

Washington International Law Journal

Volume 14 | Number 2

4-1-2005

Follow the Leader?: Japan Should Formally Abolish the Execution of the Mentally Retarded in the Wake of *Atkins v. Virginia*

Simon H. Fisherow

Follow this and additional works at: <https://digitalcommons.law.uw.edu/wilj>



Part of the [Comparative and Foreign Law Commons](#), and the [Human Rights Law Commons](#)

Recommended Citation

Simon H. Fisherow, Comment, *Follow the Leader?: Japan Should Formally Abolish the Execution of the Mentally Retarded in the Wake of Atkins v. Virginia*, 14 Pac. Rim L & Pol'y J. 455 (2005).

Available at: <https://digitalcommons.law.uw.edu/wilj/vol14/iss2/6>

This Comment is brought to you for free and open access by the Law Reviews and Journals at UW Law Digital Commons. It has been accepted for inclusion in Washington International Law Journal by an authorized editor of UW Law Digital Commons. For more information, please contact lawref@uw.edu.

FOLLOW THE LEADER?: JAPAN SHOULD FORMALLY ABOLISH THE EXECUTION OF THE MENTALLY RETARDED IN THE WAKE OF *ATKINS V. VIRGINIA*

Simon H. Fisherow[†]

Abstract: Japan is the only industrialized democracy in the world to not explicitly proscribe the execution of the mentally retarded. In the face of opposition from both international bodies and non-governmental organizations, Japan persists in engaging in a practice condemned by both international law and the laws of the vast majority of the world's nations. Even the United States, a nation that remains staunchly pro-death penalty, abandoned its practice of executing the mentally retarded in 2002 due to the emergence of a national consensus against the practice. This Comment examines Japan's use of the death penalty and its imposition on mentally retarded defendants. From a criminological standpoint, the goals of the death penalty are not served by executing the mentally retarded, who lack the culpability and blameworthiness to warrant execution.

Executing the mentally retarded fails to serve the aims of the Japanese criminal justice system, which primarily focuses on rehabilitation and reformation, rather than deterrence and punishment. If a country such as the United States, which shows no signs of abandoning its use of the death penalty, can commit to the abolition of the death penalty for the mentally retarded, Japan should also officially abandon the practice and continue to adopt international human rights norms. Multinational organizations such as the United Nations, the European Union, and the Council of Europe have raised concerns over Japan's continued use of the death penalty, as have international human rights groups such as Amnesty International. Even if Japan chooses to partially ignore these groups, formally abolishing the death penalty for the mentally retarded will demonstrate Japan's willingness to honor its international human rights commitments.

I. INTRODUCTION

The last day in the life of a Japanese death row inmate ends with a walk to the execution chamber. Once there:

They are handcuffed from behind, blindfolded, and brought onto the hanging place, whose floor is split in two. They are tied up while on their knees to prevent wounding the body in case they struggle. At the same time the hanging rope is placed around the prisoner's neck. At a signal, the floor splits into two, and prisoners fall into the opening. Since the length of the rope has been adjusted in advance to take account of the height of

[†] Fulbright Fellow, Osaka University, Faculty of Laws, Osaka, Japan, 2002-2003. The author would like to thank Professor Veronica Taylor and the members of the editorial staff of the *Pacific Rim Law & Policy Journal* for their valuable and insightful comments, as well as his friends and family for their support and patience. Any errors or omissions are entirely the author's own.

prisoners, they continue cramping until their death, suspended in the air some 15 centimeters above the underground floor.¹

As of early 2005, Japan and Kyrgyzstan² were the only two countries in the world that did not explicitly forbid the execution of prisoners with mental retardation.³ The act of executing the mentally retarded is almost universally condemned throughout the world, with both international law and international custom strongly against the practice. Japan is the only democracy to do so, with even the United States recently condemning the practice after a shift in judicial policy, despite continuing the use of capital punishment in general.

This Comment examines Japan's practice of executing the mentally retarded as well as the stance of the international community. It urges Japan to follow the approach adopted by the United States on this issue. Multinational bodies such as the United Nations ("UN") and the European Union ("EU"), as well as non-governmental organizations such as Amnesty International and other human rights groups, have all taken strong abolitionist stances against the imposition of the death penalty. Japan does not need to abolish the death penalty in its entirety to come into alignment with international human rights norms regarding capital punishment, as dozens of countries still retain it.⁴ However, Japan should formally commit to abolishing the execution of the mentally retarded, a practice condemned by the world community, both by nations and global civil society.

Part II of this Comment outlines the current state of the death penalty in Japan, including the procedures and circumstances in which the death penalty is imposed. Part III examines the approach of the international community, manifested through the actions of the United Nations, towards the death penalty and the execution of the mentally retarded. Part IV details the evolution of the United States' position on the execution of the mentally

¹ JCA-NET, HIDDEN DEATH PENALTY IN JAPAN, http://www.jca.apc.org/stop-shikei/epamph/dpinjapan_e.html (last visited Apr. 19, 2005).

² Kyrgyzstan imposed a moratorium on the death penalty in 1998, which is still in effect currently. Approximately 140 prisoners remain on death row. See, e.g., AMNESTY INTERNATIONAL, BELARUS AND UZBEKISTAN: THE LAST EXECUTIONERS: THE TREND TOWARDS ABOLITION IN THE FORMER SOVIET SPACE (Oct. 4, 2004), <http://web.amnesty.org/library/Index/ENGEUR040092004?open&of=ENG-392> (last visited Apr. 19, 2005).

³ Prior to 2002, Japan, Kyrgyzstan, and the United States maintained the practice. *Extrajudicial, Summary or Arbitrary Executions: Report by the Special Rapporteur*, U.N. Commission on Human Rights, para. 380, E/CN.4/1995/61 (1994); Brief of Amicus Curiae The European Union at 8, *McCarver v. North Carolina*, 533 U.S. 975 (2001) (No. 00-8727) [hereinafter *McCarver*].

⁴ As of September 2004, 118 countries have abolished capital punishment, while seventy-eight countries retain it. *Japan Does Not Need the Death Penalty in 21st Century*, JAPAN ECONOMIC NEWSWIRE, Oct. 8, 2004, available at LEXIS, Nexis Library, Kyodo News Service.

retarded, from an interpretation of the U.S. Constitution that allowed the practice to its current abolitionist stance. In addition, Part IV compares the U.S. Constitution with its Japanese counterpart in their treatment of human rights. Part V views the death penalty from a criminological perspective and outlines the ways in which executing the mentally retarded is incompatible with the goals of capital punishment. Finally, Part VI examines the role of capital punishment in Japan and concludes that executing the mentally retarded does not serve the aims of the Japanese criminal justice system, which focuses on rehabilitation and reformation rather than retribution.

II. JAPAN IS ONLY ONE OF TWO DEMOCRACIES CURRENTLY IMPOSING THE DEATH PENALTY

Executions in Japan occur relatively sparingly, with only a handful of prisoners executed every year.⁵ From 1981 to 2000, the largest number of Japanese citizens executed in any one year was seven in 1993.⁶ In 2004, two Japanese prisoners were executed, both on the same day.⁷ The Supreme Court of Japan's recent decision on November 19, 2004, to uphold the death sentence for a seventy-seven-year-old woman,⁸ combined with the dual executions of Mamoru Takuma, a forty-year-old man with a history of mental illness,⁹ and Sueo Shimazaki, a fifty-nine-year-old former mafia boss,¹⁰ on September 14, 2004, shines a bright light on Japan's use of the death penalty. As of September 2004, Japan has executed forty-six people since lifting the three-year-and-four-month moratorium on executions that began in 1989 and ended in 1993.¹¹ The government retains seven detention centers across the country, each of which maintains special chambers for execution of death row inmates.¹²

Japanese prisoners on death row are never sent to prison, but rather to

⁵ HIDDEN DEATH PENALTY IN JAPAN, *supra* note 1.

⁶ *Id.*

⁷ See Justin McCurry, *Japan Executes Child Killer*, GUARDIAN UNLIMITED, Sept. 15, 2004, available at <http://www.guardian.co.uk/japan/story/0,7369,1304579,00.html> (last visited Apr. 19, 2005).

⁸ Haruno Sakamoto was sentenced to death for the murder of her husband and another woman to collect on her husband's insurance payments. *Woman, 77, Must Hang: Top Court*, THE JAPAN TIMES, Nov. 20, 2004, available at <http://www.japantimes.co.jp/cgi-bin/getarticle.pl5?nn20041120b5.htm> (last visited Apr. 19, 2005).

⁹ Takuma was executed for the killing of eight schoolchildren in 2001 at an elementary school in Ikeda, a suburb of Osaka. See *supra* note 7 and accompanying text.

¹⁰ See *Japanese School Killer Executed*, BBC NEWS, Sept. 15, 2004, available at <http://news.bbc.co.uk/1/hi/world/asia-pacific/3654144.stm> (last visited Apr. 19, 2005).

¹¹ See *Killer of Eight Osaka Schoolchildren, Yakuza Boss Executed*, JAPAN TODAY, Sept. 15, 2004, available at <http://www.japantoday.com/el/?content=news&id=312075> (last visited Apr. 19, 2005).

¹² HIDDEN DEATH PENALTY IN JAPAN, *supra* note 1.

detention centers, where their executions are ultimately performed if their appeals are unsuccessful.¹³ The executions take place almost entirely in secret,¹⁴ with prisoners notified mere hours before their execution that they are to be executed.¹⁵ The relatives of death row prisoners as well as their lawyers are only notified after the execution has taken place, usually by notice the following day¹⁶ that the detention center “departed with the prisoner.”¹⁷ The Justice Ministry is simply not required to inform the condemned inmate’s family prior to execution.¹⁸ The details of how the death sentence was carried out are not made known to the public or anyone else outside the execution process.¹⁹ Typically, it takes approximately five to seven years between the death sentence and the actual execution of death row inmates.²⁰ However, there are numerous cases of prisoners languishing on death row for more than twenty years, often in inhumane conditions,²¹ such as Sadamichi Hirasawa, who had been on death row for thirty-two years before dying at age ninety-five.²²

Japanese executions are governed by the Code of Criminal Procedure, articles 475-479.²³ Article 475 states that the death penalty shall be administered under an order from the Minister of Justice,²⁴ and the order shall be given within six months from the day when a judgment becomes final.²⁵ Once the Minister of Justice orders the death penalty, the execution is carried out within five days.²⁶ Because article 475 requires an order from the Minister of Justice for a death sentence to be carried out, if the Minister of Justice chooses not to issue the order, an execution will be stayed. For nearly three and a half years from 1989 to 1993, Japan maintained a moratorium on executions because the Minister of Justice held strong

¹³ Suvendrini Kakuchi, *Rights – Japan: Death Penalty Under Fire*, IPS – INTER PRESS SERVICE, Oct. 1, 2004, available at LEXIS, Nexis Library, Inter-Press Service/Global Information Network.

¹⁴ See EXTREMIS.TV (MACUMBA INTERNATIONAL), DEATH PENALTY IN THE USA AND JAPAN (2004) (on file with author).

¹⁵ Melissa Clack, *Caught Between Hope and Despair: An Analysis of the Japanese Criminal Justice System*, 31 DENV. J. INT’L L. & POL’Y 525, 545 (2003).

¹⁶ EXTREMIS.TV (MACUMBA INTERNATIONAL), *supra* note 14.

¹⁷ HUMAN RIGHTS FEATURES, JAPAN HANGING ON TO DEATH PENALTY, Apr. 23, 2003, <http://www.hrdc.net/sahrdc/hrfeatures/HRF75.htm> (last Apr. 19, 2005).

¹⁸ U.S. DEPARTMENT OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES – 2003: JAPAN, Feb. 25, 2004, available at <http://www.state.gov/g/drl/rls/hrrpt/2003/27772.htm> (last visited Apr. 19, 2005).

¹⁹ Shigemitsu Dando, *Towards the Abolition of the Death Penalty*, 72 IND. L. J. 7, 10 (1996).

²⁰ HUMAN RIGHTS FEATURES, *supra* note 17.

²¹ See Roger Hood, *The Death Penalty: The USA in World Perspective*, 6 J. TRANSNAT’L L. & POL’Y 517, 539 (1997).

²² HUMAN RIGHTS FEATURES, *supra* note 17.

²³ Keiji Soshōhō [KEISOHŌ], art. 475-79.

²⁴ *Id.* art. 475.

²⁵ *Id.* art. 475, no. 2.

²⁶ *Id.* art. 476.

ideological objections to the practice of the death penalty²⁷ and due to the rise of a nascent abolitionist movement.²⁸

Article 477 lays out the procedures for the actual execution of a prisoner on death row: (1) the death penalty shall be administered in the presence of a public prosecutor, a public prosecutor's assistant officer, and either a warden or his representative; and (2) no person shall enter the place of execution except with the permission of a public prosecutor or a warden.²⁹

The articles of the Japanese Criminal Code also include provisions for a temporary stay of execution in which a prisoner will remain on death row without being executed. However, while making reference to insane persons (article 479 requires the staying (or postponement) of an execution if a person condemned to death is in a "state of insanity"),³⁰ the Code is silent on defendants suffering from mental retardation.³¹ Article 479 also prevents the execution of pregnant women condemned to death, though executions are only stayed under article 479 subsequent to recovery from state of insanity or delivery by the pregnant prisoner.³²

Executions generally occur in Japan while the Diet (Japan's parliament), is out of session.³³ According to Forum 90, a Japanese abolitionist group seeking to end the death penalty, the practice of holding executions while the government is out of session minimizes both public and parliamentary debate over the death penalty and its use in Japan.³⁴ In 1994, abolitionist members of the Diet established "The Federation of Diet Members for Abolition of Capital Punishment" to protest executions that take place while the Diet is not in session, so that members are unable to demand explanations from the Ministry of Justice during debate.³⁵

Japan and the United States are the only two democracies in the world to utilize the death penalty. Because of the Japanese government's secrecy and lack of transparency regarding the execution process, the death penalty in Japan is often administered without the level of public debate found in the United States.

²⁷ EXTREMIS.TV (MACUMBA INTERNATIONAL), *supra* note 14.

²⁸ DAVID T. JOHNSON, THE JAPANESE WAY OF JUSTICE: PROSECUTING CRIME IN JAPAN 198 (2002).

²⁹ KEISOHÖ, art. 477.

³⁰ *Id.*

³¹ *Id.* art. 479.

³² *Id.*

³³ See AMNESTY INTERNATIONAL, JAPAN: CEASE ALL EXECUTIONS, Nov. 29, 2002, <http://www.hrea.org/lists/hr-headlines/markup/msg00722.html> (last visited Apr. 19, 2005).

³⁴ See *Anti-Death Penalty Campaigners Criticize Executions in Japan*, JAPAN TODAY, Sept. 15, 2004, available at LEXIS, Nexis Library, ALLNWS File.

³⁵ See HIDDEN DEATH PENALTY IN JAPAN, *supra* note 1.

III. JAPAN DEVIATES FROM THE INTERNATIONAL COMMUNITY'S APPROACH TO THE DEATH PENALTY AND THE EXECUTION OF THE MENTALLY RETARDED

Over the past thirty years, international law as seen through the actions, conventions, and documents of the UN has evolved from a position of considering limitations on the use of the death penalty to a position favoring its abolition.³⁶ In 1966, the UN adopted and opened for signature, ratification, and accession the International Covenant on Civil and Political Rights ("ICCPR"), which entered into force on March 23, 1976.³⁷ The ICCPR is the most comprehensive international human rights treaty currently in existence, praised by the U.S. Department of State as "the most complete and authoritative articulation of international human rights law that has emerged in the years following World War II."³⁸

The UN firmly supports the abolition of the death penalty, as seen by its subsequent actions following the adoption of the ICCPR.³⁹ In addition, other international entities, such as the EU and the Council of Europe, also strongly support the death penalty's abolition and the protection of persons suffering from mental retardation.⁴⁰ Despite Japan's extensive involvement with the United Nations, Japan does not comport with established international norms towards the death penalty and its abolition.

A. *The United Nations Adopted the Second Optional Protocol to the ICCPR in a Deliberate Attempt to Encourage Abolition of the Death Penalty*

The ICCPR is the foundation from which the UN develops its abolitionist stance toward the death penalty. It states in article 6 that anyone sentenced to death has the right to seek amnesty, pardon or commutation of the sentence.⁴¹ It also identifies certain demographic groups that should be excluded from the death penalty, specifically persons under the age of eighteen and pregnant women.⁴² The ICCPR also refers to the ideal of

³⁶ See William A. Schabas, *International Norms on Execution of the Insane and the Mentally Retarded*, 4 CRIM. L.F. 95, 116 (1993).

³⁷ International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (1966).

³⁸ Richard C. Dieter, *International Perspectives on the Death Penalty: A Costly Isolation for the U.S.*, Oct. 1999, <http://www.deathpenaltyinfo.org/article.php?scid=45&did=536> (last visited Apr. 19, 2005).

³⁹ See *infra* notes 44-52 and accompanying text.

⁴⁰ See *infra* notes 65-67 and accompanying text.

⁴¹ International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, art. 6(4).

⁴² *Id.* art. 6(5).

abolishing the death penalty even without specifically advocating its abolition: "[n]othing in this article shall be invoked to delay or prevent the abolition of capital punishment by any State Party to the present Covenant."⁴³

In 1984, the UN went further, adopting a resolution designed to implement and guarantee rights of death row inmates beginning at the sentencing phase, an explicit codification of the rights alluded to in the ICCPR.⁴⁴ These safeguards restrict the application of capital punishment to the most serious crimes,⁴⁵ and require that steps be taken to ensure that appeals of death sentences be mandatory.⁴⁶ They also require that when capital punishment occurs that it be carried out in such a way as to inflict the least possible suffering.⁴⁷

The UN General Assembly took the final step in its evolution toward an abolitionist stance on the death penalty in 1989, when it adopted and proclaimed the Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty ("Second Optional Protocol").⁴⁸ The Second Optional Protocol was the fruition of efforts by the UN, beginning in the 1970s, to realize its goal of abolishing the death penalty in all countries.⁴⁹ The Second Optional Protocol specifically endorses an international commitment to the abolition of the death penalty.⁵⁰ It also prevents any signatory from making reservations to it, except for allowing the death penalty in time of war pursuant to convictions for crimes deemed "most serious" or crimes of a military nature committed during wartime.⁵¹ The Second Optional Protocol reflects the intentional trend toward disfavoring the use of capital punishment and clearly states the UN's support of abolition of the death penalty.⁵²

⁴³ *Id.* art. 6(6).

⁴⁴ Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty, E.S.C. Res. 1984/50, U.N. ESCOR, 1st Sess., Supp. No. 1 at 33, U.N. Doc. E/1984/84 (1984).

⁴⁵ *Id.* § 1.

⁴⁶ *Id.* § 6.

⁴⁷ *Id.* § 9.

⁴⁸ The Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty, G.A. Res. 44/128, U.N. GAOR, 44th Sess., Supp. No. 49 at 207, U.N. Doc. A/44/49 (1989) [hereinafter Second Optional Protocol].

⁴⁹ James H. Wyman, *Vengeance is Whose?: The Death Penalty and Cultural Relativism in International Law*, 6 J. TRANSNAT'L L. & POL'Y 543, 548 (1997).

⁵⁰ Second Optional Protocol, *supra* note 48, art. 1.

⁵¹ *Id.* art. 2.

⁵² Kristi Tumminello Prinzo, Note, *The United States – "Capital" of the World: An Analysis of Why the United States Practices Capital Punishment While the International Trend is Towards its Abolition*, 24 BROOK. J. INT'L L. 855, 862-63 (1999).

B. *Other International Entities, in Addition to the United Nations, Advocate Abolition of the Death Penalty, Particularly for the Mentally Retarded*

The UN has a strong influence on other international bodies that advocate abolition of the death penalty for persons suffering from mental disabilities. The EU also explicitly opposes the death penalty in all cases and has advocated its abolition.⁵³ The EU Memorandum on the Death Penalty favorably references various UN resolutions, including the ICCPR, the Second Optional Protocol, and the Safeguards Guaranteeing Protection of those Facing the Death Penalty.⁵⁴ It is a clear indication of a regional consensus against the imposition of the death penalty. Additionally, the Organization of American States (“OAS”) advocates the protection of the freedoms and human rights of persons suffering from mental disabilities.⁵⁵

International law and custom clearly support the abolition of the practice of executing the mentally retarded.⁵⁶ In 1999 and again in 2000, the UN adopted resolutions urging states that retain the death penalty not to impose it on any persons suffering from “any form of mental disorder,” including both the mentally ill and the mentally retarded.⁵⁷ The mental status of defendants is of particular importance to the UN.⁵⁸

Although arguably no customary international law (“CIL”)⁵⁹ exists regarding the abolition of the death penalty in general,⁶⁰ CIL prohibits the execution of the mentally retarded. With the decision of the United States Supreme Court in *Atkins v. Virginia*,⁶¹ Japan and Kyrgyzstan are the only

⁵³ EUROPEAN UNION, EU MEMORANDUM ON THE DEATH PENALTY, <http://www.eurunion.org/legislat/DeathPenalty/eumemorandum.htm> (last visited Apr. 19, 2005).

⁵⁴ *Id.* § 4.

⁵⁵ See *infra* note 68 and accompanying text.

⁵⁶ See Harold Hongju Koh, *Edward L. Barrett, Jr. Lecture on Constitutional Law*, 35 U.C. DAVIS L. REV. 1085, 1121-22 (2002).

⁵⁷ *Question of the Death Penalty*, U.N. Commission on Human Rights, C.H.R. Res. 1999/61, U.N. Doc. E/CN.4/RES/1999/61 (Apr. 28, 1999); *Question of the Death Penalty*, U.N. Commission on Human Rights, C.H.R. Res. 2000/65, U.N. Doc. E/CN.4/RES/2000/65 (Apr. 27, 2000).

⁵⁸ Timothy S. Hall, *Legal Fictions and Moral Reasoning: Capital Punishment and the Mentally Retarded Defendant After Penry v. Johnson*, 35 AKRON L. REV. 327, 341 (2002).

⁵⁹ After treaties, customary international law (“CIL”) is the second most important source of international law. A rule of CIL exists as a result of state practice combined with a sense of legal obligation (*opinio juris*), repeated over time by a significant number of states. Laurence Rothenberg, *International Law, U.S. Sovereignty, and the Death Penalty*, 35 GEO. J. INT’L L. 547, 555 (2004). See also JEFFREY L. DUNOFF, STEVEN R. RATNER, & DAVID WIPPMAN, *INTERNATIONAL LAW: NORMS, ACTORS, PROCESS* 74-75 (2002) (explaining the term *opinio juris*).

⁶⁰ While 117 countries have currently abolished the death penalty, seventy-eight countries still retain capital punishment. Rothenberg, *supra* note 57, at 555. To establish a rule of CIL, state practice must be consistent and uniform. *Id.* at 556.

⁶¹ See *infra* Section IV(B).

countries not to explicitly ban executions of persons suffering from mental retardation, and Kyrgyzstan has recently instituted a moratorium on all executions.⁶²

The existence of a rule of CIL is determined by the widespread repetition by states of similar international acts over time (state practice), which occur out of a sense of legal obligation (as embodied in the phrase *opinio juris sive necessitatis*) rather than simply habit or custom.⁶³ In addition, there must be state practice by a significant number of states without significant derogation.⁶⁴ All of the prerequisites for finding a rule of CIL toward abolition of the execution of the mentally retarded are present.

As discussed above, only two countries, Japan and Kyrgyzstan, currently do not formally proscribe executions of persons suffering from mental retardation. Clearly, the "state practice" of an overwhelming majority of states is to refrain from executions of the mentally retarded. Additionally, numerous international bodies have passed resolutions and memoranda declaring the inhumanity of executing the mentally retarded and its incompatibility with modern human rights standards. The UN,⁶⁵ the Council of Europe,⁶⁶ the EU,⁶⁷ and the OAS⁶⁸ have all taken steps to protect the rights of the mentally retarded and advocate their protection from execution. The international community refrains from executing the mentally retarded not merely out of habit or informal custom, but out of a sense of a legal obligation to protect the rights of those suffering from

⁶² See *supra* note 2 and accompanying text.

⁶³ See *supra* note 59.

⁶⁴ MARCI HOFFMAN, INTERNATIONAL AND FOREIGN LEGAL RESEARCH: CUSTOMARY INTERNATIONAL LAW AND GENERALLY RECOGNIZED PRINCIPLES, Oct. 1999, at <http://www.ll.georgetown.edu/intl/other.htm> (last visited Apr. 19, 2005).

⁶⁵ The United Nations Economic and Social Council clarified that Safeguard 3 of the "Safeguards Guaranteeing Protection of Rights of those Facing the Death Penalty" includes elimination of the death penalty for persons suffering from mental retardation, whether at the sentencing stage or the execution stage. *Implementation of the Safeguards Guaranteeing Protection of Rights of those Facing the Death Penalty*, U.N. Economic and Social Council, ECOSOC Res. 1989/64, UN Doc. E/1989/91 (1989).

⁶⁶ The Council of Europe is a forty-three member intergovernmental body, including all members of the European Union. McCarver, *supra* note 3. The Parliamentary Assembly of the Council of Europe noted a body of case law under the European Convention on Civil Rights on protection and treatment of persons with mental disorders, as well as observations from the European Committee on the Prevention of Torture and Inhuman or Degrading Treatment or Punishment regarding practices followed concerning psychiatric treatment of patients (citing Parliamentary Assembly of the Council of Europe, Recommendation 1235 (1994)).

⁶⁷ See *supra* note 53 and accompanying text.

⁶⁸ The OAS has called on all member states to establish laws that protect the fundamental freedoms and human rights of persons suffering from mental disabilities. Brief of Amicus Curiae The European Union at 18, *supra* note 3 (citing ORGANIZATION OF AMERICAN STATES, INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, RECOMMENDATION OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS FOR THE PROMOTION AND PROTECTION OF THE RIGHTS OF THE MENTALLY ILL, Apr. 4, 2001).

mental retardation. Therefore, customary international law requires that Japan formally abolish the execution of the mentally retarded.

C. *Despite Japan's Involvement with the United Nations, Japan Still Does Not Accept All Established International Norms Regarding the Death Penalty*

Japan adopted the ICCPR on September 21, 1979, but has not adopted the Second Optional Protocol as of June 9, 2004,⁶⁹ presumably because of its retentionist stance on the death penalty. Japan rejected a proposed amendment to the Second Optional Protocol from Colombia and Uruguay calling for the outright abolition of the death penalty, saying it "valued the laudable intention of the amendment, which it could not endorse because it had not yet abolished capital punishment."⁷⁰ Japan was the only country to express formal disagreement with the draft resolution of the Second Optional Protocol prior to its adoption and ratification,⁷¹ arguing that the matter should be decided by individual governments.⁷²

In addition to the United Nations, The Council of Europe, which invited Japan to be an official observer,⁷³ has threatened to revoke Japan's observer status if it does not commit to abolishing the death penalty.⁷⁴ The Council called on Japan and the United States to:

1. institute without delay a moratorium on executions, and take the necessary steps to abolish the death penalty;
2. improve conditions on "Death Row" immediately, with a view to alleviating "Death Row phenomenon" (this includes the ending of all secrecy surrounding executions, of all unnecessary limitations on rights and freedoms, and a broadening of access to post-conviction and post-appeal judicial review).⁷⁵

⁶⁹ OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, STATUS OF RATIFICATIONS OF THE PRINCIPAL INTERNATIONAL HUMAN RIGHTS TREATIES, June 9, 2004, available at <http://www.unhcr.ch/pdf/report.pdf> (last visited Apr. 19, 2005).

⁷⁰ WILLIAM A. SCHABAS, *THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW* 70 (2nd ed. 1997).

⁷¹ *Id.* at 169.

⁷² *Id.* at 171.

⁷³ *On Observer Status for Japan with the Council of Europe*, Eur. Consult. Ass., Res. 96(37) (Nov. 20, 1996).

⁷⁴ *Abolition of the Death Penalty in Council of Europe Observer States*, Eur. Consult. Ass., 17th Sess., Res. 1253 (2001) (June 25, 2001).

⁷⁵ *Id.* at § 8.

Japan's retentionist stance toward the death penalty places it at odds with the Council of Europe and the EU. According to the Japanese Institute of Global Communications, Japan's retention of the death penalty as well as the "inhuman conditions on death row" serve as an obstacle to closer relations between Japan and Europe.⁷⁶ The move to threaten to revoke Japan's status as an observer was applauded by human rights groups and anti-death penalty groups as a valid exercise of pressure on Japan to alter its approach to the death penalty.⁷⁷

The Human Rights Committee of the UN considered Japan's Third Periodic Report to the Committee⁷⁸ and expressed serious concerns over Japan's treatment of capital punishment and inmates subject to capital punishment.⁷⁹ The Committee conceded that unique cultural factors in Japan, such as traditional concepts of gender roles, the relationship between individuals and groups, and the homogeneity of the Japanese population, militate against attempts to implement the ICCPR.⁸⁰ However, the Committee expressed apprehension over the effectiveness of the ICCPR when in conflict with domestic Japanese legislation.⁸¹ The Committee also expressed its concern at the number and nature of crimes punishable by the death penalty in Japan under the Japanese Penal Code.⁸² The Committee noted that the terms of the ICCPR require that signatories only apply the death penalty only for the most serious crimes.⁸³ It also noted Japan's "undue restrictions" on personal visits and correspondence with death row prisoners, as well as the failure to notify family members of executions, are inconsistent with the ICCPR.⁸⁴ The Committee recommended that Japan become a party to both Optional Protocols⁸⁵ and to the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment.⁸⁶ It concluded by advocating that Japan:

⁷⁶ John de Boer, *Europe Report # 2: Japan's Observer Status to the Council of Europe Under Threat because of the Death Penalty*, JAPANESE INSTITUTE OF GLOBAL COMMUNICATIONS, Apr. 11, 2002, at http://www.glocom.org/special_topics/eu_report/20020411_eureport_s2/ (last visited Apr. 19, 2005).

⁷⁷ See, e.g., FIRST WORLD CONGRESS AGAINST THE DEATH PENALTY, FINAL DECLARATION, June 22, 2001, at http://www.coe.int/T/E/Com/Files/Themes/Death-Penalty/e_declaration_fin.asp (last visited Apr. 19, 2005).

⁷⁸ *Concluding Observations of the Human Rights Committee: Japan 05/11/93*, U.N. Human Rights Committee, U.N. Doc. CCPR/C/79/Add.28.

⁷⁹ Markus G. Schmidt, *Universality of Human Rights and the Death Penalty—The Approach of the Human Rights Committee*, 3 ILSA J. INT'L & COMP. L. 477, 478 (1997).

⁸⁰ *Concluding Observations of the Human Rights Committee: Japan 05/11/93*, *supra* note 78, at § 2.

⁸¹ *Id.* at sec. 4.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ The first Optional Protocol refers to facilitating remedies of violations of the ICCPR.

⁸⁶ *Concluding Observations of the Human Rights Committee: Japan 05/11/93*, *supra* note 78, at § 5.

Take measures towards the abolition of the death penalty, and that, in the meantime, that penalty should be limited to the most serious crimes; that the conditions of death row detainees be reconsidered; and that preventive measure of control against any kind of ill-treatment of detainees should be further improved.⁸⁷

While the UN has not taken action against Japan beyond precatory recommendations, it has clearly contributed to the abolitionist movement in Japan. Through the passage of the general Universal Declaration on Human Rights, to the more specific, but ineffective, ICCPR, to the new Second Optional Protocol, the United Nations has brought increasing pressure on the Japanese government to abandon capital punishment.⁸⁸

The Japanese government's position on the direct applicability of the ICCPR is unclear.⁸⁹ Statements by certain Japanese government ministries (i.e. Ministry of Foreign Affairs) that the ICCPR is directly applicable specifically contradict statements from other ministries such as the Ministry of Justice.⁹⁰ Courts in Japan often treat the ICCPR as being directly applicable.⁹¹ The force of the ICCPR in Japan, however, is still unclear as courts will often conclude that even though the ICCPR is directly applicable, the Covenant has not been breached in the case at bar.⁹²

Japan's position on the death penalty places it in the small minority of members of the United Nations. Japan's decision not to ratify the Second

⁸⁷ *Id.*

⁸⁸ Joseph L. Hoffman, *Justice Dando and the "Conservative" Argument for Abolition*, available at <http://www.law.indiana.edu/ilj/v72/no1/hoffmann.html> (last visited Apr. 19, 2005).

⁸⁹ YUJI IWASAWA, *INTERNATIONAL LAW, HUMAN RIGHTS, AND JAPANESE LAW: THE IMPACT OF INTERNATIONAL LAW ON JAPANESE LAW* 49 (1998).

⁹⁰ The Japanese Ministry of Foreign Affairs seemingly adopted the direct applicability of the ICCPR in Japan's Fourth Report to the United Nations Human Rights Committee in 1997. However, the Ministry of Justice later contradicted the Ministry of Foreign Affairs by declaring that the ICCPR is not "self-executing." *Id.* at 50.

⁹¹ The Tokyo High Court, Osaka High Court, Tokushima District Court and the Sapporo District Court have all found the ICCPR to be directly applicable. *Id.* at 51-52.

⁹² For example, the Supreme Court of Japan interpreted Article 19 of the ICCPR and concluded that it had not been breached in a case involving the Japanese courts' practice of prohibiting note-taking in courtrooms, which was challenged by an American lawyer. The plaintiff argued that the ban on note-taking violated Article 19 of the ICCPR as well as Article 21 of the Japanese Constitution ("(1) Freedom of assembly and association as well as speech, press and all other forms of expression are guaranteed. 2) No censorship shall be maintained, nor shall the secrecy of any means of communication be violated."). The Supreme Court of Japan rejected the plaintiff's arguments, concluding that the Article allowed some restrictions on the freedoms "provided by law," and note-taking was properly restricted in accordance with statutes. *Id.* at 52-53.

Optional Protocol to the ICCPR places the nation on the outside of mainstream of international law regarding abolition of the death penalty.

IV. THE UNITED STATES' POSITION ON THE EXECUTION OF THE MENTALLY RETARDED EVOLVED FROM A STANCE ALLOWING THE PRACTICE TO A POSITION SUPPORTING ITS ABOLITION

The United States has shown few signs of abandoning the use of capital punishment.⁹³ Prior to 2002, the United States was one of only three countries in the world to execute the mentally retarded.⁹⁴ This makes the United States Supreme Court's decision to abolish the practice of executing the mentally retarded so striking and pertinent to Japan. The U.S. Supreme Court was willing to go against both previous judicial precedent as well as popular opinion towards the death penalty in general in its decision to abolish the execution of mentally retarded offenders.⁹⁵

A. *The United States Condoned the Execution of the Mentally Retarded Under the Supreme Court's Decision in Penry v. Lynaugh*

For most of the United States' history, the U.S. Supreme Court did not construe the Eighth Amendment to prohibit the execution of the mentally retarded. It was only in 1989 that the Court first considered the issue, holding that such a practice was not constitutionally barred,⁹⁶ despite the fact it arguably violated international law.⁹⁷

Penry v. Lynaugh, a 1989 case, shaped the U.S. position on executing the mentally retarded.⁹⁸ The basis of the Court's decision⁹⁹ lay in its interpretation of the Eighth Amendment of the Constitution, which prohibits cruel and unusual punishment.¹⁰⁰ Penry, the defendant in the case, argued that the execution of a mentally retarded person with the reasoning capacity of a seven-year-old, such as himself, would violate the Eighth Amendment's prohibition against cruel and unusual punishment.¹⁰¹ Penry's argument

⁹³ See Richard C. Dieter, *supra* note 38.

⁹⁴ Eli Velasquez, Note, *The Shaping of an American Consensus Against the Execution of Mentally Retarded Criminals: A Case Note on Atkins v. Virginia*, 24 WHITTIER L. REV. 955, 979 (2003).

⁹⁵ *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

⁹⁶ See *infra* notes 105-108 and accompanying text.

⁹⁷ *Wyman*, *supra* note 49, at 555.

⁹⁸ *Penry v. Lynaugh*, 492 U.S. 302 (1989).

⁹⁹ *Id.* at 313.

¹⁰⁰ The Eighth Amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

¹⁰¹ *Penry*, 492 U.S. at 328.

arose out of the emergence of a national consensus against the execution of the mentally retarded.¹⁰² He argued that this consensus was reflective of the “evolving standard of decency that marks the progress of a maturing society,”¹⁰³ which became a central component of the Court’s Eighth Amendment analysis in *Penry*. In analyzing this consensus, the Court found that one U.S. state had already banned execution of the mentally retarded, while one other state had enacted a similar statute that had not yet taken effect.¹⁰⁴

The Court concluded in *Penry* that two state statutes prohibiting the execution of the mentally retarded did not provide sufficient evidence of a national consensus, even when augmented by the fourteen U.S. states that already prohibited capital punishment entirely.¹⁰⁵ The Court also examined public opinion polls and concluded that any public sentiment reflected in polls and resolutions may manifest itself through legislation,¹⁰⁶ a factor upon which the Court could objectively rely.¹⁰⁷ The Court did, however, leave the issue open-ended: “While a national consensus against execution of the mentally retarded may someday emerge reflecting the ‘evolving standards of decency that mark the progress of a maturing society,’ there is insufficient evidence of such a consensus today.”¹⁰⁸ It was this emerging national consensus that provided the basis for the Court’s later decision in *Atkins v. Virginia*.

B. The Supreme Court Changed Its Position on the Execution of the Mentally Retarded in Atkins v. Virginia and Prohibited the Practice as a Violation of the Eighth Amendment

Thirteen years after the Supreme Court’s decision in *Penry v. Lynaugh*, the Court’s prediction of a national consensus proved correct when the issue of the execution of the mentally retarded again came before it in the case of *Atkins v. Virginia*.¹⁰⁹ In *Atkins*, like *Penry*, a mentally retarded

¹⁰² *Id.* at 329.

¹⁰³ *Id.* at 333-34 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

¹⁰⁴ At that time, Georgia and Maryland both had statutes prohibiting execution of the mentally retarded. GA. CODE ANN. § 17-7-131(j) (Supp. 1988); MD. ANN. CODE, Art. 27, § 412(f)(1) (1989). See also *Penry*, 492 U.S. at 334.

¹⁰⁵ *Penry*, 492 U.S. at 334.

¹⁰⁶ For example, a poll taken in Texas found that even though eighty-six percent of those polled supported the death penalty, seventy-three percent opposed the death penalty for the mentally retarded. A Georgia poll found that sixty-six percent of those polled opposed the execution of the mentally retarded. In Florida, seventy-seven percent opposed the practice. *Id.* at 334-35.

¹⁰⁷ *Id.* at 335.

¹⁰⁸ *Id.* at 340.

¹⁰⁹ *Atkins v. Virginia*, 536 U.S. 304 (2002).

defendant claimed his death sentence would violate the Eighth Amendment's prohibition against cruel and unusual punishment.¹¹⁰ The *Atkins* Court undertook substantially the same analysis as the *Penry* Court, yet arrived at the opposite conclusion: executing the mentally retarded violates the Eighth Amendment's prohibition against cruel and unusual punishment.¹¹¹

Between 1989, when *Penry* was decided, and 2002, sixteen states adopted statutes prohibiting the execution of the mentally retarded.¹¹² In addition to the sheer number of states that adopted such provisions, the Court also took notice of both the "consistency of the direction of change" from allowance to abolition,¹¹³ and the overwhelming votes in favor of the prohibition in State legislatures.¹¹⁴ The Court concluded that this evidence indicated that a national consensus had developed against the execution of the mentally retarded.¹¹⁵

The Court did not end its analysis of "consensus" with only consideration of the positions of various states, however. It also referred to the views of the world community: "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved."¹¹⁶ While including the views of the world community invoked the ire of the *Atkins* dissenters,¹¹⁷ the Court nonetheless relied on international opinion as a factor in its decision.

In addition to acknowledging both the emerging national consensus and overwhelming international opinion, the *Atkins* Court completed its analysis by concluding that the criminological rationales for the imposition of the death penalty—retribution and deterrence—were not served by executing the mentally retarded.¹¹⁸ Based on the diminished capacity of mentally retarded defendants,¹¹⁹ the Court concluded: "We are not persuaded

¹¹⁰ *Id.* at 306.

¹¹¹ *Id.* at 321.

¹¹² *Id.* at 314-15.

¹¹³ *Id.* at 315.

¹¹⁴ *Atkins v. Virginia*, 536 U.S. 304, 316 (2002).

¹¹⁵ *Id.* at 316.

¹¹⁶ *Id.* at 316.

¹¹⁷ Chief Justice Rehnquist wrote: "While it is true that some of our prior opinions have looked to 'the climate of international opinion' . . . to reinforce a conclusion regarding evolving standards of decency . . . we have since explicitly rejected the idea that the sentencing practices of other countries could 'serve to establish the first Eighth Amendment prerequisite, that [a] practice is accepted among our people.'" *Id.* at 325 (Rehnquist, C.J., dissenting, quoting *Stanford v. Kentucky*, 492 U.S. 361 (1989)); "Equally irrelevant are the practices of the 'world community,' whose notions of justice are (thankfully) not always those of our people." *Id.* at 347-48 (Scalia, J., dissenting).

¹¹⁸ *Id.* at 321.

¹¹⁹ *Atkins*, 536 U.S. at 320.

that the execution of mentally retarded criminals will measurably advance the deterrent or the retributive purpose of the death penalty.”¹²⁰ The Supreme Court’s decision in *Atkins* marked the final step in the switch of the U.S. position on the execution of the mentally retarded from retention to abolition.

C. The Japanese Constitution Contains Substantially the Same Protections as the U.S. Constitution with Respect to Cruel and Unusual Punishment and Human Rights

The Japanese Constitution and the U.S. Constitution both prohibit the cruel punishment of prisoners and include clear language ensuring the protection of basic human rights. Article 36 of the Japanese Constitution specifically proscribes the use of “the infliction of torture by any public officer” and expressly forbids cruel punishments.¹²¹ In addition, the Japanese Constitution uses expansive language designed to ensure the fundamental rights of the Japanese people: “The people shall not be prevented from enjoying any of the fundamental human rights. These fundamental human rights guaranteed to the people by this Constitution shall be conferred upon the people of this and future generations as eternal and inviolate rights.”¹²²

There is, however, a clear gap between the idealistic language of the Japanese Constitution and its practical interpretation by Japanese courts.¹²³ An understanding and appreciation of human rights in Japan has not progressed in step with the apparent aims of the Japanese Constitution. Some argue that this lack of empathy for human rights results from the fact that the Japanese people did not write their own Constitution but instead had it thrust upon them by a victorious United States after World War II.¹²⁴ In other words, including fundamental civil rights and liberties in the Japanese Constitution did not result from a victory of the Japanese civil rights movement, but rather from Japan’s defeat at the hands of the United

¹²⁰ *Id.* at 321.

¹²¹ Nihonkoku Kenpō [KENPŌ], art. 36.

¹²² *Id.* at art. 11.

¹²³ Philip Alston, *Transplanting Foreign Norms: Human Rights and Other International Norms in Japan*, 1999, available at <http://www.ejil.org/journal/Vol10/No3/rev.html> (last visited Apr. 19, 2005) (reviewing YUJI IWASAWA, *INTERNATIONAL LAW, HUMAN RIGHTS, AND JAPANESE LAW: THE IMPACT OF INTERNATIONAL LAW ON JAPANESE LAW* (1998)).

¹²⁴ YASUSHI HIGASHISAWA, *ASIAN HUMAN RIGHTS COMMISSION, THE CONSTITUTION OF JAPAN AND HUMAN RIGHTS*, Nov. 9, 2001, <http://www.ahrchk.net/charter/mainfile.php/east/3/> (last visited Apr. 19, 2005).

States.¹²⁵ As a result, the Japanese people did not participate in an internal struggle for human rights and did not fully grasp these rights as their own natural rights.¹²⁶

Japanese courts do not construe human rights issues in the same terms as American courts. For example, Japanese courts do not interpret the practice of hanging, the established means of execution of condemned prisoners, as a violation of article 36 of the Constitution prohibiting torture and cruel punishment.¹²⁷ In addition, Japanese courts do not construe discrimination against both women and certain indigenous groups¹²⁸ as rising to the level requiring judicial intervention.¹²⁹ It has even been said that the Japanese live in a society where discrimination is thought to make perfect sense.¹³⁰

The U.S. Constitution, despite being more narrowly written than its Japanese counterpart, has been interpreted to proscribe executing the mentally retarded. As discussed above, the Eighth Amendment to the U.S. Constitution also prohibits the infliction of cruel and unusual punishment.¹³¹ The U.S. Constitution does not contain the same type of expansive language designed to protect fundamental human rights that is present in the Japanese Constitution. The Fourteenth Amendment to the Constitution proscribes any State from depriving any person of "life, liberty, or property" without due process of law.¹³² There is, however, nothing approximating the "eternal and inviolate rights" language of article 11 of the Japanese Constitution. In the United States, the protection of basic human rights is achieved through judicial construction and interpretation, rather than explicit enumeration in the Constitution.

Despite the expansive human rights language of the Japanese Constitution, the Supreme Court of Japan is more constrained than its American counterpart in its ability to make policy. The Supreme Court of Japan is often deferential to both the Diet¹³³ and the cabinet, relying on the

¹²⁵ HIROSHI ITOH, *THE JAPANESE SUPREME COURT: CONSTITUTIONAL POLICIES* 239 (1989).

¹²⁶ HIGASHISAWA, *supra* note 124.

¹²⁷ Charles Lane, *Why Japan Still Has the Death Penalty*, WASH. POST, Jan. 16, 2005, at B01.

¹²⁸ Groups such as the Ainu, an indigenous group of Japanese living primarily in northern Japan, have experienced systematic discrimination, as have the "burakumin," social outcasts during the *Tokugawa* Period, 1603-1868, and their descendants. See, e.g., Kyoko Kamio Knapp, *Don't Awaken the Sleeping Child: Japan's Gender Equality Law and the Rhetoric of Gradualism*, 8 COLUM. J. GENDER & L. 143 (1990).

¹²⁹ *Id.*

¹³⁰ *Id.* at 151.

¹³¹ See *supra* note 100 and accompanying text.

¹³² U.S. CONST. amend. XIV.

¹³³ The Diet is the Japanese legislature, a bicameral institution similar to the United States Congress. See, e.g., IWASAWA, *supra* note 89, at 288.

doctrine of state governance and political autonomy as the rationale for upholding the actions of the political branches of government.¹³⁴ Politicians in Japan maintain far greater influence over the judiciary than is the case in the United States.¹³⁵ Judges' political affiliation can affect their career prospects, and writing opinions contrary to the government's position can be detrimental to a judge's career.¹³⁶ When laws in Japan are amenable to more than one interpretation, courts are more likely to adopt an interpretation that upholds their constitutionality.¹³⁷ Japanese courts may be more reluctant to constitutionally challenge provisions in the Criminal Code pertaining to the death penalty and the execution of the mentally retarded than their American counterparts because of the potential repercussions. As a result, the Japanese government is likely to maintain the status quo towards executions of the mentally retarded because of the weakness of the Japanese judiciary.

The Supreme Court of Japan has sufficient legal basis to rule that executing the mentally retarded violates the Japanese Constitution. Were the Court to take the same position as the U.S. Supreme Court in *Atkins*, it might also acknowledge the international consensus that exists against executing the mentally retarded. Japanese courts could also rely on the specific and unambiguous human rights protections of the Japanese Constitution to justify a decision to abolish the execution of the mentally retarded.

V. EXECUTING THE MENTALLY RETARDED DOES NOT SERVE THE GOALS OF CAPITAL PUNISHMENT

Executing persons suffering from mental retardation runs contrary to the aims of capital punishment. Persons suffering from mental retardation possess significantly diminished mental capabilities and have lesser levels of culpability than persons unaffected by mental retardation. As such, the standards for punishment and sentencing persons with lower levels of culpability should be applied proportionately not uniformly, to reflect the goals of criminal justice.

¹³⁴ ITOH, *supra* note 125, at 174-75.

¹³⁵ J. MARK RAMSEYER & ERIC B. RASMUSEN, MEASURING JUDICIAL INDEPENDENCE: THE POLITICAL ECONOMY OF JUDGING IN JAPAN 170 (2003).

¹³⁶ *Id.* at 170.

¹³⁷ ITOH, *supra* note 125, at 212.

A. *Mental Retardation Indicates a Substantial Deficiency in Intellectual Ability*

Mental retardation refers to significantly sub-average general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period.¹³⁸ According to the Diagnostic and Statistical Manual of Mental Disorders,¹³⁹ an individual is mentally retarded when, prior to attaining the age of 18, he exhibits:

1. Significantly sub-average intellectual functioning: an IQ of approximately 70 or below on an individually administered IQ test; [and]
2. Concurrent deficits or impairments in present adaptive functioning . . . in at least two of the following areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health and safety.¹⁴⁰

As the U.S. Supreme Court wrote in *Atkins*, “if the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution.”¹⁴¹ Mental retardation is a concrete physiological condition that impairs intellectual functioning, and as a result, it should be taken into account when engaging in criminal sentencing.

B. *Execution of the Mentally Retarded Does Not Further the Criminal Justice System's Goals of Retribution and Deterrence*

The predominating purposes and rationales of the death penalty, “retribution to punish those who cannot be rehabilitated and deterrence of future crime,”¹⁴² are not served by executing the mentally retarded. Death sentences supposedly should only be imposed in cases where defendants

¹³⁸ James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414, 421 (1985).

¹³⁹ The DSM-IV is the Fourth Edition of the Diagnostic and Statistical Manual of Mental Disorders, a series of criteria used for diagnosing mental disorders. See, e.g., *Featured Book: Diagnostic and Statistical Manual of Mental Disorders—DSM-IV-TR (Text Revision)*, PSYCHOLOGYNET.ORG, at <http://www.psychologynet.org/dsm.html> (last visited Apr. 19, 2005).

¹⁴⁰ Hall, *supra* note 58, at 327, 333.

¹⁴¹ *Atkins v. Virginia*, 536 U.S. 304, 319 (2002).

¹⁴² Kelly Christine Elmore, *Atkins v. Virginia: Death Penalty for the Mentally Retarded—Cruel and Unusual—The Crime, Not the Punishment*, 53 DEPAUL L. REV. 1285, 1287 (2004).

commit the most grievous murders and deserve the most extreme punishments,¹⁴³ and as is the case in Japan when offenders are completely devoid of the potential for rehabilitation.¹⁴⁴ Because “no adult with mental retardation has a mental age higher than twelve,” the mentally retarded are unlikely to achieve the level of moral culpability for criminal wrongdoing to justify execution.¹⁴⁵

It is not enough to simply state that a defendant is culpable in cases where a death sentence could be potentially issued; rather, one must also ask whether the defendant deserves the death sentence. A determination of this issue includes both the guilt phase and the punishment phase.¹⁴⁶ For example, to impose the death penalty in a murder case, the decision-maker must go beyond the simple question of “did the defendant commit murder?” to the more important question of “should the defendant die for committing murder?”¹⁴⁷ At the punishment phase of a trial, which takes place after the defendant has been found guilty of murder, the defendant’s culpability is only relevant in terms of whether the death penalty is an appropriately proportionate punishment.¹⁴⁸

For the mentally retarded, a death sentence is not an appropriate punishment. They may be culpable at the guilt phase, but multiple factors may prevent them from being culpable at the punishment phase. First, the mentally retarded have a decreased ability to acknowledge the severity of the crime committed. Further, they are highly susceptible to manipulation. According to the U.N. Special Rapporteur: “Because of the nature of mental retardation, mentally retarded persons are much more vulnerable to manipulation during arrest, interrogation, and confession. Moreover, mental retardation appears not to be compatible with the principle of full criminal responsibility.”¹⁴⁹

Thus, the mentally retarded have “multiple vulnerabilities” and can often find themselves on death row for improper reasons.¹⁵⁰ They are

¹⁴³ Phyllis L. Crocker, *Concepts of Culpability and Deathworthiness: Differentiating Between Guilt and Punishment in Death Penalty Cases*, 66 FORDHAM L. REV. 21-22 (1997).

¹⁴⁴ See *infra* note 192 and accompanying text.

¹⁴⁵ Carol Steiker & Jordan Steiker, *ABA’s Proposed Moratorium: Defending Categorical Exemptions to the Death Penalty: Reflections on the ABA’s Resolutions Concerning the Execution of Juveniles and Persons with Mental Retardation*, 61 LAW & CONTEMP. PROB. 89, 101 (1998).

¹⁴⁶ Crocker, *supra* note 143, at 26.

¹⁴⁷ *Id.* at 28.

¹⁴⁸ *Id.* at 35-36.

¹⁴⁹ *Extrajudicial, Summary or Arbitrary Executions: Report by the Special Rapporteur*, U.N. Commission on Human Rights, para. 58., E/CN.4/1998/68/Add.3 (1998).

¹⁵⁰ James Welsh, *Mental Retardation and the Death Penalty*, Address at the First World Congress Against the Death Penalty (June 21-23 2001), at <http://www.amnesty.org.uk/action/nw/hpn/newslet/mental.shtml> (last visited Apr. 19, 2005).

susceptible to waiving their rights as a suspect without fully understanding them (as well as answering police questions without a lawyer or advisor) because of a unique desire to please authority figures.¹⁵¹ In addition, they have a higher risk of coerced answers or behaviors, false confessions,¹⁵² and having unchecked ineffective assistance of counsel.¹⁵³ This proves especially critical in capital murder cases involving the death penalty, as mentally retarded defendants often lack the insight and skills to plea-bargain or otherwise negotiate a non-capital sentence while mentally competent prisoners can avoid the death penalty.¹⁵⁴

A death sentence serves two purposes:

The decision to sentence a defendant to death represents both a legal and a moral judgment about the crime of murder and the defendant convicted of committing the murder . . . It must enforce a legally recognized punishment deemed proportionate to the crime and appropriate for the defendant, and it must express community moral outrage.¹⁵⁵

These dual purposes are not met by executing the mentally retarded because of a lack of proportionality to the crime and inappropriateness of capital punishment for mentally retarded defendants. Persons suffering from mental retardation are much less likely to understand the gravity of their offenses, both physically and morally. The deterrent effect often cited as grounds for the implementation of the death penalty is not nearly as relevant a factor when evaluating defendants with mental retardation. To the extent that the death penalty serves as a deterrent, it is highly unlikely that any deterrent effect is achieved with persons suffering from mental retardation¹⁵⁶ given that persons with mental retardation have "at most, the cognitive function of a pre-teen."¹⁵⁷ Executing the mentally retarded is an ineffective method of punishment: persons suffering from mental retardation are less able to understand their actions and are much less likely to be deterred.

¹⁵¹ Jamie Fellner, *Mentally Retarded Don't Belong on Death Row*, S.F. CHRONICLE, Jan. 4, 2000, available at <http://www.hrw.org/editorials/2000/death-0105-cron.htm> (last visited Apr. 19, 2005).

¹⁵² The importance the Japanese criminal system places on confessions makes this problem especially crucial. See *infra* note 176 and accompanying text.

¹⁵³ Welsh, *supra* note 150.

¹⁵⁴ *Id.*

¹⁵⁵ Crocker, *supra* note 143, at 79.

¹⁵⁶ Steiker, *supra* note 145, at 103.

¹⁵⁷ *Id.*

C. *Japan Does Not Sufficiently Differentiate Between Different Types of Mental Disorders, which Results in Unfair Treatment and Inadequate Protection of the Mentally Retarded*

Mental retardation is not the same as mental illness.¹⁵⁸ While some forms of mental illness are temporary, episodic, or cyclical, mental retardation is a permanent mental impairment.¹⁵⁹ As such, confusing mental retardation with mental illness can result in a failure to understand that treatment designed to assist persons with mental illness will have minimal to no effect on a mentally retarded person who is not also mentally ill.¹⁶⁰ Unlike insanity or other forms of mental illness, mental retardation has not been seen as exculpatory, nor does it prevent an imposition of punishment after trial.¹⁶¹ However, simply because a type of punishment is not explicitly prohibited, the State should not subject the mentally retarded to the same type of punishment as persons without mental retardation.

Japan has no shortage of legislation aimed at persons suffering from mental disorders.¹⁶² These laws, however, fail to isolate the crucial differences between persons suffering from mental illness, as opposed to those suffering from mental retardation. The Law Related to Mental Health and Welfare of Persons with Mental Disorders defines the term “person with mental disorder” as: “a person suffering from schizophrenia, acute poisoning of or dependence on psychotropic substance[s], mental retardation, psychopathy or other mental illnesses.”¹⁶³

Japan has not taken adequate steps to ensure the protection of the rights of the mentally retarded. The Basic Law for Persons with Disabilities, passed in 1993, does not include explicit provisions for the prohibition of discrimination and the protection of the rights of disabled persons.¹⁶⁴ Furthermore, even though the Law Related to Mental Health and Welfare of Persons with Mental Disorders conflates the mentally retarded and the mentally ill by listing all as persons suffering from “mental disorders,” the law lists a series of health and welfare benefits from which the mentally

¹⁵⁸ Ellis & Luckasson, *supra* note 138, at 423.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ Hall, *supra* note 58, at 333.

¹⁶² See *infra* notes 186-189 and accompanying text.

¹⁶³ SEISHIN HOKEN OYOBI SEISHIN SHŌGAISHA FUKUSHI NI KANSURU HŌRITSU [THE LAW RELATED TO MENTAL HEALTH AND WELFARE OF PERSONS WITH MENTAL DISORDERS], LAW NO. 123 OF 1950, art. 5 [hereinafter MENTAL HEALTH LAW].

¹⁶⁴ Toshio Kusunoki, *Rights of Disabled Persons and Japan*, ASIA-PACIFIC HUMAN RIGHTS INFORMATION CENTER, Sept. 2002, at http://www.hurights.or.jp/asia-pacific/no_29/04rightsdp.htm (last visited Apr. 19, 2005).

retarded are specifically excluded.¹⁶⁵

Japanese law requires the Japanese government to endeavor to provide "social rehabilitation, self-support, and participation in socio-economic activities" for persons suffering from mental disorders,¹⁶⁶ with the glaring exception of the mentally retarded. The Law lists the following as types of social rehabilitation facilities for persons with mental disorders but not the mentally retarded: (1) a facility for training in daily life; (2) a vocational facility; (3) a welfare home; (4) a welfare factory; and (5) a community life support center.¹⁶⁷ The Japanese government characterizes the mentally retarded as persons suffering from a form of mental disorder, yet fails to provide them with the same opportunities for social rehabilitation and development.

This creates an inherent inconsistency in the Japanese government's position. On the one hand, the government seems to treat the mentally retarded and the mentally ill as part of the same group by combining them into the category of persons suffering from "mental disorders." On the other hand, the government clearly seems to differentiate the two groups, to the extent that the mentally retarded, rather than mentally ill, are seemingly denied the opportunities to be socially rehabilitated and become valuable members of society.

This Comment does not advocate the complete exoneration of mentally retarded offenders. Mental retardation has never been treated as a factor meriting exoneration from guilt unless the retardation is almost totally disabling, as has been the case in instances of mental illness.¹⁶⁸ Mentally retarded offenders can and should be punished for crimes they commit. This punishment, however, must not include the imposition of the death penalty, which is only appropriate in cases of extraordinary blameworthiness,¹⁶⁹ where perpetrators are completely aware of their actions yet still commit their terrible crimes. Capital punishment should not be imposed on the mentally retarded in any criminal justice system, but especially in a system such as Japan, which focuses on the rehabilitation of offenders.

¹⁶⁵ MENTAL HEALTH LAW, *supra* note 163, at art. 46.

¹⁶⁶ *Id.* art. 46.

¹⁶⁷ *Id.* art. 50-2.

¹⁶⁸ Ellis & Luckasson, *supra* note 138, at 432-433.

¹⁶⁹ Fellner, *supra* note 151.

VI. EXECUTING THE MENTALLY RETARDED DOES NOT FURTHER THE AIMS OF THE JAPANESE CRIMINAL JUSTICE SYSTEM

Japan's criminal justice system is exceedingly different from the system in the United States.¹⁷⁰ While the U.S. system emphasizes deterrence and retribution, the Japanese system strives for very different goals.¹⁷¹ Although punishment is a crucial goal of the Japanese system, it serves as a means to a very different end than in the U.S. In the Japanese criminal justice system, punishment is not an end in itself, but rather a means toward assimilation back into society.

A. *The Major Aims of the Japanese Criminal Justice System Are Rehabilitation and Reintegration of Offenders*

While one of the goals of every criminal justice system is the maintenance of order, in the Japanese system that goal is attained by "specific prevention" rather than "specific deterrence."¹⁷² The concept of specific prevention embraces the idea of preventing a return to crime through rehabilitation and reformation of offenders.¹⁷³ The Japanese system has been described as one of "benevolent paternalism," resembling a "family model" in which the government acts as a concerned parent "keeping tabs" on its members, who place great amounts of trust and discretion in the hands of the authorities.¹⁷⁴

The Japanese system is not simply concerned with punishment and retribution.¹⁷⁵ Confession and subsequent forgiveness by the government are additional goals, allowing offenders to be reintegrated into society once they accept their wrongdoings.¹⁷⁶ In a survey of Japanese prosecutors, more than ninety percent stated that the objectives of "invoking remorse in the offender" and "rehabilitating and reintegrating the offender" had the same value as the procedural goals of "discovering the truth about a case" and "making a proper charging decision."¹⁷⁷ Even procedural safeguards such as proper prosecution and proof of guilt are sometimes treated as secondary to

¹⁷⁰ JOHNSON, *supra* note 28, at 279.

¹⁷¹ Daniel H. Foote, *The Benevolent Paternalism of Japanese Criminal Justice*, 80 CAL. L. REV. 317, 321 (1992).

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ Clack, *supra* note 15, at 525, 529.

¹⁷⁶ Foote, *supra* note 171, at 329.

¹⁷⁷ JOHNSON, *supra* note 28, at 98-99.

rehabilitation of guilty offenders and conformity to socially acceptable conduct.¹⁷⁸

The psychological intimidation of arrested persons into making confessions is a concern in the Japanese criminal justice system.¹⁷⁹ For a system that relies so heavily on confessions, the possibility that mentally retarded defendants will confess to crimes they did not actually commit could result in a seriously inequitable imposition of the death penalty.¹⁸⁰ In Japan, there is a very real possibility that victims may be "sacrificed" at the altar of Japan's high conviction rate.¹⁸¹ Despite the Japanese Constitution's explicit ban on the use of false or coerced confessions at trial,¹⁸² the practice still persists. The U.S. Department of State took official notice of the use of physical violence and psychological intimidation to obtain confessions from suspects in custody, or to enforce discipline in its 2003 Report on Japan's Human Rights Practices.¹⁸³ According to Amnesty International, the confession-based system in Japan allows for "incommunicado detention" for up to twenty-three days, prolonged interrogations, and harsh psychological conditions,¹⁸⁴ making the risk to the mentally retarded even more critical.

Japan has taken significant steps through various pieces of legislation to ensure that persons suffering from mental disorders are not simply cast aside and forgotten.¹⁸⁵ Legislation refers broadly to such persons as "persons whose daily life or life in society is substantially limited over the long term due to a physical disability, mental retardation or mental disability."¹⁸⁶ The Japanese government has passed, among others, The Disabled Persons Fundamental Law,¹⁸⁷ the Law for Encouraging Businesses to Facilitate Disabled Persons' Use of Telecommunications and

¹⁷⁸ Clack, *supra* note 15, at 529.

¹⁷⁹ U.S. DEPARTMENT OF STATE, *supra* note 18.

¹⁸⁰ IWASAWA, *supra* note 89, at 262.

¹⁸¹ JOHNSON, *supra* note 28, at 279.

¹⁸² Article 38 of the Japanese Constitution states: "No person shall be compelled to testify against himself. 2) Confession made under compulsion, torture or threat, or after prolonged arrest or detention shall not be admitted in evidence. 3) No person shall be convicted or punished in cases where the only proof against him is his own confession." KENPO, art. 38.

¹⁸³ U.S. DEPARTMENT OF STATE, *supra* note 18.

¹⁸⁴ *Id.*

¹⁸⁵ See HIGH-LEVEL INTERGOVERNMENTAL MEETING TO CONCLUDE THE ASIAN AND PACIFIC DECADE OF DISABLED PERSONS, 1993-2002, COUNTRY REPORT ON THE ACHIEVEMENTS OF THE GOVERNMENT MEASURES FOR PERSONS WITH DISABILITIES DURING THE ASIAN AND PACIFIC DECADE OF DISABLED PERSONS, 1993-2002: JAPAN (Oct. 25-28, 2002), at http://www8.cao.go.jp/shougai/english/oosureport/ootsu_e.pdf (last visited Apr. 19, 2005) [hereinafter HIGH-LEVEL INTERGOVERNMENTAL MEETING].

¹⁸⁶ SHŌGAISHA KIHONHŌ [DISABLED PERSONS' FUNDAMENTAL LAW], LAW NO. 84 OF 1970, art. 2.

¹⁸⁷ *Id.*

Broadcasting to Enhance Their Convenience,¹⁸⁸ the Law for Employment Promotion of Persons with Disabilities,¹⁸⁹ and the Law on Assistance Dogs for Persons with Disabilities.¹⁹⁰ The laws passed by the government are consistent with the idea of “benevolent paternalism” in which the Japanese government acts as a “parent” to the “children” of the nation.¹⁹¹ It seems clear that the Japanese government is concerned about the proper integration and welfare of persons suffering from mental disorders, making the government’s stance on the execution of the mentally retarded puzzling and incongruous.

B. The Death Penalty Is Deemed Proper in Japan Only When the Government Determines That Prisoners Are Beyond Rehabilitation

For the death penalty to be imposed in Japan, the government must find that the prisoner in question is entirely beyond redemption: someone who cannot be rehabilitated and again make a valuable contribution to society.¹⁹² There are instances in which the death penalty is imposed for the purposes of deterrence,¹⁹³ but even in these rare cases the courts will still look to the potential for rehabilitation of a defendant and a true showing of remorse before committing him or her to death.¹⁹⁴ There is, however, still no evidence in Japan that the death penalty has any effect on criminality: even the mass homicides the Aum Shinrikyo committed¹⁹⁵ were planned out and committed after the moratorium on executions was lifted.¹⁹⁶

As discussed above, the Japanese government is committed to the rehabilitation of those suffering from mental disorders.¹⁹⁷ It exempts,

¹⁸⁸ SHINTAI SHŌGAISHA NO RIKŌ NO ZŌSHIN NI SHISURU TSŪSHIN, HOSŌ SHINTAI SHŌGAISHA RIYŌ ENDAKA JIGYŌ NO SUISHIN NI KANSURU HŌRITSU [LAW FOR PROMOTING BUSINESSES THAT FACILITATE THE USE OF COMMUNICATIONS AND BROADCAST SERVICES BY THE PHYSICALLY DISABLED PERSONS], LAW NO. 54 OF 1993.

¹⁸⁹ SHŌGAISHA NO KOYŌ NO SOKUSHIN TŌ NI KANSURU HŌRITSU [LAW FOR EMPLOYMENT PROMOTION OF DISABLED PERSONS], LAW NO. 123 OF 1960.

¹⁹⁰ HIGH-LEVEL INTERGOVERNMENTAL MEETING, *supra* note 185.

¹⁹¹ See *supra* note 174 and accompanying text.

¹⁹² Foote, *supra* note 171, at 356.

¹⁹³ The Japanese Supreme Court overturned a ruling of the Tokyo High Court that reduced a sentence from death to life imprisonment for Norio Nagayama, convicted of four murders. The Japan Supreme Court referred to the relevance of general deterrence and retribution in imposing the death penalty, but also took note of the defendant’s continual “buck-passing attitude.” *Id.* at 356, n. 236.

¹⁹⁴ *Id.*

¹⁹⁵ Aum Shinrikyo is a Japanese religious cult obsessed with the apocalypse. The group gained notoriety in 1995 when its members released sarin gas in the Tokyo subway system, killing twelve people and hospitalizing more than 5000. See, e.g., COUNCIL ON FOREIGN RELATIONS, TERRORISM Q&A: AUM SHINRIKYO, 2004, at <http://www.cfrterrorism.org/groups/aumshinrikyo.html> (last visited Apr. 19, 2005).

¹⁹⁶ Dando, *supra* note 19, at 18.

¹⁹⁷ See *supra* note 166 and accompanying text.

however, the mentally retarded from some of the social benefits bestowed upon other persons suffering from mental disorders,¹⁹⁸ and it seems that the government is denying the mentally retarded an opportunity at social rehabilitation and reintegration.

C. Given the Goals of the Japanese Criminal Justice System, Executing the Mentally Retarded Is Never a Proper Punishment

Executing offenders with mental retardation does not help further the goals of the Japanese criminal justice system. Mentally retarded offenders do not have the level of culpability¹⁹⁹ sufficient to warrant execution by the State. If the goals of the Japanese system are to reintegrate offenders back into the system, those goals are not served by executing those individuals who deserve the most aid and attention from the state. If the motivation for executing prisoners in Japan is one of resignation—if the government is simply “throwing up its hands” and conceding that a particular defendant is devoid of any potential for rehabilitation—Japan cannot execute the mentally retarded simply because they might not possess the same societal value as ordinary citizens capable of an effortless reintegration.

As a nation that has begun to show greater sensitivity to international norms regarding human rights, it is surprising that Japan has not formally abolished the practice of executing the mentally retarded. International law holds a high place in Japan, even if there is some conflict between its “domestic force” and its “direct applicability.”²⁰⁰ International law in Japan may not be a “winning argument” by itself, as courts often interpret it through the prism of the Japanese Constitution.²⁰¹ A human-rights-based interpretation of the Japanese Constitution would, however, allow Japanese courts to abolish the executions of the mentally retarded.

D. Abolition of the Death Penalty for the Mentally Retarded in Japan Would Be Consistent Both with Japan's History and with the International Trend Toward Abolition of the Death Penalty

A prohibition on the execution of the mentally retarded would not be unprecedented in Japan's history. As discussed above, the Minister of

¹⁹⁸ See *supra* note 165 and accompanying text.

¹⁹⁹ See *supra* notes 145-148 and accompanying text.

²⁰⁰ Brian P. Menard, *Evidence of Compliance*, 40 VA. J. INT'L L. 763, 771 (2000) (reviewing YUJI IWASAWA, *INTERNATIONAL LAW, HUMAN RIGHTS, AND JAPANESE LAW: THE IMPACT OF INTERNATIONAL LAW ON JAPANESE LAW* (1998)).

²⁰¹ *Id.* at 786-87.

Justice imposed a moratorium on executions from 1989 to 1993 because of strong ideological objections.²⁰² Japan's use of the death penalty historically has also been mixed. While it was imposed consistently throughout most of Japan's history, there was a period in which the Japanese emperor forbade the death penalty as contrary to Buddhist teachings.²⁰³ During that time, amendments to Japanese law substituted other penalties such as exile and imprisonment rather than the death penalty.²⁰⁴ Abolitionist stances on the death penalty find "strong support in both Buddhist thought and history."²⁰⁵ Theories of retribution as grounds for capital punishment simply do not comport with the imposition of the death penalty in Buddhism. Even though religion cannot be offered as the primary argument by abolitionists in Japan, as the Japanese government is officially religion-neutral, it is significant to note that the most prevalent religion in Japan strongly opposes the death penalty.²⁰⁶ Unlike the United States, Japan cannot rely on its Judeo-Christian heritage as a rationale for the imposition of the death penalty.

Support for the death penalty in Japan remains high,²⁰⁷ with public approval being one of the reasons offered by the government to continue the imposition of capital punishment.²⁰⁸ Approximately eighty percent of the Japanese support the death penalty "in certain circumstances."²⁰⁹ Rather than curbing back on executions in Japan, the government seems to be increasing the practice, with the vast majority of Japanese people "harboring few qualms" about hanging the perpetrators of Japan's most atrocious crimes.²¹⁰ In 2003 Japan passed down a record number of death sentences, with eighty-six of them affirmed or handed out by courts.²¹¹ Support for the death penalty in Japan is nowhere near unanimous, however. The Japan Federation of Bar Associations, the largest lawyers' group in Japan, has

²⁰² See *supra* note 27 and accompanying text.

²⁰³ Damien P. Horigan, *Of Compassion and Capital Punishment: A Buddhist Perspective on the Death Penalty*, 41 AM. J. JURIS. 271, 286 (1996).

²⁰⁴ AMNESTY INTERNATIONAL, *THE DEATH PENALTY IN JAPAN: REPORT OF AN AMNESTY INTERNATIONAL MISSION TO JAPAN 3* (1983).

²⁰⁵ Horigan, *supra* note 203, at 288.

²⁰⁶ *Id.* at 285, n.83.

²⁰⁷ Masami Ito, *Debate Heats Up Over Legal Reform*, JAPAN TIMES, Apr. 25, 2004, available at <http://www.japantimes.co.jp/cgi-bin/getarticle.pl5?fl20040425x1.htm> (last visited Apr. 19 2005).

²⁰⁸ See, e.g., Henry Hilton, *More Business for the Hangman*, JAPAN TODAY, Sept. 16, 2004, available at <http://www.japantoday.com/e/?content=comment&id=639> (last visited Apr. 19, 2005).

²⁰⁹ Ito, *supra* note 207.

²¹⁰ McCurry, *supra* note 7.

²¹¹ NATIONAL COALITION TO ABOLISH THE DEATH PENALTY, JAPAN: COURT SENDS RECORD NUMBERS TO GALLOWES IN 2003, Dec. 30, 2003, at http://www.demaction.org/dia/organizations/ncadp/news.jsp?organization_KEY=206&news_item_KEY=388 (last visited Apr. 19, 2005).

openly called on the government to suspend all executions and end the "culture of secrecy" that surrounds the final hours of death row inmates.²¹² In addition, a cross-party group of approximately one hundred Japanese Members of Parliament has called for the outright abolition of the death penalty, to be preceded by a four year moratorium.²¹³

As the American experience illustrates, support for the death penalty in general and support for the execution of the mentally retarded are entirely different propositions.²¹⁴ Even if retentionist public opinion in Japan remains high, however, the Japanese government would not be without international precedent to abandon this application of the death penalty. In France, sixty-two percent of respondents favored retention of capital punishment prior to President Mitterrand's decision to abolish the practice.²¹⁵ Japan should continue its progression toward the acceptance and integration of international human rights norms and a greater role in the international community.²¹⁶ The United Nations has repeatedly expressed concerns over Japan's use of capital punishment, and the Council of Europe is considering temporarily revoking Japan's observer status if it does not suspend executions.²¹⁷ If Japan is truly going to be an established member of the international community, the government should finally officially abolish the practice of executing a subset of people who deserve the greatest amount of assistance, rather than simply casting them aside as irredeemable once convicted of a crime.

VII. CONCLUSION

Japan's practice of executing the mentally retarded is squarely at odds with the rest of the world. By condoning such a cruel and unnecessary practice, Japan has placed itself outside the mainstream of international human rights norms and practices regarding capital punishment. If a country like the United States, with its firmly retentionist stance towards the death penalty, can make an exception for this particular subset of convicted persons, Japan can and should adopt a similar approach.

The goals of capital punishment cannot be achieved by executing persons with mental retardation. Capital punishment should be reserved for

²¹² Justin McCurry on the Death Penalty in Japan, GUARDIAN NEWSPAPERS, Oct. 12, 2004, at <http://www.buzzle.com/editorials/text10-12-2004-60399.asp> (last visited Apr. 19, 2005).

²¹³ *Id.*

²¹⁴ See *supra* note 112 and accompanying text.

²¹⁵ Dando, *supra* note 19, at 8.

²¹⁶ Justin McCurry on the Death Penalty in Japan, *supra* note 212.

²¹⁷ Japan Does Not Need the Death Penalty in 21st Century, *supra* note 4.

cases of extraordinary blameworthiness, where perpetrators are fully aware of their actions, yet still commit heinous crimes. The mentally retarded, because of their physiological under-development, do not possess the level of extraordinary culpability that should be a necessity for the imposition of the death penalty. Furthermore, the death penalty for the mentally retarded is particularly inapposite to the goals of the Japanese criminal justice system. A system that emphasizes reformation of criminals and their reintegration into Japanese society does not achieve those goals by executing prisoners, particularly the mentally retarded. While the Japanese courts may be more constrained by political pressure than their American counterparts in their ability to make policy, legal reform in Japan is still a realistic goal.

When the Japanese government chooses to execute a prisoner, it is the result of a determination by the State that an individual is beyond reform and incapable of reintegration into society. The government should not be so quick to make that conclusion for the mentally retarded. As a country and a criminal system devoted to rehabilitation, the Japanese government should devote the greatest amount of resources possible to caring for the mentally retarded, rather than simply deciding that they are not worth the trouble.