

The inevitability of error

The administration of
justice in death penalty cases



THE
DEATH
PENALTY
PROJECT

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Copies of this report may be obtained from:

The Death Penalty Project

8/9 Frith Street

Soho

London

W1D 3JB

or via our website: www.deathpenaltyproject.org

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Introduction

International attitudes to the death penalty have evolved with the knowledge that the workings of any criminal justice process may be susceptible to the possibility of human error and an over-hasty response to appalling crimes. Miscarriages of justice occur in every system, however sophisticated, carrying the risk that innocent persons will be executed. This alone is one reason why countries have moved towards abolition of the death penalty with increasing frequency.

This report provides a global snapshot of cases and research findings from Japan, the United States, Taiwan, the Commonwealth Caribbean, Sierra Leone and the United Kingdom. International human rights law recognises the potential for wrongful conviction and execution of the innocent, or those who have not had fair trials. As a consequence, international norms seek to impose exacting standards and apply a heightened level of due process in capital cases. The relevance of universal human rights standards and international norms, requiring states to apply rigorous procedural rules in the application of the death penalty, is detailed in the Appendix.

Nonetheless, the examples cited clearly demonstrate that countries that still impose the death penalty cannot be certain that their system of justice is foolproof. The gravest mistake that any criminal justice system can make is the infliction of the death penalty on an innocent person.

Wrongful convictions: case studies

Japan



(i) Japan – including the case of Iwao Hakamada who spent 47 years on death row

During the 1980s, four Japanese men were exonerated after serving between 28 and 33 years in solitary confinement. These wrongful convictions – the Menda, Saitagawa, Matsuyama, and Shimada cases – were made as a result of long and brutal interrogations that led to forced confessions.¹ But the Hakamada case shows, it is not just how those convictions were secured that almost led to the execution of the innocent, but that the appeal process appears to be both slow and reluctant to admit to a miscarriage of justice.

Sakae Menda

Sakae Menda spent more than 33 years on death row until his release in 1983, following a retrial. One night in 1948, an intruder murdered an elderly prayer reader and his wife with a hatchet and a knife, and seriously injured their two daughters. Menda – the son of a farmer – was said to have pretended to be a policeman investigating the murders. He was charged with burglary, murder and attempted burglary murder. At the beginning of his trial, Menda confessed to the charges. But, on the third day of the trial, he retracted his confession and claimed his innocence. Nonetheless he was found guilty and sentenced to death in 1950.

Menda continued to claim his innocence and filed six petitions for a retrial. From his fourth petition onwards, the Japan Federation of Bar Associations (JFBA) became involved and Menda was further helped by the lowering of the retrial threshold by the Supreme Court during his sixth petition. That led, in 1979 – 29 years after the death sentence was imposed – to a retrial, which fully exonerated Menda, accepting his alibi that he was with a ‘hostess’ on the night of the crime. At the original trial, this hostess – an under-aged 16-year-old claiming to be 18 – testified she was not with Menda.² At the retrial, the court considered that the hostess had been vulnerable to the police and had thus made a false statement.

¹ Kazuko Ito, *Wrongful Convictions and Recent Criminal Justice Reform in Japan*, *University of Cincinnati Law Review* (2013) Vol. 80 (4): 1245–75.

² It should be noted, however, that the hostess retracted her statement during the original trial.

Menda was cleared mainly on the basis of his alibi, but the court criticised the way in which the police had interrogated him to secure the confession since Menda had been questioned without sleep or any break for three days. The court criticised the failure of the trial judge and the defence counsel for not questioning the validity of that confession, but stopped short of criticising the police, saying that in the postwar years, the police had shown little concern on issues such as procedural guarantees, implying that the police in 1983 had moved from such practice.³

In Menda's case, *daiyo-kangoku* (a substitute prison system) was used to obtain the confession. *Daiyo-kangoku* allows the use of detention cells at the police station, which result in the police being in charge of interrogation as well as detention. They can be used initially for three days for questioning, but the prosecution can request a 10-day extension from a judge, and a further 10-day extension, before the suspect needs to be released or charged. The *daiyo-kankoku* system was used in the immediate postwar years, as noted by the judge in the retrial. However, the system was still being used regularly in the 1960s and there have been instances of its use to this day.

Iwao Hakamada

In March 2014, Iwao Hakamada became the fifth man to be released from death row in Japan – after serving 47 years in solitary confinement.

Back in June 1966, the manager of a miso-producing factory, his wife and two children were murdered in their home. Their house was robbed and set alight. Two months later, Hakamada, a factory employee, was arrested for the quadruple murder. The police claimed that blood that was not Hakamada's, together with oil used in the arson, were found on his pyjamas.

Hakamada protested his innocence, but after being interrogated – without a lawyer – for 20 days, for up to 16 hours a day (and on average for 12 hours a day), he 'confessed' to committing the murders.⁴ At trial, he retracted his confession, arguing that the police coerced him to sign a statement after torturing him. The prosecution

³ Daniel H. Foote, 'From Japan's Death Row to Freedom,' *Pacific Rim Law & Policy Journal* (1992), Vol. 1. No. 1 pp11-103.

⁴ JFBA, 'JFBA President's statement on the retrial of the Hakamada case' (2014), available at www.nichibenren.or.jp/activity/document/statement/year/2014/140327.html

presented 45 signed documents, but only one was regarded as admissible by the court.⁵

Kumamoto Norimichi, the associate judge in the case, admitted thinking at the time that Hakamada's conviction was unsafe, but was unable to convince the other two senior judges. Kumamoto said: 'Looking at the evidence, there was almost nothing but the confession, and that had been taken under intense interrogation.'

Hakamada was sentenced to death in 1968 and, six months later, Kumamoto resigned. In 2007 he stated on national television that he had been pressured into writing a guilty verdict. Kumamoto's confession – a clear breach of the confidentiality of deliberations by judges – is a rare occasion that reveals the *politics* behind the neatly written judgment. The expectation is that judgments will be formed by rigorous legal reasoning and independent assessment of the facts, untainted by factors such as seniority. This case highlights, however, that judges are not immune to such pressures.

Halfway through the trial, five items of heavily bloodstained clothing were discovered in a miso barrel at the factory. The prosecution changed its position, stating Hakamada wore the newly found clothes when murdering the family and then changed into pyjamas to commit the arson. The confession, and the discovery of the clothing, led to the imposition of the death penalty – a ruling that was upheld by the Supreme Court in 1980.

The suspension of Hakamada's death sentence in March 2014 followed forensic tests, which showed that the DNA from the clothing allegedly worn by the killer matched neither Hakamada nor the victims. Testing further indicated that this evidence was likely to have been fabricated by the police and also highlighted the prosecution's failure to disclose exculpatory evidence, despite repeated requests made by Hakamada's lawyers, dating back to 1981.

Although Hakamada awaits retrial, and his innocence has yet to be confirmed, Hiroaki Murayama, the presiding judge, stated that 'the possibility of his innocence has become clear to a respectable degree, and it is unbearably unjust to prolong the

⁵ Amnesty UK, Hakamada Iwao (2014), available at www.amnesty.org.uk/hakamada-iwao-death-penalty-row-japan#.U5A8hPldWAg

defendant's detention any further'.⁶ Hakamada's case was supported by the JFBA from his first petition for a retrial in 1981, yet it took 33 years for the retrial to be granted.

More than 25 years on from the Menda wrongful conviction case, what does the Hakamada case tell us? One thing is clear: not much has changed. Despite the incontrovertible evidence obtained in earlier cases, the Japanese appeal process has proved unable – until now – to recognise the risks of wrongful conviction that arise from abuse of due process. Hakamada was wrongfully convicted as a consequence of precisely the same factors that led to the identifications of miscarriages of justice in the 1980s – lack of procedural guarantees during police investigation, trial and appeal. Forced confessions will be harder to obtain if all interrogations are recorded. Had full disclosure occurred at the beginning of the trial – and at retrial – Hakamada would not have served nearly half a century in solitary confinement.⁷

⁶ Hiroko Tabuchi, 'Soul-Searching as Japan Ends a Man's Decades on Death Row,' *The New York Times*, 27 March 2014, available at www.nytimes.com/2014/03/28/world/asia/freed-after-decades-on-death-row-man-indicts-justice-in-japan.html

⁷ For a more detailed report on the lack of procedural guarantees in Japan, see *The Death Penalty in Japan: A report on Japan's legal obligations under the International Covenant on Civil and Political Rights and an assessment of public attitudes to capital punishment*, available at www.deathpenaltyproject.org/wp-content/uploads/2013/03/DPP-Japan-report.pdf

Wrongful convictions: case studies

The United States



(ii) The United States – false confessions, flawed evidence and the advent of DNA testing

In the United States, the advent of modern DNA testing provided a unique window into how wrongful convictions can occur – including in death penalty cases. In 18 cases to date, DNA tests have exonerated death row prisoners.⁸ Since 1976, when the death penalty was reinstated in the US, more than 100 death-row inmates have been exonerated by non-DNA evidence.⁹ We will never know how many innocent people have been convicted, or sentenced to death, as most serious crimes lack biological evidence that can be tested years later. However, these exonerations have forever changed the death penalty debate in the United States.

Important lessons can be learned from a close examination of these cases. An exoneration refers to an official decision to reverse a conviction, either through a judicial decision or an executive pardon, based in part on new evidence of innocence. Professor Brandon Garrett has studied the cases of people exonerated by DNA tests. Eight of those 18 death row DNA exonerations involved false confessions.¹⁰ Each of those convictions involved seemingly powerful evidence in which the suspect had supposedly confessed to ‘inside information’, or provided details that only the true culprit could have known.¹¹ The case against an innocent person, even in a death penalty case, can seem uncannily strong.

Take for example, the case of Earl Washington, Jr, a 22-year-old black, borderline intellectually disabled, farmhand. In 1982, a young mother was raped and murdered in the town of Culpeper, Virginia. Washington was within nine days of execution, and was in prison for 18 years before finally being exonerated by DNA tests.

⁸ Brandon L. Garrett, *Convicting the Innocent* (2011) (examining the first 250 DNA exonerations in the US, including 17 death row exonerations and 40 cases involving false confessions); Brandon L. Garrett, *The Banality of Wrongful Executions*, Mich. L. Rev. (2014) (updating that data to discuss 18 death row exonerations in the US).

⁹ The Death Penalty Information Center maintains a current count of 144 death row inmates who have been exonerated. The Innocence List, Death Penalty Info. Ctr., www.deathpenaltyinfo.org/innocence-list-those-freed-death-row

¹⁰ An appendix describing the factors reported to have been present in each of those confessions is available at Brandon L. Garrett, Characteristics of Exonerated False Confessions, Univ. of Va. Sch. of Law, www.law.virginia.edu/pdf/faculty/garrett/convicting_the_innocent/garrett_false_confessions_appendix.pdf. For information concerning Damon Thibodeaux's confession, see Know the Cases: Damon Thibodeaux, Innocence Project, www.innocenceproject.org/Content/Damon_Thibodeaux.php

¹¹ An appendix describing factors reported to have been present in the statements those informants claimed to have overheard is available at Brandon L. Garrett, Characteristics of Informant Testimony in DNA Cases, Univ. of Va. Law Sch., www.law.virginia.edu/pdf/faculty/garrett/convicting_the_innocent/garrett_informants_appendix.pdf

How did this happen? Washington ‘confessed’ to four unsolved crimes, agreeing, ‘Yes, sir,’ when police asked about each case. Each time, the victims said he was not responsible or that other evidence definitively cleared him. No charges were brought in those four cases. But the police also asked about the case in Culpeper. Washington agreed he had been responsible for that, too. Most of the typed confession statement that law enforcement officials had Washington sign, consisted of him saying ‘Yes, sir,’ to the questions. However, in a key passage, suddenly the typed confession statement contained striking details. Washington appeared to volunteer that he had left a shirt at the victim’s apartment. This was not information that the police had made public. And he appeared to know about an identifying characteristic that made the shirt unusual – a torn-off patch. Of course, the police were holding the shirt in front of him during this interrogation. But there was more in the typed statement. Washington appeared to know where the shirt had been left, in a dresser drawer in the bedroom. Finally, Washington said that he left it there because it had blood on it. The shirt the officers showed Washington no longer had blood on it, since the stains had been cut out for forensic analysis.

The confession was the centrepiece of the prosecution case. The prosecutor told the jury, *Now, how does somebody make all that up, unless they were actually there and actually did it? I would submit to you that there can’t be any question in your mind about it, the fact that this happened and the fact that Earl Washington Junior did it.* Although it was a death penalty case, the trial was just five hours long, and the jury quickly sentenced Washington to death. He lost appeals from 1984 until 1993. However, DNA tests finally cleared Washington in 1993. Such was the power of the confession, however, that the Governor of Virginia gave him only partial clemency: he would leave death row, but would serve life in prison. It took until 2000, when new DNA tests again confirmed his innocence and also matched another man in a DNA databank, that he was pardoned. Only in 2002 was he freed.

There is a large and growing body of research on false confessions, yet few exonerees were able to have experts present evidence concerning their confessions. Many of these exonerees were juveniles or intellectually disabled, and particularly susceptible to suggestion by the authorities, yet the jury never had this fact explained to them.

Other flawed evidence in these cases should give us cause for concern. Fourteen of the death penalty cases involved forensic evidence, including cases with unreliable

forensics. Ten involved hair comparisons, and two involved fibre comparisons. Nine involved serology, or blood-typing. Two involved bite mark comparisons.¹² Ten of the 18 death row DNA exonerations involved testimony by informants, including jailhouse informants. They had claimed to have overheard confessions, some containing details that only the culprit could have known. Nine of the cases involved eyewitness identifications.¹³ For example, Kirk Bloodsworth was sentenced to death in Maryland, on the testimony of not one, but five separate eyewitnesses, who claimed to have seen him near the crime scene. They were all mistaken. Responding in part to his case, Maryland has since abolished the death penalty.

The experience of Bloodsworth increases concern over cases such as the case of Troy Davis, who was executed in Georgia in 2011. Davis was convicted based on the testimony of a group of eyewitnesses, who identified him following suggestive procedures. But in this case, there was no DNA evidence to test.

Often these cases followed a tortuous path to exonerations. Four of those 18 exonerees had two trials, and two had three trials. After each retrial they were reconvicted until, finally, they obtained DNA testing and were exonerated. Some, such as Ray Krone, were reconvicted despite the initial DNA tests that cleared them. Damon Thibodeaux was sentenced to death in Mississippi at a time when DNA tests were available, but DNA tests were simply not conducted because police placed weight on his confession. We should also be troubled by cases such as Chris Ochoa, who was not sentenced to death, but who was threatened with the death penalty and, as a result, confessed and cooperated by testifying against another innocent man. Both were wrongly convicted and exonerated by DNA tests years later.

The US Supreme Court has noted, '*a disturbing number of inmates on death row have been exonerated*'.¹⁴ At state level, moratoriums and abolition of the death penalty have occurred, in part, in response to death row exonerations. However, many of the investigative procedures that contributed to these convictions remain in place. For

¹² An appendix that describes the forensic testimony in these cases and that in the others of the first 250 DNA exoneree trials is available at Brandon L. Garrett, Forensic Testimony, Univ. of Va. Law Sch., www.law.virginia.edu/pdf/faculty/garrett/convicting_the_innocent/garrett_forensics_appendix.pdf

¹³ An appendix describing eyewitness testimony in those and other DNA exoneree cases is available at Brandon L. Garrett, Characteristics of Eyewitness Misidentifications in DNA Exonerees' Trials, Univ. of Va. Law Sch., www.law.virginia.edu/pdf/faculty/garrett/convicting_the_innocent/garrett_eyewitness_appendix.pdf. In addition, Damon Thibodeaux was misidentified by two eyewitnesses. See Innocence Project, *supra*.

¹⁴ *Atkins v. Virginia*, 536 U.S. 304, 320 n.25 (2002).

example, the Supreme Court has declined to recognise a claim of actual innocence under the US Constitution.¹⁵ The court has also declined to regulate the reliability of confession evidence as a constitutional matter.¹⁶ Many US courts do not permit expert testimony on the subject of false confessions. Yet, as Professor Saul Kassin puts it: '*False confession is not a phenomenon that is known to the average layperson as a matter of common sense.*'¹⁷ More jurisdictions in the US require that police interrogations be videotaped, particularly in homicide cases, but most still do not.

¹⁵ *Herrera v. Collins*, 506 US 390 (1993).

¹⁶ *Colorado v. Conolley*, 479 US 157, 161 (1986).

¹⁷ Saul Kassin, *Why Confessions Trump Innocence*, 67 *Am. Psychol* 431–445 (Sept. 2012).



Wrongful convictions: case studies

Other countries

(iii) Other countries – procedural irregularities, miscarriages of justice and unfair trials

Taiwan

There have been 11 executions in Taiwan since 2013, in spite of growing public disquiet that there is a real danger that the state could execute someone in error following an unfair trial. In recent years, there have been four widely publicised cases that have drawn attention to serious human rights concerns: Chiang Kuo-Ching, Hsieh Trio, Hsing-Tse, and Chiu He-Hsun.¹⁸

In January 2011, Taiwan's Ministry of Justice admitted that Chiang Kuo-ching had been executed in error in 1997 for the rape and murder of a five-year-old girl, committed 15 years previously. After a campaign by Chiang's parents, the Military Supreme Court Prosecutor's Office filed an extraordinary appeal in 2010 with the Military Supreme Court to reopen the case. The authorities acknowledged that Chiang's statement 'confessing' to the crime had been made as a result of torture by military investigators, including being subjected to a 37-hour interrogation, exposed to strong lights, threatened with an electric prod, and being deprived of sleep, while forced to undergo strenuous physical activities.¹⁹ It was accepted that the trial court had ignored Chiang's allegations of torture and his pleas of innocence and that his conviction had been rushed through by the military court.²⁰ In September 2011, a military court formally acquitted Chiang and, in October 2011, Taiwan's Ministry of Defence agreed to pay US\$3.4m in compensation to Chiang's relatives. The President, Ma Ying-Jeou, publicly apologised to Chiang's mother and conceded that the authorities had 'acted wrongly' in the case.²¹

¹⁸ For more information, see *The Death Penalty in Taiwan: A Report on Taiwan's legal obligations under the International Covenant on Civil and Political Rights*, available at www.deathpenaltyproject.org

¹⁹ Taiwan Alliance Against the Death Penalty, "Doubts raised over soldier's execution", 30 January 2011 at www.taadp.org.tw/en/story/1875

²⁰ *Death Sentences and Executions 2013*, Report by Amnesty International. See also China: *Against the law: Crackdown on China's human rights lawyers deepens*, Report by Amnesty International (2011) at www.amnesty.org/en/library/info/ASA17/018/2011/en

²¹ "Taiwan 'child rapist' cleared 14 years after his execution", *The National*, 2 February 2011 at www.thenational.ae/news/world/asia-pacific/taiwan-child-rapist-cleared-14-years-after-his-execution

Trinidad and Tobago

Ann-Marie Boodram had been sentenced to the mandatory death penalty in Trinidad for the murder of her husband on 20 February 1998. Her appeal to the Court of Appeal was rejected and she further appealed to the Judicial Committee of the Privy Council (the Privy Council), which considered whether her trial lawyer's gross incompetence had resulted in a miscarriage of justice. In delivering the judgment of the Privy Council, Lord Steyn held that:

*'In the present case, [the lawyer's] multiple failures, and in particular his extraordinary failure when he became aware on 17 February 1998 that he was engaged on a retrial to enquire into what happened at the first trial, revealed either gross incompetence or a cynical dereliction of the most elementary professional duties... it is the worst case of the failure of counsel to carry out his duties in a criminal case that their Lordships have come across. The breaches are of such a fundamental nature that the conclusion must be that the defendant was deprived of due process... The conclusion must be in this exceptional case the defendant did not have a fair trial.'*²²

St Christopher and Nevis

In 2012, the appeal of Sheldon Isaac,²³ a prisoner under sentence of death in St Christopher and Nevis, was determined by the Eastern Caribbean Court of Appeal (ECCA). With the last hanging taking place in St Christopher and Nevis as recently as 2008, Isaac and his three co-defendants were at real risk of execution and the Privy Council granted all four defendants stays of execution, pending the determination of their appeals. Psychiatric and psychological evidence was adduced before the Privy Council, demonstrating that Isaac was severely brain damaged and should never have stood trial in the first place. The Privy Council remitted the case to the ECCA to review the safety of his conviction and death sentence in light of the fresh evidence. The Court of Appeal accepted the evidence that he was severely (and visibly) mentally disordered and concluded that he was unfit to stand trial, and should not, therefore, have been convicted of murder and sentenced to death. The court rejected

²² [2002] 1 Crim. App.R.12, [40].

²³ Sheldon Isaac v Director of Public Prosecutions, Eastern Caribbean Court of Appeal, Criminal Appeal No. 19 of 2008.

the possibility of ordering a retrial as being ‘inappropriate and unnecessary’. The system of criminal justice in St Christopher and Nevis clearly failed in this capital case because no one recognised or had the foresight to enquire into Isaac’s mental state. The investigating authorities, the prison service, the lawyers, as well as the trial judge, all failed to appreciate that Isaac was so severely mentally disordered that he was unfit to stand trial. As a result, he was tried, convicted, sentenced to death and very nearly executed, contrary to international standards and recognised norms.

In many cases from the Caribbean and elsewhere, individuals who are sentenced to death have subsequently been found to be suffering from mental illness and/or an intellectual disability, thus impacting on the safety of their convictions and the lawfulness of their death sentences. This is especially so in countries where the level of mental health services, training and resources is lacking. The reality is that the death penalty is regularly being imposed on persons with significant mental disorder who are, therefore, at risk of execution contrary to recognised norms and the strict procedural requirements that countries are obliged to observe in all capital cases. There are many examples of defendants being wrongly sentenced to death by virtue of the fact that inadequate or no medical evidence was produced at trial.

Sierra Leone

‘MK’ was the longest-serving woman on death row in Sierra Leone. She was arrested in 2003 for the murder of her stepdaughter, convicted in 2005 and sentenced to the death penalty, which was mandatory at the time in Sierra Leone.

MK’s case highlights many of the serious human rights concerns raised in this report. From her arrest until shortly before trial, MK received no legal advice or assistance. MK, who is illiterate, thumb-printed a confession, which was later used against her at trial. It was not until the start of the trial that the state provided MK with a lawyer. This lawyer met MK three times before the trial, with each meeting lasting no longer than 15 minutes.

Following her trial, MK again did not have access to a lawyer, nor the knowledge or resources to file an appeal against her conviction within the stipulated 21-day time limit. MK filed an appeal to the Court of Appeal 10 months after her conviction, with the assistance of a state-provided prison welfare officer. The Court of Appeal

subsequently rejected the appeal on the basis that it was filed out of time, holding that the time period for filing appeals cannot be extended – even for those facing the death penalty.

In 2010, MK received legal assistance from AdvocAid, a Sierra Leonean non-governmental organisation, and the matter was re-listed in the Court of Appeal. In March 2011, after spending six years on death row, MK's conviction was overturned in a landmark decision by the Court of Appeal, and she was released immediately. The court found that the procedural irregularities – lack of legal advice and assistance, lack of resources to file an appeal against her conviction – were fundamental and, therefore, rendered MK's trial a nullity. The state has declined to re-prosecute in light of the length of time MK has already spent in prison.

The tragedies identified above are only a small cluster of cases that call into question the application of due process and protection of the law. As it stands, these systems clearly do not provide an adequate basis for the exclusion of unreliable confessions, identifications and other aspects of a defective investigation. Persons who face the death penalty are tried and convicted, typically upon challenged confession evidence. The right of access to a lawyer while in custody remains, in some countries, theoretical rather than practical. Trial and appeal lawyers are too frequently ill-equipped and/or insufficiently experienced to ensure a fair hearing and often lack sufficient resources to obtain the expert assistance (medical or otherwise) needed to prepare the defence adequately.

Wrongful convictions: case studies

The United Kingdom



(iv) The United Kingdom – lessons to be learned

Many lessons can be learned from the United Kingdom's abolition of capital punishment. Most notably, a number of miscarriages of justice could only be rectified when cases of malpractice subsequently came to light after the death penalty had been abolished.

In the United Kingdom, the death penalty for murder was, in effect, abolished in 1965. Attempts by Parliament to reintroduce the death penalty finally ended after a shocking series of miscarriages of justice in cases concerning particularly heinous crimes. Most notable were three cases: The Birmingham Six, The Guildford Four (all wrongfully convicted of murder through terrorist bombings), and Stefan Kisko, a man of limited intelligence, wrongfully convicted after confessing to the sexual assault and brutal murder of an 11-year-old child. He was released after 16 years of a life sentence when it was proved that he was physically incapable of producing sperm, and that police had suppressed evidence that would have exonerated him.²⁴

The rejection of capital punishment has been further strengthened by a series of cases where the courts posthumously reviewed the cases of individuals who had been executed. For example, in 1998 the Court of Appeal found that the conviction of Mahmoud Hussein Mattain, who was hanged in Cardiff Prison on 8 September 1952, was unsafe and should be quashed. Delivering judgment, Lord Justice Rose stated that the case had wide significance and he noted poignantly the potential for wrongful conviction and the inevitable execution of the innocent, stating that this miscarriage of justice demonstrated that '*Capital punishment was not an appropriate culmination for a criminal justice system which was human and therefore fallible.*'

There is no reason to believe that the British police officers who dealt with the The Guildford Four and The Birmingham Six cases were uniquely wicked, or that the prosecutors and scientists who failed in their duties in other miscarriage cases have no counterparts elsewhere in the world. The weaknesses exposed in the criminal justice system by these and other cases led, in March 1997, to the establishment in the UK of the Criminal Cases Review Commission (CCRC). This independent

²⁴ See also Roger Hood and Carolyn Hoyle, Chapter 2, Vanguard of Abolition, *The Death Penalty: A Worldwide Perspective*, (4th ed. 2008), Oxford: Oxford University Press, pp42-47.

public body, which reviews possible miscarriages of justice in the criminal courts of England, Wales and Northern Ireland,²⁵ has so far received more than 17,000 applications, with 500 cases referred to the Court of Appeal. Of those, approximately 70% have resulted in convictions being quashed.²⁶

One example was the case of Sean Hodgson, a man of limited intellectual ability, sentenced to life imprisonment for the rape and murder of a 22-year-old woman in 1979. At trial, he withdrew his confession (which the police had claimed contained information that only the perpetrator could have known) and pleaded not guilty. He continued to deny his guilt while in prison, thus preventing any prospect that he would be released on licence, having not 'addressed his offending behaviour'. After imprisonment for 27 years, he was finally released when a lawyer was able to uncover evidence that made a DNA test possible. The analysis of blood and semen samples taken at the crime scene exonerated him.

Notwithstanding the creation of the CCRC, errors in the administration of justice can still be missed. The most recent example is the case of Victor Nealon, who spent 17 years in prison after being wrongfully convicted of sexual assault. While serving his life sentence, Nealon applied to the CCRC requesting it to examine the forensic evidence used against him. His applications were turned down because the CCRC considered his conviction to be safe. In his third application, Nealon finally received justice and his conviction was quashed (based on DNA evidence) by the Court of Appeal in 2013. The chairman of the CCRC apologised for the lack of proper investigations carried out by it: *'I regret the fact in this particular case we missed something and I apologise to all concerned for the fact we did so.'*²⁷

²⁵ Criminal Cases Review Commission's website: www.justice.gov.uk/about/criminal-cases-review-commission.

If the CCRC considers that there is a real possibility that the conviction is unsafe, it has the power to refer a case back to the Court of Appeal. What is unique about the CCRC is that in order to apply, applicants need to have exhausted other avenues of appeal. In carrying out the review, the CCRC has the power to access information held by public officials such as police, forensic and prosecution authorities. It can also appoint senior police officers and independent forensic experts to conduct inquiries.

²⁶ The CCRC has received 17,708 applications since its establishment, referred 552 cases of which 361 have been quashed by the Court of Appeal.

²⁷ 'Wrongfully convicted man Victor Nealon gets apology', *BBC News*, 20 May 2014, at www.bbc.co.uk/news/uk-england-27468183

Conclusion

It is vital that procedural guarantees are improved and that protection of the law is provided to individuals in all cases. However, wrongful convictions and the likelihood of miscarriage will always occur. The examples cited in Japan and the United States – both fully developed nations – are testament to this, and the cases from the UK after abolition prove that errors will persist, despite some of the best resourced criminal justice systems being in place.

All countries need to ask whether the purest concepts of due process are routinely achieved in all capital cases? It must be accepted that the pre-condition for imposing the ultimate penalty is that the investigation, prosecution and trial have all been conducted with such fairness and propriety that there can be no possibility that a mistake has been made and the wrong person convicted. Appellate procedures must be swift, thorough and ready to rectify mistakes. This may, in theory, decrease the likelihood of wrongful convictions, but it will never eliminate it altogether. Ultimately, criminal justice is fragile and experience shows that all it takes is one dishonest police officer, one incompetent lawyer, one over-zealous prosecutor or one mistaken witness and the system fails.

There is no *perfect* justice system – error is inevitable. Wherever the death penalty is imposed, there is always a risk that innocent people will be convicted and executed.

(i) The scheme of the International Covenant on Civil and Political Rights (ICCPR)

Article 6(2) of the ICCPR provides that:

'In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the offence and not contrary to the present Covenant... This penalty can only be carried out pursuant to a final judgment rendered by a competent court.'

Although capital punishment is an exception to the right to life, as long as it is not arbitrarily imposed (Article 6(1)). Article 6 of the ICCPR lists various safeguards in the application and implementation of the death penalty. It may only be imposed for the most serious crimes; it cannot be pronounced *unless rigorous procedural rules are respected*, and it may not be imposed on pregnant women or individuals for crimes committed under the age of 18.

Article 6(6) goes on to place the death penalty in its real context and assumes its eventual elimination:

'Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.'

While retention of the death penalty is permitted by international law (albeit in extremely limited circumstances pending abolition as required by Article 6(6)), its use *per se* does not *by itself* constitute cruel or unusual punishment, or torture, or inhuman treatment and punishment. However, use of the death penalty *may* become an arbitrary violation of the right to life if capital punishment is imposed in circumstances that breach other rights under the ICCPR. For present purposes, those other rights are – most significantly – the right to a fair trial and the prohibition on torture.

The comprehensive provisions of Article 14 of the ICCPR set out, in detail, the minimum guarantees for a fair trial. These provisions *must* be respected in all capital cases. The United Nations Human Rights Committee (HRC) has consistently held

that if Article 14 (fair trial) of the ICCPR is violated during a capital trial, then Article 6 (right to life) of the ICCPR is also breached. In *Carlton Reid v Jamaica*, the HRC held that:

*'[T]he imposition of a sentence of death upon the conclusion of a trial in which the provisions of the Covenant have not been respected constitutes ... a violation of Article 6 of the Covenant. As the Committee noted in its general comment 6(16), the provision that a sentence of death may be imposed only in accordance with the law and not contrary to the provisions of the present Covenant implies that the procedural guarantees therein prescribed must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence, and the right to review by a higher tribunal.'*²⁸

(ii) Safeguards guaranteeing protection of the rights of those facing the death penalty

Restrictions on capital punishment set out in Article 6 of the ICCPR are reflected and further developed in the safeguards guaranteeing protection of the rights of those facing the death penalty (the safeguards) which, '*... constitute an enumeration of minimum standards to be applied in countries that still impose capital punishment*'.²⁹

The safeguards were adopted in 1984 by the UN Economic and Social Council Resolution 1984/50. In 1989, these standards were further developed by the Council, which recommended *inter alia* that there should be a maximum age beyond which a person could not be sentenced to death or executed, and that persons suffering from mental retardation should be added to the list of those who should be protected from capital punishment. The Council in Resolution 1996/15 called upon member states in which the death penalty had not been abolished '*... to effectively apply the safeguards guaranteeing the rights of those facing the death penalty*'. The significance of the safeguards has subsequently been reaffirmed by the Commission on Human Rights in 2005 and the General Assembly in its resolutions 62/149 and 63/168.

²⁸ Communication No. 250/1987, U.N. Doc. CCPR/C/39/D/250/1987, (21 August 1990) at paragraph 11.5.

²⁹ *Capital punishment and implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty*, Report of the Secretary-General, UN Doc. E/2010/10, at pp33.

All states are bound by the international standards set out in the safeguards, which should be considered as the general law applicable to the death penalty.

The fifth safeguard states: *‘Capital punishment may only be carried out pursuant to a final judgment rendered by a competent court after legal process which gives all possible safeguards to ensure a fair trial, at least equal to those contained in Article 14 of the ICCPR, including the right of anyone suspected of, or charged with, a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings.’* This was strengthened in 1989 with an additional safeguard: *Affording special protection to persons facing charges for which the death penalty is provided by allowing time and facilities for the preparation of their defence, including the adequate assistance of counsel at every stage of the proceedings, above and beyond the protection afforded in non-capital cases.’*

The UN Special Rapporteur on extrajudicial, summary, or arbitrary executions has stated that fair trial guarantees in death penalty cases *‘must be implemented in all cases without exception or discrimination’*.³⁰ The Special Rapporteur has reiterated that *‘proceedings leading to the imposition of capital punishment must conform to the highest standards of independence, competence, objectivity and impartiality of judges and juries, in accordance with the pertinent international legal instruments’*.³¹ Those facing the death penalty should be afforded special protection and all guarantees to ensure a fair trial (sometimes referred to as *‘super’ due process*) above and beyond the protection afforded in non-capital cases.

³⁰ *Extrajudicial, summary or arbitrary executions: Report of the Special Rapporteur...*, UN Document E/CN.4/2001/9, (11 January 2001) paragraph 86

³¹ *Extrajudicial, summary or arbitrary executions: Report of the Special Rapporteur...*, UN Document E/CN.4/1997/60, (24 December 1996) paragraph 81

Contributors

Professor Roger Hood is Professor Emeritus of Criminology at the University of Oxford and Emeritus Fellow of All Souls College.

Professor Brandon Garrett is Professor of Law at the University of Virginia School of Law.

Dr Mai Sato is a Research Fellow at the Institute for Criminal Policy Research, and a Research Officer at the Centre for Criminology, University of Oxford.

Maiko Tagusari is a lawyer and Secretary-General of the Centre for Prisoners' Rights Japan.

Saul Lehrfreund and Parvais Jabbar are the founders and Executive Directors of the Death Penalty Project.



The Death Penalty Project

We work to promote and protect the human rights of those facing the death penalty. We operate in all countries by providing free legal representation, advice and assistance.

For more than 20 years, our work has played a critical role in identifying a significant number of miscarriages of justice, promoting minimum fair trial guarantees in capital cases and in establishing violations of domestic and international law. Through our legal work, the application of the death penalty has been restricted in many countries in line with international human rights standards. Our training programmes and research projects create awareness of the issues surrounding the death penalty, encourage greater dialogue and provide a platform to engage with experts and key stakeholders.