the need for a public trial and sentencing, adequate notice

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<sup>11</sup> Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/67/279, 9 August 2012.



to defendants of their substantive and procedural rights, notice to defendants, their families and their legal representatives regarding the death sentence and the timing of execution. At a general level, transparency serves the purpose of enabling the public to make an informed evaluation of the use of the death penalty and of the administration of justice in general.

## *Executions of people with mental or intellectual disabilities*

In 2014 Amnesty International has documented the use of the death penalty against people with mental or intellectual disabilities in several countries.

-Devender Pal Singh Bhullar has been receiving treatment at a psychiatric facility in **India** since 2010. Despite this, the President of India rejected his mercy petition in 2011 and the Supreme Court upheld his death sentence in March 2013 without adequately considering concerns around his mental health. In May 2013, a medical panel set up to assess his condition stated that he was suffering from a form of psychosis. Another medical panel examined Devender Pal Singh Bhullar in December 2013 and found that his symptoms of psychosis had continued, and “chances of his full recovery remain poor.” It was only on 31 March 2014 that the Indian Supreme Court commuted his death sentence, on the grounds of mental illness and delay in the disposal of his mercy petition.<sup>12</sup> This ruling followed the Supreme Court’s landmark judgment in January 2014, in which the court commuted the death sentences imposed on Sundar Singh and Magan Lal Barela on the ground that they suffer from mental illness.<sup>13</sup> While these are welcome developments, it is of serious concern that all three men had their mercy petitions rejected and were facing executions despite their mental health status.

-In **Japan**, several prisoners known to have been suffering from mental illness have already been executed; others remain on death row. Hakamada Iwao, now 78 years old, was sentenced to death for murder following an unfair trial in 1968. Like most other persons on death row, Hakamada Iwao was held mainly in solitary confinement. Within months of the Supreme Court’s 1980 judgment confirming his death sentence, he began to show signs of seriously disturbed thinking and behaviour. His communication with his lawyers became ineffective and his letters and verbal communication with his elder sister incoherent. Hakamada Iwao was temporarily released pending retrial in March 2014; he continues to suffer from mental illness and could go back to prison if an appeal by the prosecution against the order for retrial is successful.

Matusmoto Kenji has been on death row for murder since 1993 and could face execution any moment – he has a mental disability from mercury poisoning (Minamata disease), is reportedly paranoid and incoherent as a result of a mental illness he developed during his detention on death row, and his lawyers are seeking a retrial.

-Mohammad Asghar was diagnosed with paranoid schizophrenia in the United Kingdom in 2010, after which he moved to **Pakistan**. He was convicted on charges of blasphemy in 2014 and sentenced to death. Despite his

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<sup>12</sup> Amnesty International, “India: Commutation of another death sentence must spur rethink on death penalty”, ASA 20/009/2014, 31 March 2014.

<sup>13</sup> Amnesty International, “India: Landmark Supreme Court decision upholds rights of death row prisoners”, ASA 20/002/2014, 21 Jan 2014.



diagnosis in the UK, the trial court ruled that Asghar was sane.<sup>14</sup>

-Since the beginning of 2014 Amnesty International has raised concerns in relation to the cases of four men with mental or intellectual disabilities in the **United States of America**. Askari Abdullah Muhammad was executed in Florida on 7 January 2014 for a prison murder committed in 1980. He had a long history of serious mental illness, including diagnoses of paranoid schizophrenia. On 9 April Mexican national Ramiro Hernandez Llanas was executed in Texas despite evidence that his intellectual disability, as assessed in six different IQ tests over the past decade, rendered his death sentence unconstitutional. Robert Campbell had his execution stayed just two and a half hours before it was due to be carried out in Texas on 13 May to allow his lawyers to pursue an appeal based on new evidence that he has an intellectual disability that would render his execution unconstitutional.

Among the condemned prisoners currently seeking clemency from the governor of Florida, and who may face an execution date if their requests are rejected, are Frank Walls and Michael Zack. Frank Walls,<sup>15</sup> who was 19 at the time of the murders, was assessed as functioning at the level of a 12-year-old and as suffering from brain damage, brain dysfunction and major psychiatric disorders. Michael Zack<sup>16</sup> suffered severe physical, sexual and psychological abuse as a child and teenager. Mental health experts testified at his trial that in their opinion he suffered from post-traumatic stress disorder, chronic depression, and possible brain damage, had the mental and emotional age of a young child, and that his ability to appreciate the criminality of his conduct had been substantially impaired.

## 8. Conclusions and recommendations

International law and standards clearly state that people with mental or intellectual disabilities must not be sentenced to death.

The authorities at all levels should ensure that the criminal justice system in their country is equipped with all the necessary technical expertise and resources to allow the strictest adherence to international standards in all capital cases. As soon as mental or intellectual disabilities are diagnosed, individuals should receive appropriate treatment and support.

Pending full abolition of the death penalty, Amnesty International calls on governments of countries that still retain capital punishment in their legislation to:

-immediately establish a moratorium on executions with a view to abolishing the death penalty, in line with UN General Assembly resolutions adopted since 2007, most recently resolution 67/176 of 20 December 2012;

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<sup>14</sup> Amnesty International, Pakistan: Further information: Guard shoots mentally ill prisoner, ASA 33/014/2014, 3 October 2014. Laws criminalising blasphemy are inconsistent with states' obligations to ensure the rights to freedom of expression and freedom of thought, conscience and religion. The UN Human Rights Committee, the expert body that oversees the implementation of the International Covenant on Civil and Political Rights (ICCPR), has noted in its General Comment No. 34 that "Prohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant".

<sup>15</sup> Amnesty International, USA: Florida death row prisoner seeks clemency: Frank Walls, AMR 51/079/2013, 26 November 2013.

<sup>16</sup> Amnesty International, USA: Death row inmate seeks commutation to life, AMR 51/033/2014, 27 May 2014.



-ensure that defendants in capital cases have access to regular, independent and rigorous mental health assessments at intervals throughout the entire criminal justice process, including after sentence, and that the criminal justice system in their country is equipped with all the necessary technical expertise and resources to allow the strictest adherence to international standards in all capital cases;

-as soon as mental or intellectual disabilities are diagnosed, provide prisoners with prompt and appropriate treatment and support, and ensure that they are not subjected to the death penalty;

-ensure full transparency in all death penalty cases, including by notifying the prisoner, their relatives and legal representatives of any execution dates scheduled in their case;

-end the detention of prisoners under sentence of death in prolonged solitary confinement and that conditions of detention comply with international standards, such as the UN Standards Minimum Rules for the Treatment of Prisoners and the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.