



The Death
Penalty Project

**WRONGFUL
CONVICTIONS
AND THE DEATH
PENALTY**

One of the most compelling forces behind the evolution of international attitudes towards capital punishment in recent decades has been the increasing recognition of the potential for error in its use – that those states that choose to retain the practice may be taking the lives of innocent individuals.

The high-profile release of prisoners from death row has sparked public debates in a number of states in recent years, including in China, Japan, Vietnam and the US. Among the American public, this has contributed to a steady decline in support for retention, with a narrow majority of 55% now supporting the death penalty – the lowest level for half a century – and 43% favouring abolition.

An inevitable fallibility

While the risk of executing the innocent is a critical concern, it is evident that procedural reforms are not sufficient to resolve the myriad of problems arising from the use of the death penalty. No system yet developed, no matter how sophisticated, has been able to overcome the inherent presence of arbitrariness, with the most vulnerable and disadvantaged in society subject to the greatest risk of execution, and the significant risks of wrongful conviction.

Furthermore, even if a system could be developed which removed the risk of wrongful conviction and arbitrariness observed across all existing systems of capital punishment, this would not resolve the matters of principle weighing against its use. Its imposition is ultimately incompatible with the human dignity of each individual – even those who have committed the most serious offences.

Analysis of the issue of wrongful convictions is nonetheless highly instructive in understanding the functioning of the criminal justice systems of retentionist states and the particular factors which can contribute towards the risk of injustice in the administration of the death penalty, even where safeguards are in place.

Data on wrongful convictions

Most empirical research into wrongful convictions in death penalty cases derives from the US. As of February 2021, the Death Penalty Information Center has recorded 185 instances, from 29 different US states, in which individuals were exonerated after being wrongfully convicted and sentenced to death since the resumption of capital punishment in 1973.

This figure equates to one wrongful conviction for every 8.3 executions carried out during that period. The total only accounts for legally established wrongful convictions, many others may remain unproven given the systemic challenges to reviewing convictions.

Notable cases

Earl Washington Jr., convicted of the rape and murder of a woman in 1982, had at one point come within nine days of execution. He was exonerated by new DNA evidence in 1993, but it was only in 2002, after 18 years in prison, that he was released after a match was found to the DNA of another man.

In 2015, Henry McCollum and Leon Brown, half-brothers, both with intellectual disabilities, were pardoned due to DNA evidence, having spent 30 years imprisoned for the rape and murder of a young girl. Brown spent 10 years on death row, while McCollum spent the entirety of the 30 years awaiting execution.

The phenomenon of death row exonerations has led to moratoriums and abolition of capital punishment in a number of US states. Despite 'super due process' protections in capital cases,

even the US Supreme Court, in the case of *Atkins v. Virginia* (2002), expressed concern that: '...a disturbing number of inmates on death row have been exonerated.'

Other egregious examples of death row exonerations have been documented across various jurisdictions worldwide. Among the most notable is the case of Iwao Hakamada, who was released from death row in Japan in 2014 at the age of 78, having served 47 years in solitary confinement while subject to the threat of execution. Hakamada had been convicted of the murder of four people in 1966, on the basis of evidence which DNA testing later found was likely to have been fabricated and a forced confession made during police interrogation that involved torture. The Japanese court system had continually failed in providing safeguards against this miscarriage of justice.

The risk of false confession

False confessions, particularly those produced under torture, are a common feature of cases of wrongful convictions. In April 2003, a man named Badar Ramadan Shaath was acquitted by Jordan's Cassation Court, having been sentenced to death for two murders. Since his arrest in 2000, he had maintained his innocence, and alleged that his confession had been extracted under torture. The Court found the confession to have been invalid, clearing him of all charges.

Posthumous exoneration

Tragically, in some instances exonerations only occur after executions have taken place. In Taiwan in 2011, the country's President formally apologised to the family of a soldier named Chiang Kuo-Ching, who had been executed in 1997 for a crime to which another man had subsequently confessed. The government accepted that Chiang's allegations of torture and claims of innocence had been ignored.

A 2019 review of capital cases in Taiwan raised very serious concerns about the risk of such wrongful convictions. Of a total of 62 judgments examined, the review found that 10 contained serious flaws due to lack of inculpatory evidence; in 32, the required element of premeditation had not been established; and in 28, unsupported statements about the criminal intent of the accused were made.

Access to adequate legal counsel

Another key risk factor in wrongful convictions is the absence or weakness of an individual's legal defence. In some jurisdictions, the right of access to effective legal representation is either not honoured at all or the defendant has inexperienced, often ineffective and typically inadequately funded counsel.

In 2001, a woman named Ann-Marie Boodram had her conviction for the

1989 murder of her husband in Trinidad overturned on appeal to the Judicial Committee of the Privy Council (JCPC), prior to which she had faced a mandatory death sentence. The JCPC found that Boodram's legal defence had been so grossly incompetent that she had not had a fair trial, and ordered that she should not be retried. Her release came after a period of more than 12 years of incarceration.

The issue of culpability

Individuals are also known to have been sentenced to death despite having a mental illness and/or intellectual disability. This has often occurred due to inadequate or no medical evidence being made available at trial.

In 2012, an appeal in the case of Sheldon Isaac, who faced a death sentence in St Christopher and Nevis, came before the JCPC. After medical evidence was provided showing that Isaac suffered from severe brain damage, his case was remitted to a regional appeal court, which accepted that he was unfit to stand trial, should never have been convicted, and that a retrial was inappropriate.

In some jurisdictions, death sentences are imposed during procedures which are not conducive to defendants' ability to prepare an adequate defence. In Bangladesh, for example, a 2013 case saw 152 soldiers receive death sentences for their alleged roles in a 2009 uprising, in the context of the mass trial of 846 people, with the accused afforded little to no access to legal representation.

Transparency and accountability

The likelihood of wrongful convictions is even greater in those jurisdictions in which the death penalty is shrouded in secrecy, such as Vietnam and China, where capital cases are considered a state secret. Even if such secrecy is not present, there can often be significant gaps between the standards a criminal justice system aspires to and those that it upholds in practice.

In 2020, Amnesty International recorded the imposition of death sentences following trials which did not meet international fair trial standards in a number of countries, including Bahrain, Egypt, Iran, Malaysia, Singapore and Yemen.

Under international law, although there is an exception to the right to life in the International Covenant on Civil and Political Rights for the death penalty, this is contingent upon respect for other human rights, including the right to a fair trial and the prohibition on torture. Where there are violations of these rights, executions can constitute an arbitrary deprivation of life.

The wider impact

As Professor Brandon Garrett has documented in the US, the impact of wrongful convictions goes far beyond cases where death sentences are imposed, affecting the criminal justice processes of retentionist states more widely. However, where there is a threat of capital punishment, individuals can be more likely to plead guilty, even if they are innocent of the crimes they are charged with, with one study in the US state of Georgia finding that guilty pleas increased by 20-25%.

Where capital punishment is retained, there is the potential for victimisation through wrongful conviction. For victims who are exonerated prior to execution, their experience of imprisonment and the threat of execution causes severe ongoing pain and trauma, among many other detrimental impacts.

That many other victims are only exonerated after their execution, or are wrongly convicted but never exonerated, is testament to the fact that retentionist states maintain the possibility of the gravest form of error that any criminal justice system could inflict – the imposition of a wrongful punishment that is irrevocable.

The Death Penalty Project is a legal action NGO with special consultative status before the United Nations Economic and Social Council. We provide free representation to people facing the death penalty worldwide, with a focus on the Commonwealth. We use the law to protect prisoners facing execution and promote fair criminal justice systems, where the rights of all people are respected.

Read more in this series from The Death Penalty Project, and our other publications, on our website www.deathpenaltyproject.org

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