

# Unsafe convictions in capital cases in Taiwan

A report based on the research and findings of Chang Chuan-Fen

By Carolyn Hoyle



In association with:



# Acknowledgements

This report was made possible by a grant to The Death Penalty Project from the Magna Carta Fund of the United Kingdom Foreign and Commonwealth Office.

We are very grateful to Dr Chang Chuan-Fen, without whose dedicated and rigorous review of all finalised death penalty cases in Taiwan from 2006 to 2015 – some containing as many as 25 judgments – this report would not have been possible.

We must also thank Professor Carolyn Hoyle for her significant contributions and expertise, integral to producing this compelling and important work.

We are most grateful to Chuang Chi-Ting Serena for her translation of this report and ongoing support of our work in Taiwan. Finally, we express our immense gratitude to Lin Hsin-Yi and the team at the Taiwan Alliance to End the Death Penalty, for their ground-breaking work and dedication to our common goal of ending the death penalty in Taiwan and worldwide.

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Copies of this report may be obtained from:  
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ISBN: 978-1-999-6417-2-6





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## Foreword

Two of our previous reports on the death penalty in Taiwan, both published in 2014, made clear that, while Taiwan had passed legislation to incorporate the International Covenant on Civil and Political Rights (ICCPR) into the domestic legal order in 2009, death penalty practice did not meet its minimum standards.<sup>1</sup> A further report is under way, examining public attitudes towards the death penalty in Taiwan through empirical evidence.<sup>2</sup> When nation states do not honour their commitments to ensure due process of law at all stages of the criminal process, the risk of erroneous or unsafe convictions is unacceptably high. Our research on four widely publicised cases of wrongful conviction in Taiwan<sup>3</sup> established serious abuses of the defendants' human rights, with considerable breaches of due process protections.

This report presents an alarming collection of unsafe capital convictions in Taiwan, revealing an array of flaws in the criminal justice system's response to these cases – from human rights abuses during the investigatory and pre-trial phases to unfairness at trial and injustices in post-conviction processes. The research makes plain the urgent need for adherence to international human rights norms that safeguard the rights of those facing the death penalty, including the exacting standards and rigorous procedural rules demanded in capital cases. It is clear that Taiwan must work to ensure it fulfils its obligations under international law, particularly the ICCPR.

We hope this research gives the government, civil society and all other stakeholders helpful insights into what particular reforms to criminal justice law and practice would be most effective in the Taiwanese context.

**Saul Lehrfreund and Parvais Jabbar**

Executive Directors

The Death Penalty Project

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<sup>1</sup> The Death Penalty Project, *The Death Penalty in Taiwan: A Report on Taiwan's Legal Obligations under the International Covenant on Civil and Political Rights*, London: 2014, at [www.deathpenaltyproject.org/knowledge/the-death-penalty-in-taiwan/](http://www.deathpenaltyproject.org/knowledge/the-death-penalty-in-taiwan/) and The Death Penalty Project, *Handbook of Forensic Psychiatric Practice for Capital Cases in Taiwan*, London: 2015, at [www.deathpenaltyproject.org/wp-content/uploads/2018/02/Handbook-of-Forensic-Psychiatric-Practice-for-Capital-Cases-in-Taiwan-2015.pdf](http://www.deathpenaltyproject.org/wp-content/uploads/2018/02/Handbook-of-Forensic-Psychiatric-Practice-for-Capital-Cases-in-Taiwan-2015.pdf).

<sup>2</sup> *For or against abolition of the death penalty: Evidence from Taiwan* (to be published March 2019).

<sup>3</sup> See note 1 above.

## Introduction

This report in The Death Penalty Project's series of studies on capital punishment in Taiwan draws on data collected from Supreme and High Court judgments by Dr Chang Chuan-Fen, in preparation for her 2017 thesis to demonstrate that at least one-sixth – and probably many more – of the convictions that resulted in a death penalty over the decade from 2006-2015 were unsafe.<sup>4</sup> By this it is not asserted that those who were convicted were certainly factually innocent, but, rather, that the evidence to support their conviction was inadequate or flawed. In some cases, the evidence appeared to refute the defendant's role in the crime and, in many cases, defendants were not protected in the criminal process by the appropriate safeguards. In other words, these were cases that seemed to be insufficiently robust for a conviction – and certainly so for a death sentence.

This report describes the various flaws in the criminal justice response to these cases within the context of the organisational culture and practices of the criminal justice system in Taiwan, which are seen to be conducive to the production of erroneous convictions. While the focus of the report is on the death penalty, these findings are an indictment of the criminal justice system as a whole.

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<sup>4</sup> See Chang Chuan-Fen, *Justice Inc.: The 'how' and 'why' of death sentences in Taiwan 2006-2015* (2017), DOI: 10.15476/ELTE.2016.193, available at [edit.elte.hu/xmlui/handle/10831/33757](http://edit.elte.hu/xmlui/handle/10831/33757)

## The criminal justice system in Taiwan

Taiwan's criminal justice system has evolved over the past century. Between 1895 and 1945, under Japanese rule, justice was delivered through an inquisitorial system. Since then, there has been a gradual shift towards an adversarial model of justice, culminating in the revision of the Code of Criminal Procedure in 2003, which brought about a modified adversarial system. Unlike the Anglo-American system, however, there is no jury in Taiwan and the judge remains, in practice, both the factfinder and legal arbiter.

There are certain structural features of the Taiwanese justice system that may increase the risk of wrongful convictions: the order in which evidence is investigated, with the police and prosecution ahead of the defence; discontinuous hearings, which mean trials can go on for months or longer, with typically two or more months between hearings; and the role of the judge as someone who takes the lead in trial proceedings (rather than the prosecutors and defence lawyers), as well as who judges the veracity of the evidence and decides guilt and sentence.

Furthermore, and a legacy of the inquisitorial system, judges in Taiwan maintain a close relationship with prosecutors. Not only do they share the same qualifications, training and offices, but they can also switch between the two jobs. Organisationally and culturally, they have a shared affinity. As we will see below, this close relationship challenges the fundamental principle of equality of arms between the prosecution and the defence, leaving the defendant with two key players in the justice system seeking evidence against him or her and, sometimes, without an adequate legal representative.

## Offences subject to the death penalty

The death penalty in Taiwan is not reserved for murder. More than 50 offences in the Criminal Code and other statutes are punishable by death, though many cannot be said to meet the threshold of the most serious offences that the ICCPR requires before the imposition of a death penalty. For example, death sentences can be imposed for drug and firearm offences, and 'offences of malfeasance in office'.<sup>5</sup> While the Supreme Court has not upheld the death penalty for offences other than murder since 2002 (when a death sentence was upheld for

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<sup>5</sup>The Death Penalty Project, *The Death Penalty in Taiwan*, at [www.deathpenaltyproject.org/knowledge/the-death-penalty-in-taiwan/](http://www.deathpenaltyproject.org/knowledge/the-death-penalty-in-taiwan/), pp. 13-17.

drug trafficking), district courts and the High Court have issued death sentences for offences other than murder on a number of occasions over the past decade or two.<sup>6</sup>

In the 1990s, there were more than 50 offences punishable by a mandatory death sentence, but the mandatory death penalty was abolished in 2006, the year that marked the start of an unofficial moratorium that ended in 2009. Most years, only a few people are executed – but there are no rules regarding the time prisoners can or should spend on death row before they are executed,<sup>7</sup> and no information available on the criteria for selecting prisoners for execution.

Previous research conducted by The Death Penalty Project demonstrated that: some capital cases have involved the torture and ill-treatment of defendants; some defendants do not have access to an attorney at the Supreme Court; most cases do not include oral debate at the Supreme Court; defendants are not usually allowed to be present at their Supreme Court hearings; and procedures for seeking amnesty are not in place. We concluded that, in Taiwan, the death penalty was not reserved only for the most serious cases, and the criminal justice system could not be confident of protecting the innocent or the undeserving from the ultimate penalty, and could not guarantee the protection of human rights.<sup>8</sup> This report offers a far more comprehensive analysis of death penalty trials and appeals, but comes to the same damning conclusions.

## Empirical analysis of finalised death sentences

The empirical research conducted by Dr Chang Chuan-Fen and analysed in this report is based on an in-depth review of each of the 62 cases that were finalised with death sentences during the 10 years between 2006 and 2015.<sup>9</sup> All involved convictions for murder: 30 were judged to be premeditated and 32 non-premeditated, suggesting that more than half of these cases were not ‘the most serious crimes’ and, therefore, judicial practice was in breach of the ICCPR.

In each case, there were multiple judgments from the various courts (as few as three in some cases and as many as 25 in others). The binding judgments are the final ones – which are issued by the Supreme Court and deal with the application of law, rather than fact-finding – and the

<sup>6</sup> Fourteen defendants were sentenced to death for crimes other than murder between 2002 and 2015, though the Supreme Court later commuted these sentences to lesser penalties.

<sup>7</sup> Taiwan has not seen challenges to the ‘death row phenomenon’ caused by lengthy delays between conviction and execution that have resulted in the commutation of hundreds of death sentences in countries in the Caribbean and Africa.

<sup>8</sup> The Death Penalty Project, *The Death Penalty in Taiwan*, at [www.deathpenaltyproject.org/knowledge/the-death-penalty-in-taiwan/](http://www.deathpenaltyproject.org/knowledge/the-death-penalty-in-taiwan/)

<sup>9</sup> For comprehensive narratives of, and citations for, each case analysed and referenced in this report, see Chang Chuan-Fen, *Justice Inc.: The ‘how’ and ‘why’ of death sentences in Taiwan 2006–2015*, at note 4 above.

penultimate judgments, which are issued by the High Court and deal with factual issues.<sup>10</sup> As the Supreme Court considers appeals based on legal points, not on factual evidence, our main focus here is on the final factual judgment of the High Court. However, the research also draws on other judgments to better understand the development of each case and the coherence and fidelity of the prosecution's assertions. The methodological approach was to conduct 'document analysis' of each judgment, reading critically and coding data according to two main themes: 1) the fidelity of the evidence (whether the facts in the judgment are supported by evidence); and 2) the coherence of the narrative (whether the story in the judgment is internally consistent and logical).

The research does not start from the presumption that judgments present facts, but rather that they are a product of judicial consideration of – and persuasion by – partial narratives from the prosecution and the defence. In a judgment after a finding of guilt, the story of what happened is inevitably shaped by the selective presentation by the prosecution of *some* of the available information, gathered with the explicit purpose of justifying the decision to prosecute the offender with a death-eligible offence. Fundamental to the adversarial process is that each side must not be distracted or overwhelmed by the elusiveness and complexity of what happened. Instead of a search for the truth, the prosecution and the defence must create a narrative about what has happened that best serves their role; the prosecutor's narrative is aimed at securing a conviction, while the defence's is constructed to, at least, create reasonable doubt about the prosecution's case and, at best, establish that the defendant is innocent.<sup>11</sup>

The arbiter – often the jury, but in Taiwan the judge – will consider and assess the veracity of the competing stories. Hence, control of the content and timing of information to the judge is crucial in the process of privileging one story over another. In most adversarial systems, the power to construct plausible cases is unequally distributed, with the prosecution having more powers and more resources. The research shows that this is particularly true in Taiwan for structural reasons. This 'case construction'<sup>12</sup> approach to understanding the accumulation and presentation of evidence and argument drives the analysis.

Each case was coded according to a set of analytical themes, with the aim of explicating, as far as is possible, the details of the case, considering the strength of the evidence and arguments presented to support 'facts'. Attempts were made to identify the stages in the process of case construction at which mistakes could have occurred, and any challenges that might have

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<sup>10</sup> In most cases, the last factual judgment overrides the first ruling.

<sup>11</sup> A. Sanders (1987) 'Constructing the Case for the Prosecution', *Journal of Law and Society*, 14(2), 229-253.

<sup>12</sup> M. McConville, A. Sanders and R. Leng, *The Case for the Prosecution*, Routledge, London and New York: 1991.

prevented those errors from resulting in an erroneous conviction. Particular attention was paid to evidence in support of the ‘defendant–weapon–victim’ chain that has probative value in any murder conviction. By this we mean, did the prosecution present robust evidence that tied the defendant to the murder weapon and is there similarly strong evidence to demonstrate that the weapon caused the death of the victim?

## Constructing the case for death

Analysis of judgments reveals a mindset among the judiciary that is closely aligned with the prosecution. As judgments are written after a defendant has been convicted of an offence, it is inevitable that they are unequivocal about the heinousness of the crime (particularly in capital cases) and the guilt of the offender. However, in the cases reviewed, there was a sometimes gratuitously partial account of the offender, with the selective presentation of relevant and sometimes irrelevant evidence. In most cases, those who were convicted were not ascribed identities other than ‘criminal’ and, in support of this spoiled identity, 29 of the 62 judgments began with a discussion of the offender’s criminal record, defining them at the outset as criminally inclined. While reference to past violent crimes may be relevant, in many of these cases the only prior offences discussed were petty property offences that bore no relationship to the conviction. We can assume that in the other cases, where the judgment presented no evidence of a history of offending, the person convicted did not have prior criminal convictions – yet the *absence* of a prior record was not noted in any of them.

In those 32 cases that did not present information about prior criminal activity, judgments began by simply describing preparation for the crime and other details of the crime, or by suggesting motive or opportunities to commit a crime. For example, some cases began with details of resentment or antagonism between the defendant and the victim, resulting sometimes from difficult relationships characterised by unresolved conflicts. Others implied that defendants were motivated by an urgent need for money to honour financial debt. In some cases, information about meetings between co-defendants suggested conspiracy to commit an offence and other details similarly alluded to motives and opportunities for murder. No information was provided in these judgments about the structural or cultural factors that might have influenced criminal behaviour. Those who are convicted are presented as fully accountable for their crimes, with little information provided by way of mitigation. While the language of judgments can suggest a partial presentation of the information available, of greater concern to us was the incoherence of some of the information provided.

Almost half (28) of the judgments contain assertions about criminal intent without evidence to support this – demonstrating clear weakness in fidelity – or have only feeble assertions or speculations about intent, demonstrating weakness in coherence. In some cases, the judgment

has drawn selectively and misleadingly from statements. Without strong evidence of intent, we cannot be sure that all of these cases are, in fact, capital murders.

Some defendants' claims about killing in self-defence, or evidence of mental illness that go to the heart of culpability, remained unexplored or rejected, without proper attempts to test them. In such cases, while the defendant may have killed the victim, it is not clear that these were premeditated killings or that the defendant was fully culpable. Such cases should not be subject to capital punishment – and yet, these were. Though the prosecutor in one case referred to the defendant – who had an IQ of just 57 and a history of mental illness – as 'a patient of major depressive disorder', she was sentenced to death.

After asserting the facts of the case, judgments must provide a rationale for the sentence. While the judgment often runs to about 30,000 words, the justification for the death penalty, near the end, is typically brief – usually not more than 1,000 words. Furthermore, the language is unnecessarily emotive and, arguably, prejudicial; references are made to defendants' lack of humanity or to their 'sins'. Assertions are made about crimes being 'unforgivable', which is decidedly different from determining whether a defendant is beyond rehabilitation, which might be a relevant factor in sentencing. Similarly, judgments included references to a lack of remorse – which might speak to a decision to award a death sentence rather than a life sentence – without any evidence to support this, or, indeed, with some indication of regret.

The oral debates that precede sentencing in these cases are typically no more than the prosecutor's assertion of the need for severity in sentencing – though this is never justified – and the defendant's plea for leniency. With no more discussion and no attempt to draw on principles of proportionality, or to weigh mitigating and aggravating features of the case, the judge is reduced to platitudes. Judgments often draw on Chinese proverbs, such as 'He cannot escape his guilt' (罪無可遁); '(The cruelty) enrages not only all human beings but also gods' (人神共憤); 'A crime of the blackest dye' (罪大惡極); 'He manifested the death of humanity' (人性已泯); and 'A man with an innate ferocity' (生性兇殘). Such proverbs leave no room for mercy. Elsewhere, judges asserted that the death penalty is justified by retribution and incapacitation, with some nod to its deterrent effect, though a life sentence would clearly serve these sentencing rationales. In a few cases, however, we saw the judge appealing to public opinion to justify a death, rather than a life, sentence. For example, in one case, the judge stated:

"The robbery and murder in this case, the personality of the defendant and the method to commit the crime all qualify as serious. If the lighter punishment of 'life in prison' is applied, doesn't this mean the defendant's crime was not serious? This is so incompatible with public opinion and runs counter to legal justice."

A judge presiding over another case similarly remarked:

“We are balancing the ideals of fairness and justice, responding to the need for social justice, and maintaining the nation’s security, public order and good customs, and it is necessary to enhance the public good.”

What is meant by ‘public good’ is left unarticulated, but we must assume it refers to the Court’s desire to take into account public desire for vengeance. Accordingly, the emotive, impartial language of the judgments constructed the case for a death penalty.

If the evidence against the defendant in each of the 62 cases was robust, leaving little or no room for doubt, we would be concerned only about whether the close alignment between prosecutor and judge had influenced the sentencing decision in favour of the death penalty, and whether mitigating factors had been downplayed in favour of the construction of an irredeemably merciless offender. However, analysis of the research suggests that at least 10 cases were wrongfully convicted, and there is good reason to doubt the strength of further cases, too.

## Erroneous convictions

Convictions that exhibited a clear break in the chain between defendant, the murder weapon and the victim were characterised as flawed. Ten such cases were identified, with no significant inculpatory evidence to support the prosecution’s claim. In some, there was simply no evidence to link the defendant to the murder weapon; in others, mere speculation or hearsay is presented as if points of fact. In certain cases, the facts are contradictory. For example, in one judgment, it is first claimed that one defendant ‘slashed’ the victim with a sharp weapon but did not kill him, after which the co-defendant delivered the fatal stab, then killed the second victim with the same weapon. In other words, only one of the two defendants was guilty of causing a fatal injury. Further on in the judgment, however, it is asserted that: ‘Based on the above evidence... it is clear that the victims... were both stabbed with more than two weapons and that the offence must have been committed by two people.’ This was clear speculation. We cannot be confident where the truth lies, but we are sure that the judgment does not provide an unequivocal account with sufficiently strong evidence to support a conviction – and certainly not to justify a sentence of death.

Similarly, in another judgment, it is stated that there were only three bullets fired and all were retrieved at the scene or in the hospital; yet there were three people with bullet wounds, one of whom had three separate wounds. In this case, the assumed murder weapon was not tested for a match with the bullets and some of the claims about entry wounds did not fit with the other evidence gathered. Despite such inconsistencies, the case was successfully prosecuted.

While the research could clearly identify 10 of the 62 cases as seriously flawed, given the break in the ‘defendant–weapon–victim’ chain, there may have been many other wrongful convictions among these cases. Though analysis of the judgments precludes confident assessment of the reliability of decisions made before, during and after the trial at which guilt was concluded, the various errors in the criminal process to which we now turn suggests that some of the other 52 cases are likely to be unsafe.

## Errors in the criminal process

Here, we consider mistakes originating from: the pre-trial process; errors at trial caused, in part, by the legal rules and organisational culture of the court and the wider criminal justice system; and post-conviction processes. In line with other research on wrongful conviction,<sup>13</sup> we find that faults can be created not only by purposefully wrongful acts, but by a series of routine procedures that may – on the face of it – appear harmless, but which facilitate the accumulation of errors.

### Pre-trial injustice

The judgments reviewed demonstrate the conditions likely to produce bias towards inculpatory evidence and testimonial evidence at the pre-trial stage. Given the lengthy pre-trial process in Taiwan, when judges are exposed solely to prosecution evidence before the first hearing (sometimes for up to three months), it should not be surprising that judges become prosecution oriented. The time lag causes them to be immersed in evidence that is prejudicial to the defendant – primarily testimonial evidence – long before they are exposed to exculpatory evidence. In all of the cases, the prosecution’s case dossier was provided to the judge well in advance of the defence case.

Common practices of the police and prosecutors mean judges tend not to receive rigorous reports on the analysis of scientific evidence until a fairly late stage in the proceedings. While forensic evidence – such as whether a fingerprint or a DNA sample appears to be inculpatory – will be included in the prosecutor’s case dossier, expert analysis of such tests is usually produced much later, sometimes near the end of the proceedings. This is because it takes time to appoint an expert acceptable to both the prosecution and defendant, and for the expert to conduct the necessary analysis to present the evidence to the court. This inevitably produces

<sup>13</sup> See, for example, Garrett, Brandon L., ‘Trial and Error’. pp. 77–90 in *Wrongful Convictions and Miscarriages of Justice: Causes and Remedies in North American and European Criminal Justice Systems*, Routledge, New York: 2013; Gould, Jon and Richard A. Leo. (2010). ‘Centennial Symposium: A Century of Criminal Justice: II: “Justice” in Action: One Hundred Years Later: Wrongful Convictions After a Century of Research’. *Journal of Criminal Law and Criminology* 100:825–68.

a bias in the construction of a case towards testimonial evidence against the defendant. We do not assert here that judges are unable to resist these biases, but rather that there is little to persuade them of the defendant's innocence for a considerable time in the progress of a case.

It is common, the world over, that insufficient efforts are made by police and prosecutors to collect rigorous evidence once a suspect has made a confession – particularly when that confession is supported by an apparently coherent narrative, including details of the crime that only the suspect could know. This is the case despite significant evidence from international studies that: such confessions can be false; highly suggestible and otherwise vulnerable suspects are likely to confess under even minimally coercive conditions of detention; and that the police often give them details of the offence and crime scene – sometimes accidentally or innocently, and, other times, deliberately.<sup>14</sup>

Confessions cannot be reliable if extracted through significant coercion. In many of the cases, there are assertions by the defendant that confessions made in police custody were made under duress. In-depth analysis of the judgments provides evidence to support some of these claims; for example, evidence of injuries to suspects that were not apparent upon arrest, but appeared during the interrogation phase. Review of the cases uncovered examples of the torture of suspects while in police custody, though this was not discussed in the judgments or presented as persuasive, despite the fact that it was verified by other sources. One judgment does not acknowledge that torture took place, yet – in this case – the Control Yuan<sup>15</sup> took punitive measures against the police officers for their coercive tactics, and the officers were later prosecuted and found guilty of assaulting the defendant.

Confessions obtained through torture, false statements given by co-defendants, or misleading statements by witnesses are all presented to judges, with the defendant unable to present alternative exculpatory evidence. The suspect has the right to hire a lawyer during the investigation, though some are prohibited from corresponding with family, friends, and even their lawyer. Until very recently, however, lawyers had no rights of access to information gathered by the prosecutor during the investigation.<sup>16</sup> Without access to inculpatory evidence, there is no equality of arms.

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<sup>14</sup> Garrett, Brandon L. (2015). 'Contaminated Confessions Revisited', *Virginia Law Review* 101:395–454; Gould, Jon, Julia Carrano, Richard Leo, and Katie Hail-Jares. (2013). 'Predicting Erroneous Convictions', *Iowa Law Review* 99:471–522.

<sup>15</sup> The Control Yuan is one of the five branches of the government in Taiwan and is an investigatory agency that monitors other branches of the government.

<sup>16</sup> In November 2018, article 33-1 of the Code of Criminal Procedure gave lawyers the right of access to information during the investigation.

## Errors at trial

Procedures at trial continue to privilege testimony as distinct from forensic evidence. Furthermore, exculpatory evidence is presented in a fragmented fashion over the discontinuous hearings, unlike inculpatory evidence, which is presented all at once at the start of the trial. In addition to the procedural injustices, the research revealed examples of judges failing to conduct the trial in an impartial manner, playing the role of accuser and judge. The strong affinity between judges and prosecutors, as discussed above, may shed light on legal decision-making and accumulation of errors over the criminal process. As a relic from the inquisitorial system, prosecutors are passive during the trial. They typically repeat the indictment and may ask a few questions, but rarely actively challenge the defence.

It may be thought that this would allow for a strong defence, but, in practice, the judge takes over the role of the prosecutor, seeking inculpatory evidence, and becoming the accuser during the trial and the decision-maker at the end of it. A judge engaging in interrogation in the court room is arguably more likely to be persuaded of the guilt of the defendant, though this is not easy to prove. The cases reviewed, however, provided examples of judges allowing information into the trial that would benefit the prosecution. In some cases, the conviction relied on testimony from people with criminal records and motives for misleading the court – indeed, people with a personal interest in the conviction of the defendant.

Procedures that militate against the defendant increase the likelihood of substantive errors in the trial process. The cases reviewed included errors in expert evidence, errors in testimony and a failure to collect and present relevant exculpatory evidence. Careless, sometimes reckless, collection and preservation of physical evidence make forensic tests impossible in some cases and unreliable in others – sometimes leaving judges little choice but to rely on testimony. In one case, for example, the murder weapons were missing, the fingerprint sample was missing, and there was no documentation about where in the room the evidence had been found. In another case, the deceased's body had been found in the defendant's car, yet the police returned the car to his family without conducting any forensic tests on it. In a further case, an audiotape of the ransom call was missing, as were the murder weapons and clothing from the crime scene. All of these had been found by investigators but lost when they failed to preserve them as evidence. In almost all cases where the defendant maintained they had been tortured during investigation, the police claimed to have lost the audio or videotapes of interrogations. In one fairly typical case, the defendant's photo – taken by staff in the detention house – showed clear signs of bruising to his eye. Access to the photo was denied during trials until the prosecution filed for a retrial in 2016 and the case was reopened. During the retrial, the detention house finally provided the photo that they had earlier claimed did not exist.

Forensic evidence can be helpful to both defence and prosecution, but as judges are not knowledgeable about forensic science, they do not spot mistakes in the tests. Moreover, the judgments reviewed suggest that the courts can be tolerant of recklessness in the collection and preservation of evidence. While the court will discard confessions that are manifestly extracted by force, demonstrating force is often an insuperable challenge. Even when false confessions are disregarded by the court, we found that the court will accept other evidence of dubious quality where there has clearly been police malpractice.

In one case, a forensic expert asserted that it was very possible that the victim had been sexually assaulted before her death, based on her clothes not being intact when her body was found. Yet she had been drifting in a river for many hours before her body was discovered, which could easily account for any damage to her clothing. In another case, the forensic witness determined the number of killers based on the quantity of semen found at the scene (20cc). During cross-examination, however, the doctor reluctantly admitted that he had guessed at the amount simply by glancing at the fluid and that the sample may, in any event, have been a mixture of semen and other bodily fluids. Clearly the evidence was insufficient to suggest how many defendants there may have been. In a further case, the forensic expert had attempted to preserve biological evidence in formalin and, in so doing, destroyed biometric traces. Most of the evidence at trials is not reviewed independently, but by labs affiliated to the prosecution and the police.

Given their heavy workloads, judges are not always on top of the evidence provided. Statistics from 2005 to 2014 – when the majority of the cases reviewed were handled – show that a district Court judge completes between 56 and 80 criminal cases each month; in the High Court it is between 17 and 37 cases; and in the Supreme Court it is between 14 and 21 cases. There are organisational imperatives for completing cases within the time limits assigned; indeed, judges' salaries and benefits – as well as their promotion prospects – can be negatively affected by delays. Moreover, given that trials are held in a discontinuous fashion (in all our cases, the hearings were held discontinuously), a judge may be handling dozens of other cases at the same time as he or she is dealing with a murder case. This is likely to impact negatively on their command of the case and their ability to hold all of the relevant factors in their mind at each stage.

As we made clear above, the broken evidence chain in 10 of the 62 cases suggests these were unsafe convictions. However, other aspects of the 62 cases, concerning failures of due process, were also cause for some concern, as we summarise in Table 1.

**Table 1: Unsafe convictions**

Unfair instructions from the judge	3
Failure to establish direct intent to murder	12
Failure to establish premeditation	32
Errors in expert evidence	17
Errors in testimonial evidence	10
Failure to collect or preserve evidence	12
Errors or inadequacies in sentencing	7
Failure to take note of mitigating evidence in sentencing	10

These failures and errors were present in a considerable number of the cases reviewed and, in some, we found a range of errors; in 15 cases, there were at least three of the errors listed in Table 1. In such circumstances, it is hard to argue that the defendant received due process of law or anything resembling a fair trial. While we cannot assume that they are not guilty, we can assert with some confidence that their conviction is unsafe.

## Failure of post-conviction review

A simple comparison of the rulings of different instances in the same case demonstrate that each successive judgment draws heavily on the text from the previous ruling. As the Supreme Court only deals with the application of the law and not the establishment of facts, hearings before the Supreme Court, across most of our cases, did not challenge the prosecution's narrative. The Supreme Court has only recently introduced oral debate for all capital cases, so this happened for just five of our 62 cases. Furthermore, in none of the cases reviewed was the defendant allowed to attend his or her Supreme Court hearing, and in 23 cases he or she did not have a legal representative at the Supreme Court appeal. Clearly, in many cases, review of conviction at the Supreme Court does not offer a credible opportunity for the defence to challenge the case for the prosecution. While old errors remain, new errors are introduced at the Supreme Court.

The research demonstrates that, in Taiwan, the death penalty is not immune to the many errors and failures of due process that blight the criminal justice system as a whole. Death sentences are not reserved only for those cases where there is reliable, indisputable evidence, and where the arguments and narratives leave no room for doubt. The criminal justice system is not able to reliably detect and respond to errors. Indeed, the routine functioning of the criminal process fosters the accumulation of errors and discourages their discovery and correction. In particular, the practice of holding 'discontinuous hearings' in a system where judges and prosecutors have an unhealthy close relationship – and where the defence is unable, at an early stage, to present inculpatory evidence – militates against defendants' due process rights. In this regard, errors or breaches of procedural safeguards are facilitated by the normal functioning of the criminal process, rather than being a perversion of justice.



## Contributors

### Chang Chuan-Fen

Dr Chang Chuan-Fen is a professor at Taipei National University of the Arts Graduate Institute of Transdisciplinary Study on Creative Writing and Literature. She has published four books on the death penalty: *My country kills: Constitutional challenges to the death penalty in Taiwan* (co-authored with Chang Wen-Chen); *The murder at 'Auntie 13' Karaoke, The difficulties in killing: Essays on the death penalty*, and *The unhealthy coming of age: The case of Hsi-chih trio, 1991 to date*. Dr Chang is an executive member of the Taiwan Alliance to End the Death Penalty.

### Carolyn Hoyle

Carolyn Hoyle is a professor of criminology at the University of Oxford Centre for Criminology and Fellow of Green Templeton College, Oxford. She teaches and researches on the death penalty around the world, and has published (with Professor Roger Hood) the 4th and 5th editions of *The Death Penalty: A Worldwide Perspective* (Oxford University Press, 2008; 2015), and various other articles and chapters on capital punishment. Her recent scholarship focuses on Asia. She has collaborated with The Death Penalty Project, the National Law University, Delhi and the University of Dhaka, Bangladesh, on studies of elite opinion on the death penalty in India and in Bangladesh. More recently, she has begun work on elite and public opinions on the death penalty in Indonesia, and she is currently researching the plight of foreign nationals at risk of the death penalty in Malaysia, Indonesia and Singapore.

In addition to her work on capital punishment, Professor Hoyle has been researching wrongful convictions in the UK for the past decade. Her book on applications to the UK post-conviction review body, the Criminal Cases Review Commission, was published by Oxford University Press in January 2019 (*Reasons to Doubt: Wrongful Convictions and the Criminal Cases Review Commission*).

## The Death Penalty Project

The Death Penalty Project (DPP) is a legal action charity, based in London, working to promote and protect the human rights of those facing the death penalty. We provide free legal representation to death row prisoners around the world to highlight miscarriages of justice and breaches of human rights. We also assist other vulnerable prisoners, including juveniles, those who suffer from mental health issues and prisoners who are serving long-term sentences.

For more than three decades, our work has played a critical role in identifying 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. To complement our legal activities, we conduct capacity-building activities for members of the judiciary, defence lawyers and prosecutors, as well as mental health professionals.

DPP also commissions and publishes academic research and targeted reports to increase knowledge and understanding of criminal justice and human rights issues relating to the death penalty. Covering thematic issues such as public opinion, conditions of detention and the implementation of human rights law, these resources are developed in close consultation with local partners to respond to specific needs. Our publications are used by NGOs, lawyers and policymakers around the world as tools to effect lasting change in policy and practice. Our previous publications focusing on wrongful convictions include:

- *The inevitability of error: The administration of justice in death penalty cases* (2014), by Roger Hood et al.
- *A Rare and Arbitrary Fate: Conviction for Murder, the Mandatory Death Penalty and the Reality of Homicide in Trinidad and Tobago* (2006), by Roger Hood

These reports and other publications by The Death Penalty Project are available to view and download at [www.deathpenaltyproject.org](http://www.deathpenaltyproject.org)

## Taiwan Alliance to End the Death Penalty

Taiwan Alliance to End the Death Penalty (TAEDP) is a coalition of Taiwanese abolitionist groups, non-governmental organisations and research institutes. The Alliance, formed in 2003, is the first coalition in Taiwan that advocates for the abolition of the death penalty and promotes reform of Taiwan's penal system. TAEDP undertakes its work through several different approaches. It works on individual death penalty cases and monitors trial procedures to ensure that every defendant receives a fair trial. TAEDP also regularly hosts training programmes and seminars for criminal defence attorneys. As a human rights organisation, TAEDP is not only concerned with the rights of those facing the death penalty, but also advocates for victims' rights and a more comprehensive victim support system for those affected by murder and other serious crimes. TAEDP regularly holds open forums to communicate with the general public, and collaborates with school teachers to develop teaching plans and other educational materials.

This report, a collaborative publication between the DPP and TAEDP, is released alongside *For or against abolition of the death penalty: Evidence from Taiwan*, a report by Chiu Hei-Yuan edited by Roger Hood. Previously, the DPP and TAEDP published *The Death Penalty in Taiwan: A Report on Taiwan's Legal Obligations under the International Covenant on Civil and Political Rights* (2014), and *The Handbook of Forensic Psychiatric Practice for Capital Cases in Taiwan* (2015).

# Unsafe convictions in capital cases in Taiwan

The greatest mistake that a criminal justice system can make is the wrongful execution of an innocent person. It cannot be acceptable on the one hand to retain and implement the death penalty but, on the other, accept that innocent people may be sentenced to death and executed. Where such a risk exists, there is simply no room for capital punishment – in Taiwan or elsewhere in the world – regardless of the cultural expectations of citizens and the demands of political and public opinion. Once the fallibility of criminal justice systems is acknowledged, the question is not whether an individual deserves to be sentenced to death and executed, but whether the state can ever claim the right to deprive an individual of the most basic human right – namely the right to life.

The findings in this report are consistent with the experiences in other jurisdictions in which the death penalty is imposed. Indeed, there is a risk that innocent people will be sentenced to death wherever capital punishment exists. In 2017, at least 55 death row prisoners were exonerated around the world. In the US alone 164 people have been freed from death row since 1973. Miscarriages of justice occur in every system, however strict and robust their adherence to due process. As many abolitionist countries recognise, error is inevitable and the only solution is to abolish the death penalty.



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