

HANGING BY A THREAD

MENTAL HEALTH AND THE DEATH PENALTY IN JAPAN

“Because writing. There is no case, but innocent comes out. I had training for ten years underground. Specially. The magic wisdom started working, the machine made itself. It’s called the machine of Gakushuin ... Written, nothing more than written. It’s not amongst existing. It’s a finished matter. This is not real.”

RESPONSE OF A DEATH ROW PRISONER WHEN QUESTIONED ABOUT THE HELP HE WAS RECEIVING FROM LAWYERS



© Amnesty International

“If a person condemned to death is in a state of insanity, the execution shall be stayed by order of the Minister of Justice.”

Article 479(1), Japanese Code of Criminal Procedure (Act 131)

Japan is one of only two industrialized countries that retains the death penalty and uses it (the other is the USA). Its use is veiled in secrecy, with prisoners informed of their fate

just moments before their execution and relatives told only after the fact. Among those executed have been prisoners affected by serious mental illness.

International human rights standards oppose the application of the death penalty against certain categories of offender, including those under 18 at the time of the crime for which they were convicted, pregnant women, the aged and those with a serious mental disorder. Amnesty

Tokyo Detention House, one of seven locations in Japan where prisoners are executed.

International calls on the Japanese authorities to introduce effective safeguards for prisoners sentenced to death, and to ensure that prisoners with mental illness are not executed. It urges the government to improve prison conditions so that prisoners will not suffer declining mental health or the development of serious mental illness.

**AMNESTY
INTERNATIONAL**



HAKAMADA IWAO

Hakamada Iwao (b.10 March 1936), a former boxer, was arrested and prosecuted on charges of murder in 1966. It was alleged that on 30 June 1966 he stabbed to death the manager of the factory where he worked and three other family members. He was arrested and interrogated for 20 days by police without a lawyer present. Under the *daiyo kangoku* (substitute prison) system, suspects can be detained for up to 23 days of questioning. There is no limit on the length of interrogation sessions, during which the detainees' lawyers have only restricted access to them. Hakamada Iwao was tried on 11 September 1968. He retracted his confession, testifying that police had coerced him into signing it. Nevertheless he was found guilty and sentenced to death. His appeal to the Tokyo High Court was subsequently heard and rejected in 1976 and a further appeal to the Supreme Court in 1980 was rejected and the death penalty confirmed.

Within months of the finalization of his death sentence Hakamada Iwao 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 were incoherent. He continued to write such letters up until August 1991.

Hakamada Iwao was permitted the very limited visits allowed to death row prisoners – his sister and three members of a support group. However, in August 1994, he refused visits. For 12 years his sister was unable to see him. He has accepted visits sporadically since November 2006.

Hakamada Iwao was examined by a mental health expert for the court during one hour interviews on 23 and 25 October 2007. The examiner's diagnosis was that Hakamada suffered from "mental disability, mainly due to the long-term stay in the detention centre".

An independent psychiatrist examined him on 16 January 2008 and concluded that Hakamada Iwao is suffering from a prison reaction (also known as prison psychosis) with megalomania and thought disorder, that his condition constitutes a "state of insanity" within the terms of the Code of Criminal Procedure, and that he therefore lacks competence for execution.

Hakamada Iwao, now 73, was using a wheelchair and continued to speak in a confused manner when last seen by supporters in April 2009. He remains in isolation in a small cell in Tokyo Detention House awaiting death by hanging. In the meantime his supporters are petitioning for a retrial that they hope will establish his innocence of the crime for which he was sentenced to death 41 years ago.



Hakamada Iwao, shown in the photo above during his career as a boxer, has been under sentence of death for over 40 years and is currently held in Tokyo Detention Centre.

THE DEATH PENALTY IN JAPAN

The use of the death penalty in Japan is an anomaly. The crime rate is low in comparison to other countries of a similar socio-economic level of development. The number of murder convictions is low – 70 per cent lower than half a century ago. The level of imprisonment is also relatively low. And only about one in 100 of those prisoners convicted of murder or a similar crime is sentenced to death.

A number of prisoners in Japan are reported to have been executed despite having been mentally ill.

On 23 August 2007, Japan executed three prisoners, including Takezawa Hifumi, born in 1937. He had been suffering from mental illness following a stroke, which made him paranoid and aggressive. According to reports of his trial, doctors acting for both the prosecution and the defence diagnosed Takezawa Hifumi as mentally ill. However, he was deemed responsible for his crime, sentenced to death and executed.

Japan is the only Asian country reported to show increasingly severe policies with respect to both the death penalty and imprisonment. The method of execution specified by Japanese law is hanging.

LAWS AGAINST EXECUTING THE MENTALLY ILL

International standards calling on states to refrain from using the death penalty on those suffering from mental illness include two statements by the UN Economic and Social Council and resolutions of the UN Commission on Human Rights. The UN Special Rapporteur on extrajudicial, summary and arbitrary executions has affirmed the international prohibition on executing people with mental disorders.

It is widely recognized in criminal law and international human rights

DEATH PENALTY INDEX: JAPAN	
Prisoners with death sentence finalized by Supreme Court	97
Finalized prisoners' age range	youngest: 26 oldest: 85
Number of prisoners executed, 1979-2008	91 (includes one female)
Number of mentally ill prisoners executed	information not available
Age of prisoners executed since 1979	youngest: 32 oldest: 77
Time between first conviction and execution	shortest: 3 years longest: 30 years
Number of mentally ill prisoners on death row	information not available
Number of prisoners exonerated and released since 1979	4
Number of prisoners permanently exempted from execution on appeal on mental health grounds	0

EXECUTING THE ELDERLY

In Japan, the age of a prisoner is a factor in determining whether or not he or she is liable to be sentenced to death. Japanese law conforms to international standards proscribing the execution of persons under 18 at the time of the crimes for which they are being sentenced. In fact, most of those executed are elderly. In the three years between January 2006 and January 2009, 32 men were executed in Japan. Of these, 15 were aged under 60, and 17 were older than 60. Five of this older group were in their 70s, including one aged 77 and a 75-year-old man who had to be taken to his execution in a wheelchair. These are among the oldest executed prisoners in the world.

law that certain factors must be taken into consideration when an individual is tried, convicted and sentenced for a criminal act. These include factors that are regarded as mitigating or even exculpatory, such as acting in self-defence or acting under the influence of a serious mental illness.

Different national jurisdictions account for mitigating factors arising from mental status in different ways. Cases involving offenders with mental illness can give rise to verdicts of “not guilty due to insanity”, “guilty but insane”, and “guilty of manslaughter [rather than murder] due to diminished responsibility”, among others. In cases where guilt is established by the court, the sentence may be lessened due to the mental state of the accused.

In Japan, Article 39 of the Penal Code specifies that acts due to insanity or diminished responsibility will not be punished or will result in a lesser penalty. The Code of Criminal Procedure provides that, “In case the accused is in the condition of mental derangement, the public trial procedure shall be suspended by ruling for the period [of the] condition after hearing the opinion of a public procurator and the counsel”. Moreover, Article 479 of the Code of Criminal Procedure specifies 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”. The law therefore requires diminution of punishment where an accused or convicted person has diminished capacity or competence at the

DEFINITION OF TERMS

Mental illness: 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.

Intellectual disability (also known as mental retardation): 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.

Diminished responsibility: a legal term referring to the view that a person affected by a mental disorder may not be held to the same level of accountability as someone who is in possession of their faculties.

Personality disorder (in particular, antisocial or borderline personality disorder): not a mental illness that can be treated with drugs or therapy, it is a behavioural condition in which the affected person may lack empathy and understanding of others and may disregard social and legal conventions.

time of the crime, during the legal process or at the time of execution.

Japanese law emphasizes the mental well-being of the prisoner — the law contains explicit references to the obligation of the authorities to maintain the prisoner’s “peace of mind”. A representative of the Adult Correction Section of the Justice Ministry was quoted in a 2004 press article as saying: “We want to maintain the mental stability of those waiting for death.” He added: “Emotionally, everybody wants them to face their last moments in peace.”

The view of one criminologist seems to Amnesty International to more accurately sum up the interaction of law and practice: “The law says peace of mind [of the prisoner] should be protected; the policy is to break minds”.

ASSESSING COMPETENCY TO STAND TRIAL

Mental disorders can give rise to crimes, can be a contributing factor, or may not be directly relevant to the commission of a particular crime. It is the responsibility of the criminal justice system to take account of the mental state of the accused or convicted offender in order to meet both judicial goals and international human rights standards.

Japanese law takes account of competence in the criminal justice sector in three ways. The first level of competence is related to responsibility for actions or **criminal responsibility**. Lawyers whom Amnesty International interviewed

explained that a person accused of a capital offence such as murder might be evaluated for competence at the request of the judge or the prosecutor during interrogation. Defence lawyers would not have a right to seek such an evaluation. If questions arose about the mental competence of the defendant at the point of trial, a judge, prosecutor or defence lawyer might seek an evaluation of the prisoner.

The second level of competence relates to the capacity of the accused to **participate in legal proceedings**. This is known in Japan as procedural competence. It is characterized by a capacity to be able to understand the nature of the charge, to communicate coherently with lawyers, to assist in his or her own defence and to make rational decisions regarding appeals.

The third level of competence corresponds to the notion of **fitness for punishment** or execution and is defined by Article 479(1) of the Code of Criminal Procedure. However, the suspension of a death

sentence on the grounds of mental incapacity following a lower court conviction has occurred only twice — both for reasons of procedural competence. A death sentence has never been commuted (that is, reduced to a lesser sentence) because of incompetence for execution under the terms of Article 479.

LIFE ON DEATH ROW

Prison conditions experienced by death row inmates in Japan are harsh and constitute cruel, inhuman or degrading treatment or punishment. Prisoners are not allowed to talk to each other – 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 anyone; in fact, supportive letters from the public will not be delivered. Both outgoing and incoming correspondence is censored.

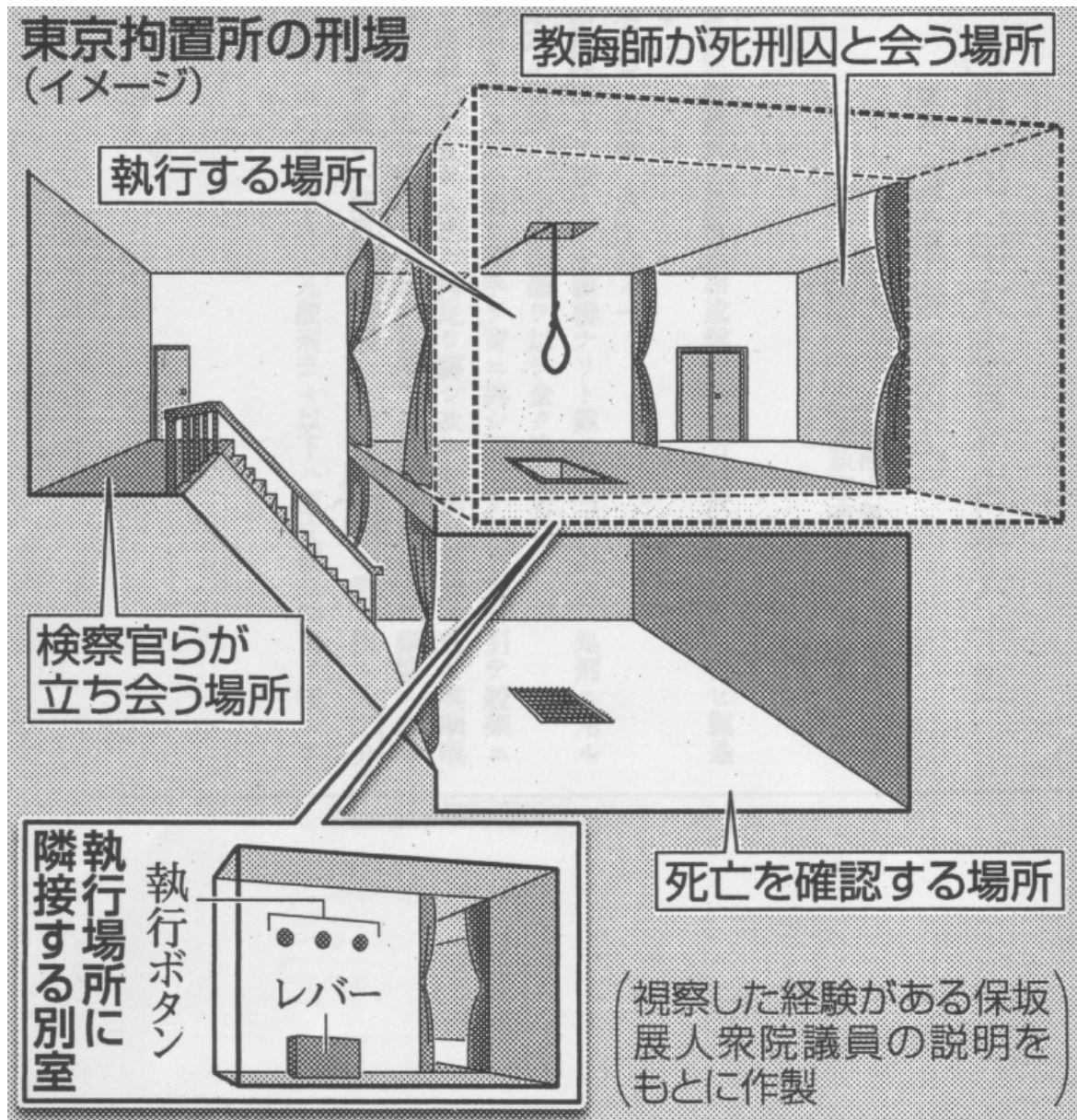
Death row prisoners are not allowed to watch television or to undertake personal projects or activities, although they can work voluntarily. Prisoners are allowed three books subject to approval. Exercise is limited to two 30 minute sessions per week outside their cells in summer and three times a week in winter. A prison staff member observes these exercise periods during which the prisoner is alone. Apart from this, prisoners are not allowed to move around their cell but must remain seated.

Not only are prisoners isolated from others within the prison, but in many cases, they are also rejected or disowned by their families. In some cases, the prisoner himself refuses visits for whatever reason although in such cases it is difficult to verify the prisoner's views or the reasons for refusing visitors.

MATSUMOTO MISAO

Matsumoto Misao (b.20 February 1965) was convicted on 24 August 1993 of two murders and an injury resulting in death, and a robbery, perpetrated respectively in December 1990 and July 1991. He had had mental problems prior to his arrest and had a history of solvent abuse. He appealed to the Tokyo High Court in September 1994 but his appeal was rejected. He then appealed to the Supreme Court in 1998, which confirmed his death sentence on 1 December of that year.

A co-defendant in the case had testified that Matsumoto was not involved in the killing and Matsumoto is appealing for a retrial. Currently he voices delusional thoughts, saying that he is being affected by microwave radiation, and has purple blood. He complains of headache which is being investigated with computerized (axial) tomography scans. These scans are believed to show that he has no underlying problem but lawyers cannot get access to the results. His legal team is applying for a retrial but say that the prisoner's mental state is affecting his ability to participate in his sentence. Matsumoto Misao is liable to be executed at any time even though he is seeking a retrial.



Sketch of the execution chamber, Tokyo Detention House, from the *Asahi Shimbun* newspaper, 10 March 2009. The sketch is based on the recollections of Nobuto Hosaka, a member of the Japanese Diet who has visited the chamber. No official illustration or information about the chamber is available. In the top right of the picture is the execution chamber with an area to the right where the prison chaplain meets the prisoner. In an adjacent room (see image, bottom left) are three buttons; three staff members press these buttons simultaneously but only one releases the trapdoor, activating the hanging. To the left of the execution chamber is the witness area. The prosecutors view the prisoner with the noose around his neck; the curtains are then closed and the execution carried out. Below the execution chamber the body is examined by a doctor who pronounces death.

TRANSPARENCY

Because prisoners are vulnerable to violations of human rights, there is a need for both a strict application of the rule of law and for transparency and accountability in the procedures taking place within places of detention. An informal level of transparency might be provided by assuring visits by friends and family of prisoners, as well as by their lawyers. However, the limits placed on visits, the extent of isolation of the prisoner and the difficulties faced by lawyers in getting information all conspire to obscure detention procedures in Japan.

In 2006, the government introduced a new system of prison visiting by inspection committees composed of doctors, lawyers and other citizens. The function of these visiting committees has yet to be fully evaluated. Amnesty International believes that they represent a positive step forward but they have limited powers and see a small percentage of prisoners. Visits without notice or at a time of the committees' choosing are not usually granted. The presence of a doctor and a lawyer in the visiting committees is to be welcomed although given the scale of mental health problems in prisons, inclusion of mental health expertise would be a useful additional resource.

MEDICAL ETHICS

The ultimate fate of the condemned prisoner represents a major pressure on the ethics of medical

professionals. Providing medical care to inmates of Japanese prisons takes place in the absence of a capacity by the prisoner to make demands and in an environment in which informed consent cannot always be assured. The prison confirms on a daily basis prisoners' lack of agency.

Linked with the situation of the prisoner is the doctor's inability to resolve many of the prisoner's underlying existential problems and related medical problems. Prisoners live in a system that is highly likely to generate stress and illness. Thirdly, prison doctors lack true clinical independence since some clinical recommendations available to doctors in civil society are not available to the prison doctor. Moreover they face acute dilemmas arising from dual loyalties: doctors must conform to the requirements of their employer, the prison director and the Department of Corrections, and at the same time must provide care to the prisoner on the basis of need and with due regard to principles of medical ethics. These obligations are frequently not compatible.

Another clash between ethics and psychiatric practice arises in the context of forensic evaluations bearing on competence. Since a finding of competence (or an evaluation that might assist a judge to determine competence) could hasten the death of a prisoner, it raises important questions of ethics. A key element in arriving at an ethical position is an understanding of who makes the

assessment of competence. The World Psychiatric Association has called on psychiatrists not to make evaluations of competence for executions. However, some psychiatrists do provide mental health evaluations in the belief that they contribute to the judicial process and possibly to the reversal of the death sentence of an incompetent prisoner.

The Japan Society of Psychiatry and Neurology adopted a temporary position in 2002 against participation by psychiatrists in the death penalty and subsequently adopted a definitive position. Among the elements included in that position were prohibitions on psychiatrists in correctional practice participating in forensic assessments of the mental health of prisoners, on any psychiatrist assessing competence for execution, and on treating death row inmates to restore them to competence.

LEGAL REFORMS

In May 2009, a new law came into effect providing that cases of serious crime will be heard by a panel of three judges sitting with a six-member panel of lay assessors – the “quasi-jury” system (*saiban-in seido*). Conviction and sentencing will be by majority decision provided that the majority contains at least one judge. The effect of this on the role of mental health evidence in death penalty cases and more widely on the application of the death penalty has yet to be seen.

CONCLUSION

The procedures leading to conviction and sentence of death in Japan are characterized by a number of unacceptable features that contradict the emphasis on prisoner well-being and peace in domestic law: (i) holding a suspect for up to 23 days in *daiyo kangoku* (substitute prison) detention in a police cell after arrest, a practice which has been repeatedly

criticized by the UN; (ii) the reliance of the court on confession evidence, which has been repeatedly criticized as unreliable when people with mental illness, personality disorders or intellectual disabilities are concerned; (iii) the lack of mandatory appeal in death penalty cases; (iv) the de facto process of “social extinguishment” of the convicted prisoner through isolation and lack of social contact; (v) the

harsh conditions to which the prisoner is subjected, in some cases for decades; (vi) the lack of respect for the rights of prisoners with mental illness; (vii) the lack of transparency and accountability; and (viii) the failure of the authorities to respond to requests by the UN Human Rights Committee to rectify aspects of Japan’s use of the death penalty that it regards as cruel, inhuman or degrading.

RECOMMENDATIONS

Amnesty International calls on the government of Japan to:

- Review all recommendations made to the UN Human Rights Committee to bring Japanese prison practice into line with international human rights standards.
- Initiate an immediate independent review of cases where there is credible evidence that prisoners may be mentally ill and could fall within the scope of Article 479 of the Code of Criminal Procedure. This would include those who were not mentally ill at the time of the commission of the crime(s) for which they were sentenced to death, but whose mental health has deteriorated while in prison.

- Ensure that a sentence of death is not carried out if the prisoner has a mental disorder or disability that significantly impairs his or her capacity to decide on appeals, to assist their legal counsel or to appreciate the reason for the imposition of the death penalty.
- Ensure that all prisoners are given proper medical assessments prior to their trials.
- Ensure that lawyers have a right to seek and receive information about the prisoner directly from the doctors responsible for health care of the prisoner under sentence of death.
- Ensure that prisoners (or lawyers working on their behalf)

- have the right (within reason) to seek a forensic medical evaluation during the investigation, trial and appeal processes, with equal rights of access to the accused person and to the criminal file as the medical expert mandated by the prosecutor or judge.
- End the possibility of prisoners with current applications for retrial being liable to execution before their appeal is heard.
- End the practice of not giving notice of the date of an execution to the prisoner and his or her family significantly in advance of the event.
- End the routine solitary confinement of death row prisoners.

