國家人權委員會鑑定意見書

案號：111 年度憲民字第 904052 號

國家人權委員會基於落實憲法對人民權利之維護，奠定促進及保障人權之基礎條件，確保社會公平正義之實現，並符合國際人權標準建立普世人權之價值及規範，茲就本次 111 年度憲民字第 904052 號聲請案及相關併案共 34 件聲請案，從國際人權標準，蒐整相關資料，比較分析，提供下列意見，供憲法法庭審酌參考。

一、 國際人權公約相關規範

人權保障乃繫於生命之存在，因生命權為其他人權之基礎，亦為個人實現所有其他權利與自由之先決條件。然現存之死刑制度以剝奪人民生命為刑罰制裁，洵侵害基本權之核心及本質，與法治國家保障人權之目的及國際人權公約相悖。茲就有關規範臚列如下：

（一）《世界人權宣言》（Universal Declaration of Human Rights）

1. 第 3 條：「人人有權享有生命、自由和人身安全。」
2. 第 5 條：「任何人不得加以酷刑，或施以殘忍的、不人道的或侮辱性的待遇或刑罰。」

（二）《公民與政治權利國際公約》（The International Covenant on Civil and Political Rights，以下簡稱 ICCPR）

1. 前言[1]：「……對於人人天賦尊嚴及其平等而且不可割讓權利之確認，實係世界自由、正義與和平之基礎，確認此種權利源於天賦人格尊嚴……」
2. 第 6 條第 1 項：「人人皆有天賦之生存權（inherent right to life）。此種權利應受法律保障。任何人之生命不得無理剝奪。」
3. 第 6 條第 2 項：「凡未廢除死刑之國家，非犯情節最重大之罪，且依照犯罪時有效並與本公約規定及防止及懲治殘害人群罪公約不

[1] 按《維也納條約法公約》（Vienna Convention on the Law of Treaties）第 31 條規定：「一、條約應依其用語按其上下文並參照條約之目的及宗旨所具有之通常意義，善意解釋之。二、就解釋條約而言，上下文除指連同前言及附件在內之約文外，……」

抵觸之法律，不得科處死刑。……」

4. 第 6 條第 6 項：「本公約締約國不得援引本條，而延緩或阻止死刑之廢除。」

5. 第 7 條：「任何人不得施以酷刑，或予以殘忍、不人道或侮辱之處遇或懲罰。……」

（三）聯合國人權事務委員會公民與政治權利國際公約第36號一般性意見（2018 年）

1. 第 2 段：「《公民與政治權利國際公約》第六條承認並保護所有人的生命權。生命權是不允許減免的最高權利，即使在武裝衝突和危及國家生存的其他公共緊急狀況下也是如此。生命權對個人和整個社會都至關重要。它作為每個人固有的一項權利本身就是最重要的，而生命權也是一項基本權利，其有效保障是享有所有其他人權的先決條件，其內容可因其他人權而啟發。」

2. 第 3 段：「生命權是一項不應狹義解釋的權利。生命權涉及的個人具體權利包括個人免於遭受故意導致或預期可導致非正常死亡（unnatural death）或提早死亡（premature death）的作為或不作為的權利，以及有尊嚴地享有生命的權利。第六條不加任何區別地保障所有人的這項權利，包括涉嫌或被判犯有情節最重大之罪（the most serious crimes）的人。」

3. 第 12 段：「剝奪生命如不符合國際法或國內法，通常是無理的。然而，剝奪生命即使有國內法授權，仍會是無理的。『無理』（arbitrariness）的概念並非完全等同於『違反法律』，而應作更廣泛的解釋，以包括不當、不公、缺乏可預見性和正當法律程序等要素以及缺乏合理性、必要性和比例性等要素。……」

4. 第 41 段：「訴訟中違反《公約》第十四條規定的公平審判保障作成之死刑判決，將使判決具有任意性質並違反《公約》第六條。這種違反行為可能涉及：使用非任意性自白；被告無法詰問相關證人；在刑事訴訟各階段，包括刑事偵訊、預審、審判和上訴在

內，因律師與當事人無法在秘密情況下會面，缺乏有效代理；不尊重無罪推定，……缺乏適當的通譯；未能為身心障礙者提供可使用之文件和程序調整；審判或上訴過程中過度和不當拖延；刑事訴訟程序普遍缺乏公平性，或者審判或上訴法院缺乏獨立性或公正性。」

5. 第 42 段：「《公約》第十四條沒有明確涵蓋的其他嚴重程序缺陷仍可使判處死刑違反第六條。例如，未能根據《維也納領事關係公約》及時告知被拘禁的外國國民他們有權通知領事，結果導致判處死刑，以及未能向即將被驅逐到生命面臨真實危險的國家的個人提供利用現有上訴程序的機會，將會違反《公約》第六條第一項。」

6. 第 49 段：「締約國應避免對於面臨特殊障礙難以在與他人平等的基礎上進行自我辯護的個人，如存在嚴重社會心理和心智障礙而阻礙其進行有效辯護的個人，以及道德可非難性有限的個人判處死刑。締約國並應避免對於判決理由理解能力不足（diminished ability）的人執行死刑，以及對於受執行者其本人及其家屬為極度殘酷或會造成極其嚴厲後果的人，如老年人、子女年幼或仍受其撫養的父母，以及以往曾遭受過嚴重侵犯人權行為的人執行死刑。」

7. 第 50 段：「第六條第六項重申的立場是，尚未完全廢除死刑的締約國應朝上一條不可逆轉的道路，在可預見的將來在事實上和法律上完全廢除死刑。死刑與充分尊重生命權不可調和。廢除死刑不僅合乎需要，而且十分必要，可以強化人性尊嚴，促進人權逐步發展。……」

8. 第 51 段：「雖然第六條第二項提到適用死刑的條件表明在起草《公約》時，締約國並沒有普遍認為死刑本身是一種殘忍、不人道或侮辱的懲罰，但締約國締結的嗣後協定或確立此類協定的嗣後實踐可得的最終結論是，死刑在任何情況下都違反《公約》第七條。

旨在廢除死刑的《公約第二任擇議定書》的締約國越來越多，其他國際文書禁止判處或執行死刑，以及越來越多的未廢除死刑的國家事實上暫停執行死刑，都表明締約國在形成共識，將死刑視為一種殘忍、不人道或有辱人格的處罰形式方面，可能已經取得了相當大的進展。這種法律發展符合《公約》支持廢除死刑的精神，這種精神除其他外，展現在第六條第六項與《第二任擇議定書》的文本中。」

（四）《公民與政治權利國際公約第二任擇議定書》（Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty）前言：「本議定書締約國，認為廢除死刑有助於提高人的尊嚴和促使人權的持續發展，回顧1948年12月10日通過的《世界人權宣言》的第3條和1966年12月16日通過的《公民權利和政治權利國際公約》的第6條，注意到《公民權利和政治權利國際公約》第6條提到廢除死刑所用的措詞強烈暗示廢除死刑是可取的，深信廢除死刑的所有措施應被視為是在享受生命權方面的進步，切望在此對廢除死刑作出國際承諾……」

（五）聯合國身心障礙者權利委員會（Committee on the Rights of Persons with Disabilities）關於平等與不歧視之第6號一般性意見（2018年）

1. 第4段：「平等與不歧視是國際人權法中最基本的原則及權利之一，因其與人性尊嚴相互關聯，所以是所有人權的基石。……」
2. 第6段：「『尊嚴』一詞在公約中比在其他任何聯合國人權公約中更頻繁地出現。它被載入序言，其中締約國回顧聯合國憲章以及其中宣示的各項原則確認人類大家庭所有成員的固有尊嚴及價值以及平等及不可剝奪的權利，是世界自由、正義與和平的基礎。」

（六）依前述ICCPR第36號一般性意見第49段，論及應避免執行死刑造成極其嚴厲後果，如涉及面臨死刑之被告育有未成年子女時，相關規範應從《兒童權利公約》（Convention on the Rights of the Child，以下簡稱CRC）進行檢視，分述如下：

1. CRC 第 3 條第 1 項：「所有關係兒童之事務，無論是由公私社會福利機構、法院、行政機關或立法機關作為，均應以兒童最佳利益為優先考量。」

2. CRC 第 3 條第 2 項：「締約國承諾為確保兒童福祉所必要之保護與照顧，應考量其父母、法定監護人或其他對其負有法律責任者之權利及義務，並採取一切適當之立法及行政措施達成之。」

3. CRC 第 9 條第 1 項：「締約國應確保不違背兒童父母的意願而使兒童與父母分離。但主管機關依據所適用之法律及程序，經司法審查後，判定兒童與其父母分離係屬維護兒童最佳利益所必要者，不在此限。……」揭示任何涉及到兒童與其父母分離之情形，均應審酌其等於分離狀態時，對於兒童最佳利益之影響。

4. CRC 第 14 號一般性意見

(1) 第 28 段：「對於刑事案，對於與法律產生衝突（即：被告或被確認為違法）的兒童，或（作為受害者或證人）法律所觸及到的兒童，以及因家長觸犯法律而受影響的兒童，均必適用兒童最大利益的原則。……」

(2) 第 69 段：「對家長或其他首要照料者犯罪服刑的情況，應按逐一情況，提供並適用替代拘禁的做法，以充分考慮到不同的刑期可對受影響兒童，或若干兒童造成的影響。」

（七）歷次聯合國大會決議（Resolution adopted by the General Assembly）

1. 第 62/149 號決議（2007 年）：呼籲各國暫時停止執行死刑，並宣導全面廢除死刑。

2. 第 63/168 號決議（2008 年）：呼籲各國暫時停止使用死刑。

3. 第 65/206 號決議（2010 年）：重申對全面廢除死刑的承諾，並強調死刑不符合人權的基本原則。

4. 第 67/176 號決議（2012 年）：再次呼籲各國暫時停止執行死刑，並敦促那些仍然執行死刑的國家確保公正審判和尊重法律程式。

5. 第 69/186 號決議（2014 年）：再次重申對全面廢除死刑的承諾，

並敦促各國採取措施確保執行死刑的透明度和公正性。

6. 第 71/187 號決議（2016 年）：再次呼籲各國暫時停止執行死刑。

7. 第 73/175 號決議（2018 年）：再次籲請仍保留死刑的國家暫停執行死刑，目標是廢除死刑。

8. 第 75/183 號決議（2020 年）：再次呼籲各國暫時停止執行死刑。

（八）《歐洲保護人權與基本自由公約》關於任何情況下廢除死刑的《第 13 號議定書》於 2002 年經歐洲理事會通過。該議定書明定，締約國在任何情況下，包括戰時或面臨戰爭威脅時期，均須廢除死刑。

（九）《美洲人權公約關於廢除死刑的議定書》（Protocol to the American Convention on Human Rights to Abolish the Death Penalty），該議定書於 1990 年 1 月 1 日由美洲國家組織發布。該議定書明確表示，締約國在其管轄區內不得對任何人實施死刑。

二、 死刑與憲法保障權利之扞格

本會主張生命權乃係超越憲法而存在，是一切人民基本權利之源，屬固有最高自然權[2]。縱我國憲法並無生命權或人性尊嚴之明文規定，亦無如《德國基本法》等國家憲法之規範禁止死刑，但「生命權絕對保障原則」應無待憲法明文，自當屬憲法保障之核心權利及法治國家存立之目的。另依前揭相關國際人權公約規範，生命權尚有與「人性尊嚴」彼此相嵌之本質，死刑制度剝奪生命權、背離人性尊嚴，且構成違反禁止酷刑。析述如下：

（一）生命權

1. ICCPR 第 6 條中所謂的「天賦之生存權（inherent right to life）」具有多種可能的含義，但其中最核心的解釋應係指「生命」與「死亡」之間的對比。按此解釋，天賦之生存權的核心目的應係防止國家對人民的生命進行剝奪。為確保落實這一目的，ICCPR《第二任擇議定書》以 ICCPR 第 6 條為基礎制定，其主要意旨乃

[2] 生命權非僅係個體獲得基本生活條件之權利，而是人類基本權利之母體，故不應附屬於任何其他基本權（如我國憲法第 15 條所保障之生存權）之下。

聚焦於防止國家剝奪生命，並要求各國實行不可抗辯之義務－在其管轄範圍內不執行任何人的死刑。[3]

2. 聯合國人權事務委員會在第 36 號一般性意見第 12、41、42 段均指出，對於「違法」的解釋不僅限於直接的法律違反，還可能涉及更廣泛的範疇，例如不當、不公、缺乏可預見和正當程序等要素，以及缺乏合理、必要和比例的限制等。因此，在實踐中，必須意識到「違法」的含義可能會因情況而異，並且需要將這些因素納入考慮，以確保對所謂「天賦生存的固有權利」之有效保護。

（二）人性尊嚴

1. 依 ICCPR 前言：「……依據聯合國憲章揭示之原則，人類一家，對於人人天賦尊嚴及其平等而且不可割讓權利之確認，實係世界自由、正義與和平之基礎，確認此種權利源於天賦人格尊嚴……」前言第一段確認「尊嚴」及「權利」兩者不盡相同；第二段進一步解釋，兩者雖有差異，卻息息相關，因為「尊嚴」乃是「權利」之根源。

2. 承上，聯合國身心障礙者權利委員會關於平等與不歧視之第 6 號一般性意見（2018 年）第 4 段：「平等與不歧視是國際人權法中最基本的原則及權利之一，因其與人性尊嚴相互關聯，所以是所有人權的基石。……」、第 6 段：「『尊嚴』一詞在公約中比在其他任何聯合國人權公約中更頻繁地出現。它被載入序言，其中締約國回顧聯合國憲章以及其中宣示的各項原則確認人類大家庭所有成員的固有尊嚴及價值以及平等及不可剝奪的權利，是世界自由、正義與和平的基礎。」參照前揭 ICCPR 第 6 條第 1 項規定，可知源自天賦人格尊嚴之生命權乃所有權利之最基本，亦為首要且不可割讓之權利（inalienable rights），既確認為不可割讓權利，即不

[3] David H. Moore, "Treaty Interpretation at the Human Rights Committee: Reconciling International Law and Normativity," *University of California Davis Law Review* 1311 (2023), BYU Law Research Paper No. 23-01, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4357359>.

應受國家法律所限制[4]，反之即違反人性尊嚴且侵害生命權。

3. 死刑制度除侵害受執行者之人性尊嚴，亦罔顧相關執法者所具之人類良心（conscience）[5]自由，以「公務」為由令渠等參與計劃性剝奪他人生命之過程，尤其倘有涉及精神鑑定之個案，可能導致醫師背離其維護生命尊嚴之核心使命，更難謂未侵犯其等應受憲法保障之人性尊嚴。

（三）平等權

1. 按我國憲法第 7 條規定，所有人民在法律上一律平等，不分性別、宗教、種族、階級或黨派。然死刑制度，作為一種國家以公權力將有人性尊嚴的個體轉化為物體（即屍體）之手段，實際上讓「人」的最高權利－生命，面臨被他「人」否定之不平等狀態，對於本質上相同的事物並非以相同的方式處理，難謂與平等原則相符。

2. 此外，死刑的恣意性（arbitrariness）有極高機率導致相似案件間的判決出現顯著差異，同樣的罪行在不同情境或由不同法官審理時可能得到截然不同的結果。且觀我國民眾對於支持死刑立場之態度，當死刑的判斷係受到公眾輿論、政治壓力等外部因素影響時，則無法保證所有人在法律上一律平等，死刑的恣意性於焉創造一種具偏見的階級制度，如此不一致性削弱法律的預見性和公平性，與平等權的基本要求背道而馳[6]。

（四）自由民主憲政秩序

1. 自由民主憲政國家之存立正當性，源於對人民憲法基本權利的保障。法治國原則包括權力分立、依法行政、司法獨立、依法審判

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[4] 生命權及人性尊嚴之不可剝讓性，實質設定出國家權力之邊界（boundaries of state authority），即不論係於維持社會秩序抑或國家安全，國家有責任保護公民生命權，而非剝奪，更無權使用死刑作為刑事懲罰或政治工具。

[5] 「人類良心」載於《世界人權宣言》前言，象徵著道德與倫理的普遍原則，凸顯尊重與保護人權的重要性，不僅是法律要求，更體現人類共同的價值與道德。這一概念成為國際人權法發展的道德支柱，彰顯全人類對維護人權的共同承諾。

[6] 參見本鑑定意見書第 12 頁暨附件 2，英國牛津大學法學院教授 Carolyn Hoyle 撰寫相關報告略以，無論國家刑事司法系統如何改善設計、均難以保證死刑絕無恣意性。該報告透過全球的證據及案例研究，揭示判決中之主觀性及隨機性，導致死刑制度無可避免地存在顯著的不一致性及歧視。

及法律的穩定性，其核心目的在於確保人民基本權利得以實現。

2. 臺灣經歷了近半世紀的威權統治，法律服膺於黨國主導之意識形態，死刑為合法的政治工具。白色恐怖時期，動輒以叛亂及匪諜之名，鑄成無數侵犯人權的冤偽錯案，直至 1992 年民主化後，方漸次奠定現行的自由民主憲政秩序。

3. 國家人權委員會於 2023 年公布的威權時期「國家不法」專案報告中，即係以「違反自由民主憲政秩序」為判斷，使未能符合過去補償（賠償）法制的監察院相關調查案，亦得平復歷史傷痕。故若此刻我們能夠認知，現存的死刑制度其實亦是「國家不法」行為，並與「自由民主憲政秩序」相違，則藉此揭櫫「國家不得殺人」[7]之重大意義，也絕非為時已晚。

4. 觀諸其他國家之歷史經驗，從葡萄牙於 1974 年的康乃馨革命（Carnation Revolution）終結數十年的獨裁統治，並於 1976 年正式廢除死刑；西班牙在佛朗哥（Francisco Franco）獨裁統治後，於 1978 年憲法確立後進行民主化，逐步限制並於 1995 年全面廢除死刑；南非種族隔離時期，利用死刑壓制異議，但轉型民主後，1995 年憲法法院判決死刑違憲，廢除死刑；波蘭於 1989 年終結共產黨統治，1997 年改革憲法，鞏固民主與法治，廢除死刑，到阿根廷經歷了 1976 至 1983 年的軍事獨裁統治，民主政府於 1984 年廢除了針對一般犯罪的死刑，並在 2008 年完全廢除死刑。廢除死刑不僅標誌著一個國家向過往的獨裁威權告別、對「國家不法」行為深刻反省，更彰顯國家到民主轉型及對人權保障的承諾。

（五）禁止酷刑

1. 依《禁止酷刑及其他殘忍不人道或有辱人格之待遇或處罰公約》第 1 條第 1 項：「為本公約目的，『酷刑』指為自特定人或第三人

[7] 參見本鑑定意見書第 12 頁暨附件 1，本會邀請英國非營利組織「死刑專案（The Death Penalty Project）」撰寫專案報告略以，中華民國憲法第 23 條雖有規範限制公民權利之條件，惟具「恣意性」且未有嚇阻作用證明之死刑制度，洵然踰越憲法第 23 條所要求之目的正當性、手段必要性、限制妥當性，從而顯現所謂國家維持社會秩序、增進公共利益之責，絕非係以犧牲人民最高之絕對權利 -生命權為代價。

取得情資或供詞，為處罰特定人或第三人所作之行為或涉嫌之行為，或為恐嚇、威脅特定人或第三人，或基於任何方式為歧視之任何理由，故意對其肉體或精神施以劇烈疼痛或痛苦之任何行為。此種疼痛或痛苦是由公職人員或其他行使公權力人所施予，或基於其教唆，或取得其同意或默許。但純粹因法律制裁而引起或法律制裁所固有或附帶之疼痛或痛苦，不在此限。」次依 ICCPR 第 36 號一般性意見第 51 段：「……締約國締結的嗣後協定或確立此類協定的嗣後實踐可得的最終結論是，死刑在任何情況下都違反《公約》第七條[8]。旨在廢除死刑的《公約第二任擇議定書》的締約國越來越多，其他國際文書禁止判處或執行死刑，以及越來越多的未廢除死刑的國家事實上暫停執行死刑，都表明締約國在形成共識，將死刑視為一種殘忍、不人道或有辱人格的處罰形式方面，可能已經取得了相當大的進展。……」顯見 2018 年聯合國人權事務委員會重新審視 ICCPR 之解釋，復以與日俱增的國家（政治實體）無論在法律抑或實踐中廢除死刑，已然否決死刑得以「合法制裁」之名而豁免於「酷刑」定義，從而違反禁止酷刑。

2. 復據 2022 年 11 月在德國柏林舉行的第 8 屆世界反死刑大會（World Congress against the Death Penalty），由主導廢除法國死刑的關鍵人物－法國前司法部長 Robert Badinter、西班牙前首相 José Luis Rodríguez Zapatero、聯合國前反酷刑特別報告員 Juan E. Méndez 等各國專家簽署有關全球死刑廢除進程中的法律標準之宣言（又稱柏林宣言）揭櫫[9]，在國際層面上對「酷刑」的定義已具相當充分證據表明「死刑」應排除於「合法制裁」（lawful sanctions）之外；主要理由除前揭國際思潮之流變外，政府所進行的制度化殺戮－「死刑」，自宣判至執行之過程，均可能產生刑求、

[8] ICCPR 第 7 條規定：「任何人不得施以酷刑，或予以殘忍、不人道或侮辱之處遇或懲罰。……」

[9] Declaration on the abolition of the death penalty as a peremptory norm of international law （jus cogens） on the occasion of the 8th World Congress Against the Death Penalty. （2022, November）.
< https://blog.uclm.es/luisarroyozapatero/wp-content/uploads/sites/188/2022/11/Manifiesto_EN.pdf>

單獨監禁及待死現象（death row phenomenon）所致之身心影響，於絕大多數的情況下已經構成酷刑，且侵害層面不僅止於受刑人本身，亦包括其家屬、執法人員及所有受死刑判決影響的人。

3. 承上，上述大會會議紀錄同時載明：死刑非合法政府之正當職能；它侵犯人權；並違反普遍國際法的強制規範（jus cogens）[10]。從刑罰體系中禁止死刑，係根基於對「生命權」及「不對人類進行酷刑或不人道待遇」的權利保障，這些權利乃「強制規範」中不可分割的基本權利。

三、 死刑制度所欲追求之目的及意義何在？

（一）自 1985 年始，我國相繼有司法院釋字第 194 號（1985 年）、釋字第 263 號（1990 年）、釋字第 476 號（1999 年）等解釋，認為處死刑，立法固嚴，但為國家安全及社會秩序之必要，而認定死刑制度之合憲性；惟上揭解釋均缺乏論證死刑制度具「維持社會秩序、增進公共利益」等實際作用之證據。反思此刻，基於對人權價值之堅持，臺灣已將聯合國 9 大人權公約陸續國內法化，各級法院的判決也多有引用及參採相關國際人權規範[11]。時至今日，對於死刑的意義理當有重新思考之必要。

（二）我國目前對於死刑的民意研究大多強調支持度的數據統計，如八成民眾不贊成廢除死刑等；惟在未能充分理解臺灣社會的真實面貌下，如何得證國家發動死刑作為刑罰之目的與正當性？本會認為影響民眾對死刑存廢的因素辨識應更值探討。綜觀當前社會各種論述，大抵分為死刑具應報抑或嚇阻之立論，其中死刑不能有效達成嚇阻作用

[10] Jus cogens 原則代表了國際社會的共同價值和公認的基本法律原則，是不容違反的最高法律效力的基本原則。如果任何條約或協議的內容與 Jus cogens 原則相違背，則該條約或協議被視為無效。

[11] 依司法院委託國立臺灣大學之委外專題研究《初探兩公約之司法實踐--以我國法院判決為核心》期末報告指出，以 LAWSNOTE 裁判資料檢索系統，輸入「公民與政治權利國際公約」及「經濟社會文化權利國際公約」，期間自 2009 年 12 月 10 日至 2019 年 1 月 10 日，並排除僅有當事人主張而法官未引為裁判基礎者，依其所得資料共 2,195 筆。刑事裁判中關於兩公約之引用為最多，共 1673 件；而行政裁判次之，共 314 件；民事裁判則居於最末，共 204 件。此依裁判類型之分布，亦反映出兩公約保障人權之規定多係為拘束國家公權力之行使，其中又以刑罰權之實施最為直接且干預強度最高，是以刑事裁判引用之情形最為普遍。

已有可信的支持實證，如 1990 至 2020 年的美國，廢除死刑的各州的平均遭殺害人數比率反呈現下降趨勢[12]，又 1995 年南非、1997 年波蘭、1998 年愛沙尼亞及 2012 年拉脫維亞等國，在廢除死刑後的 10 年內的謀殺率也皆為下降走勢[13]，顯見死刑對嚴重罪行並無嚇阻作用。

（三）關於更多死刑制度未能實現任何合法的刑事目標的證明，本會成立「推動逐步廢除死刑」工作小組後，長期與國際各相關組織及專家交流對話，為本案憲法法庭言詞辯論，本會特邀請英國非營利組織「死刑專案（The Death Penalty Project）」撰寫意見（附件 1）。該組織為此，特借重英國牛津大學法學院教授 Carolyn Hoyle 及美國哥倫比亞大學法學院教授 Jeffrey Fagan 具公信力的實證研究報告，以供憲法法庭參酌。Carolyn Hoyle 從臺灣司法判決得證死刑具恣意性、1997 年錯誤定罪的江國慶冤案、刑事司法系統缺陷（附件 2）；Jeffrey Fagan 從各國相關數據分析證明，死刑判決或執行與臺灣或其他地區的謀殺、故意殺人或搶劫率的增加無關。暴力犯罪的趨勢不受死刑判決或執行下降的影響，從而表明死刑制裁的嚇阻效果缺乏實證支持等（附件 3），相關論述均與本會立場相符，錄作本文附件，以資佐證。

（四）進而言之，司法制度亦無可能完全排除誤判的風險，即使科學已經高度發展，司法偵查與審判的知識、技術與工具有時難以全面釐清案件現場的真相，從而造成冤案；衡諸判決死刑後，改判無罪的江國慶、蘇建和、徐自強、鄭性澤、謝志宏等案可證。監察院業有公布多篇調查報告[14]指出，死刑案件自司法偵查、審判、羈押至執行等各階段，皆有違反人權的事實，如採用刑求、非法取供、法官重複參與審判有

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[12] Death Penalty Information Center. （2021）. *Murder rate of death penalty states compared to non-death penalty states.* <https://deathpenaltyinfo.org/facts-and-research/murder-rates/murder-rate-of-death-penalty-states-compared-to-non-death-penalty-states>

[13] Abdorrahman Boroumand Center. （2018, December 13）. *What happens to murder rates when the death penalty is scrapped? A look at eleven countries might surprise you.* < https://www.iranrights.org/library/document/3501>

[14] 調查案號：107 司調 0048、108 司調 0074、109 司調 0052、109 司調 0044、109 司調 0027、112 司調 0004、113 司調 0010 等調查報告。

違公平審判原則、羈押期間受酷刑及不正對待及受刑人過晚知悉不及尋求救濟等，而死刑的執行將對生命權造成不可逆之侵害，如 1997 年江國慶被逮判死刑並於同年遭處決，即便嗣後再審宣判無罪，但已無法挽回其無辜生命，並侵蝕民主社會人人平等之真諦。只要存在無法挽回的冤案風險，死刑真的能夠達到應報理論所欲追求的正義理想嗎？

（五）被害人的正義與人權？

1. 基於生命權與人性尊嚴是一切基本權利的根本，國家對於生命自應負有保護義務，落實此一保護義務，不僅是防止國家剝奪人民生命，亦應於人民生命受剝奪或侵害的犯罪發生後，保護犯罪受害人。究竟被害人家屬在司法審判及國家補償制度中，真正的需要為何？社會乃至個人如何面對傷痛，進而讓未來得以正常進行？應為國家對於被害人正義與人權，所應投注心力與保護之重點。

2. 所謂正義體現於被告「伏法」之時，若僅係由國家在刑事政策上，選擇便捷、極端的「永久隔離」手段，表面上似乎為被害人家屬及社會營造出猶如「替天行道」般的司法正義，實際上卻無助於犯罪過程的真相瞭解，也無法帶來更深層次的正義與補償需求，更無法有效預防類似悲劇的再次發生，反而暴露出國家支持以暴制暴的「惡之循環」。國家應是在充分尊重生命權及人性尊嚴的前提下，修復因犯罪造成的創傷，以守護在黑暗中期盼正義的被害人家屬。

（六）總括而言，死刑既無嚇阻作用，亦無法彌補因犯罪而生之裂痕，其對於被害人正義的實現、心靈的治癒，究竟有何正面意義？應為此次憲法法庭須深刻思考之要點，且觀我國憲法審查制度，係為實現憲法保障人權之意旨，生命權既為基本的最高權利，國家公權力當不得對個人「生存」抑或「死亡」作出評斷。死刑以奪取生命的方式懲罰犯罪行為，除違反法治國家存在之目的、被執行者與執法者之人性尊嚴，

更嚴重侵犯生命權的絕對價值。

四、 廢除死刑為國際趨勢－他國（政治實體）憲法及相關司法判決

（一）各國憲法法庭（院）宣判死刑違反生命權與人性尊嚴，例如 1990 年匈牙利、1995 年南非、1998 年立陶宛、1999 年阿爾巴尼亞及烏克蘭、2019 年波士尼亞與赫塞哥維納等國家之憲法法庭（院），均明確承認生命權是其他權利的必要先決條件，包括「實現所有其他人類和公民權利和自由的條件」，個人透過享有生命權方可滿足其人性尊嚴，益證生命權與人性尊嚴之間存在不可分割之關係，死刑剝奪個人生命權相當於侵害基本權的核心本質。要言之，上揭案例可證司法權針對死刑制度進行實質審查，除可補強代議民主系統無法有效保護與多數人利益不一致的少數弱勢之外，並真實體現「司法獨立的存在價值正在於反抗多數」之精神。為此，本會亦邀立陶宛前憲法法院院長 Dainius Žalimas 博士撰文，分享該國憲法法院解釋死刑違憲之方法，以及如何確保法律系統尊重人權及人性尊嚴等，以供本案憲法法庭參酌（詳如附件 4）。

（二）眾多國家之憲法明文禁止死刑，如 1949 年 5 月 23 日公布的《德意志聯邦共和國基本法》第 102 條規定：「死刑應予廢止。」、1999 年《瑞士聯邦憲法》第 10 條第 1 項規定：「每個人皆有生命的權利，死刑為絕對禁止。」、2014 年《挪威憲法》第 93 條規定：「人人有權享有生命，任何人不得被判處死刑。」等廢除死刑的國家之憲法。可知「禁止死刑」係屬基本權利保障核心，應為憲法明文所保障。

（三）近年美國各州陸續廢除死刑制度，審視其違憲及人權問題：2018 至 2021 年美國華盛頓州（Washington）、新罕布夏州（New Hampshire）、科羅拉多州（Colorado）、維吉尼亞州（Virginia）等相繼透過州最高法院或州議會廢除死刑。依 2018 年 10 月 11 日華盛頓州最高法院於 State v. Gregory 案（案號 88086-7）判決：「死刑無效，因為其實施方式是隨意的且存在種族偏見。死刑的使用並不平等，有時取決於犯罪地點、居住縣、某一特定時點的預算資源，或被告的種族。在我們的

州，死刑的執行未能實現任何合法的刑事目標；因此，它違反了州憲法第 I 條第 14 款[15]。」為司法體系表明死刑具「恣意性」的例證之一。

五、 落實生命權之保障－國際審查委員會相關結論性意見與建議

我國於 2009 年將兩公約國內法化後，由政府就兩公約涉及權利提出國家報告，邀請國際獨立專家進行審查，國際審查委員會分別於 2013 年、2017 年、2022 年通過結論性意見與建議，其中關於死刑制度之部分，審查委員每年均指明我國應予以廢除，其中 2022 年更以 7 點意見疾呼，摘述其中 5 點意見如下：

（一）第 68 點：「……中華民國（臺灣）有可能成為認可及執行國際人權的亞洲標竿者，但只要死刑仍是其刑事司法系統的一個要素，它就永遠無法實現此一目標。」

（二）第 69 點：「2020 年 12 月，聯合國大會重申其 10 多年來的聲明，呼籲所有國家暫停執行死刑，以期廢除死刑。……」

（三）第 70 點：「……2018 年通過的第 36 號一般性意見，該意見指出，人們越來越認識到，死刑構成了一種殘忍、不人道或有辱人格的處罰形式。」

（四）第 72 點：「委員會強烈建議行政院立即宣布暫停執行死刑。法務部部長不應再簽署執行令。所有死刑應立即減刑。檢察官不應再於正在進行及未來起訴的案件求處死刑。總統應拒絕授權執行死刑，並在死刑案件的定罪證據不明確的情況下，例如，有證據表明供詞及其他證據是透過酷刑獲得的，酌情行使赦免特權。特別是，應赦免已在死囚牢房服刑 33 年的邱和順。」

（五）第 73 點：「委員會還呼籲中華民國（臺灣）完成對國際人權憲章的

[15] 判決原文：the death penalty is invalid because it is imposed in an arbitrary and racially biased manner. The use of the death penalty is unequally applied – sometimes by where the crime took place, or the county of residence, or the available budgetary resources at any given point in time, or the race of the defendant. The death penalty, as administered in our state, fails to serve any legitimate penological goal; thus, it violates article I, section 14 of the state constitution.

承諾，將公政公約第二任擇議定書國內法化，旨在以與兩公約相同的方式於其國家法律秩序中廢除死刑。」

綜上以觀，回顧自首次國際審查迄今已逾十載，生命的歲月不斷流逝，國際社會在保障人權的道路上持續進展，然而，我國在死刑議題上卻仍舊原地踏步，政府囿於各界對死刑存廢仍有相當疑慮，而停滯不前，凸顯我國與國際人權保障進程之間的落差，亦呈現政府歷年來均無法與國際社會有效對話或回應上揭呼籲。

六、 結語－廢除死刑是促進人類尊嚴及人權進步發展的必要手段

「生」與「死」之間並不存有灰色地帶，生命既已消逝，人性尊嚴及生命權也即無從附麗與保障，空言自由權利僅得於必要時以法律加以限制之強調與要求，為時已晚，也再無意義了。

死刑制度作為國家刑罰，實為政府對人民生命之剝奪，有違法治國家保障人權之核心目的，目前國家懲罰殺人的法律，本身卻也以刑戮殺人，以殺止殺，實難以止殺。廢除死刑已為人權保障的主流趨勢，並屬於國際法之強制規範，全球已有四分之三的國家廢除死刑，臺灣從威權體制邁向自由民主的艱辛進程中，透過法律制度的改革、社會運動的浪潮，及對國際人權規範的致力實踐，已逐漸展現出對人權保障意識的深化與成熟。此刻，正是臺灣向國際社會承諾遵循國際人權公約之際，亦是得以賡續在人權價值道路上堅持守護的歷史新頁。

國家人權委員會衷心希望，國家應是在充分尊重生命權及人性尊嚴的前提下，修復因犯罪造成的創傷，以守護在黑暗中期盼正義的被害人家屬。每個人的權利及尊嚴都能獲得保障，臺灣可以成為亞洲的人權標竿，並為人類的共同進步作出貢獻之關鍵里程碑。

此　致

憲法法庭　公鑑

中　華　民　國　113　年　4　月　9　日

具狀人　國家人權委員會

附件1至4，詳後目錄。

國家人權委員會鑑定意見書附件目錄

以上附件之參考譯文，如有疑義，請以原文為準。

附件1

In the Constitutional Court of Taiwan

SUBMISSIONS OF THE DEATH PENALTY PROJECT IN SUPPORT OF THE NATIONAL HUMAN RIGHTS COMMISSIONS *BRIEF*.

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SUBMISSIONS OF THE DEATH PENALTY PROJECT

Introduction

1. These submissions address the first three questions which this Court is tasked with answering when considering the overarching question of whether the death penalty is unconstitutional, namely:

   Is the death penalty, as one of the penalties prescribed by law, unconstitutional?

   i. *In addition to depriving an individual of the right to life, does the death penalty also interfere with other constitutional rights, such as the right to freedom from torture, human dignity, etc.?*
   ii. *What are the goals pursued by the death penalty system? Are they all constitutional?*
   iii. *Is using the death penalty as a means to achieve the above-mentioned goals, resulting in the deprivation of people's constitutional rights, allowed by the Constitution of our country? If the death penalty is considered unconstitutional, what other criminal sanctions are sufficient to replace the death penalty? Alternatively, what supporting measures should be taken?*

2. These submissions seek to show that the principal question to be addressed by this Court, 'Is the death penalty constitutional,' can only be answered in the negative. It is our broad submission that the death penalty is unlawful on a proper reading of the Constitution of the Republic of China (Taiwan) (hereinafter "the Constitution").

3. These submissions are filed on behalf of The Death Penalty Project (the DPP), alongside the National Human Rights Commission's *Amicus Curiae* brief. The DPP is a UK based nonprofit legal organization with expertise in criminal law, constitutional law and international human rights law, particularly in relation to the death penalty. The DPP provides free legal representation to people facing the death penalty worldwide, with a focus on the Commonwealth, using the law to protect prisoners facing execution and to promote fair criminal justice systems, where the rights of all people are respected. The DPP's work is primarily focused on strengthening and enforcing human rights standards in criminal justice systems. Over the last three decades, the DPP has worked in more than 30 countries.

4. In 2016, the DPP was granted special consultative status before the United Nations Economic and Social Council.

5. The objectives of the DPP are to abolish the death penalty and other cruel and unusual punishments. To achieve this goal, the DPP provides access to justice for individuals, safeguarding the human rights of those accused of crimes that are punishable by death. The DPP uncovers miscarriages of justice, develops and promotes human rights standards in criminal justice systems, encourages and facilitates evidence-based discussions on capital punishment and engages with policymakers around the world to advocate for penal reform.

6. The DPP has significant experience in representing individuals in challenges to the imposition and operation of the death penalty, both in constitutional challenges in domestic courts and efforts to uphold international standards before regional and international tribunals. For example, the DPP has litigated constitutional challenges to the imposition and application of the death penalty in the Constitutional Courts of Guyana; St. Vincent and the Grenadines, St. Lucia; Belize; St. Kitts and Nevis; Jamaica; Trinidad & Tobago; the Bahamas; Barbados; Malawi; Uganda; Bangladesh; Kenya; and Tanzania.[1] These cases involved violations, *inter alia*, of the right to life, the prohibition on cruel, inhuman and degrading treatment and punishment, the right to a fair trial and equality before the law concerning the death penalty *per se*, the mandatory death penalty, extended delay on death row, mental disorder on death row, clemency procedures, and sentencing in capital cases.[2]

7. The DPP has also litigated numerous cases raising these issues before regional and international tribunals including the Inter-American Commission on Human Rights (IACHR), the Inter-American Court of Human Rights (IACtHR), the African Court on Human and Peoples' Rights (ACHR) and the United Nations Human Rights Committee (HRC), under the First Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR).[3]

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[1] *See, e.g.,* Harte & Greenidge v The State (Guyana) [2023] CCJ 9 (AJ) GY; Spence and Hughes v The Queen [2001] Criminal Appeals 20/1998 and 14/1997 (St Vincent and the Grenadines and St Lucia); White v The Queen (Belize) [2010] UKPC 22; Fox v The Queen (St Kitts and Nevis) [2002] 2 AC 284; Lendore v Attorney General of Trinidad and Tobago [2017] 1 W.L.R. 3369; Pitman v The State and Hernandez v The State [2017] UKPC (Trinidad and Tobago; [2017] 3 LRC 407; Lewis v Attorney General of Jamaica [2001] 2 AC 50; Boyce v The Queen (Barbados) [2005] 1 A.C. 400; Bowe v The Queen (Bahamas) [2006] 1 WLR 1623; Kafantayeni & Ors v The Attorney General (Malawi) Case No. 12 of 2005, 46 ILM 566; Attorney General v Kigula & Ors (Uganda) [2008] UGSC 15; Bangladesh Legal Aid and Services Trust v The State [2015] AD 1; Muruatetu & Anor v Republic of Kenya Number 15 and 16 of 2015; Jebra Kambole v The Attorney General (Tanzania) CivApp No. 236 of 2019.

[2] *Id.*

[3] *See, e.g.,* Kennedy v Trinidad and Tobago UN Doc CCPR/C/74/D/845/1998; Johnson v Ghana, UN Doc CCPR/C/110/D/2177/2012; Baptiste v Grenada, I/A Comm HR, Case 11.473, Report no 38/00 (1999); Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago, I/A Court HR, Series C no 94 (2002); Errol Johnson v Jamaica ICCPR no 588/1994; RS v Trinidad and Tobago ICCPR no 684/1996; Mackenzie v Jamaica I/A Comm HR. Case no 12.023, Report no 41/00 (2000).

8. The DPP also commissions academic research to provide comprehensive and reliable data, supporting informed and constructive debate that challenges misconceptions and deepens understanding around the death penalty. The DPP has commissioned several academic studies analysing the administration of the death penalty in Taiwan.

A. Executive Summary

9. We submit that when the Constitution is read in accordance with Taiwan's international legal obligations, the death penalty is not a lawful punishment which the State can impose. The death penalty violates Articles 7 and 15 of the Constitution as well as the right to the protection of the law. The death penalty cannot be rendered lawful by Article 23 of the Constitution, as there is no credible evidence establishing that the death penalty has a greater deterrent effect over and above other serious punishments, and the State cannot therefore demonstrate that any social good or benefit is rendered by the imposition of death sentences.

10. In answering the questions above, we invite the Court to interpret the Constitution in a way which maximises the rights to life, the protection of the law, and equal treatment under the law. We submit that it is appropriate to interpret these rights in accordance with international law and jurisprudence in a manner which is expansive of these rights. We will also seek to demonstrate that, when read in compliance with international law, the death penalty requires evidence-based justification to be lawful under the Constitution. We submit that no such evidence has been provided and we demonstrate through expert academic evidence that no such evidence is capable of being provided.

11. These submissions are structured in the following way:

(i) **Section B** provides a comparative review of other jurisdictions where constitutional courts have determined that capital punishment violates constitutional protections. We review the constitutional court decisions in South Africa, Albania, Hungary, Lithuania, and Ukraine to abolish the death penalty. We describe the basis for each decision and highlight the courts' findings that (a) the death penalty violated the foundational nature of the right to life, (b) no evidence supported the contention that the death penalty has a special deterrent effect, and (c) the death penalty was inconsistent with the rehabilitative aims of punishment.

(ii) **Section C** examines the rights enshrined in the International Covenant on Civil and Political Rights (ICCPR). As Taiwan has incorporated the ICCPR into its domestic legal order, we examine the following rights: the right to life under Article 6 of the ICCPR, the prohibition on cruel, inhuman, and degrading treatment or punishment under Article 7 of the ICCPR, and the obligation to ensure a fair trial and equal rights under Article 14 of the ICCPR. We review the jurisprudence of the United Nations Human Rights Committee (HRC) which suggests that the signatories to the ICCPR

are required to demonstrate that they are on "*an irrevocable path towards complete eradication of the death penalty*".[4]

(iii) **Section D** provides empirical evidence offered through academic research and expert reports. The evidence considers whether the death penalty can operate in a manner which is not arbitrary and whether it can be said to have a deterrent effect. This evidence is in the form of expert reports authored by Professor Carolyn Hoyle and Professor Jeffrey Fagan.

(iv) **Section E** provides a contemporary interpretation of relevant rights enshrined in the Constitution[5] that incorporates consideration of (1) the conclusions of experts Professors Hoyle and Fagan, (2) Taiwan's legal obligations under the ICCPR, and (3) previous judgments of constitutional courts abolishing the death penalty. This section also considers the effect of Article 23 of the Constitution and explains why Article 23 cannot protect the death penalty from judicial attack based on its requirements.

B. Comparative Review of International Constitutional Courts

12. The route to abolition is a multi-faceted process. In some manner all states abolishing the death penalty have only been able to do so with the assistance of an independent judiciary upholding fundamental rights. It is rare for the death penalty to be abolished through a single constitutional case. However, this has happened in some European countries, in South Africa, and, to a certain degree, in the United States.

13. In Europe, the constitutional courts of Albania, Hungary, Lithuania, and Ukraine all abolished the death penalty, each decision against the backdrop of the European Convention on Human Rights and justified by reference to the foundational nature of the right to life, the lack of any evidence that the death penalty has a specific deterrent effect, the inconsistency of the death penalty with rehabilitative aims of punishment, and its incompatibility with values of modern democratic civilisation.[6]

14. South Africa abolished the death penalty in 1995 in the Constitutional Court decision *The State v Makwanyane* [1995] ZACC 3 [163] (hereinafter "*Makwanyane*"). In circumstances where there was no evidence that death sentences would have more than a negligible effect on crime rates, the court reasoned that it could not be proportionate to extinguish the right to life. The decision in *Makwanyane* to abolish the death penalty was predicated on the punishment being incompatible

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[4] *General Comment No. 36*, UN Human Rights Committee (HRC). 3 September 2019. §50

[5] Article 7, providing the principle of equality; Article 8, which provides due process protections; Article 15, which guarantees the "right to existence"—or, in other words, the right to life; and the rule of law, a foundational concept protected by the Constitution, including under Articles 1 and 16.

[6] ALB-1999-3-008 (1999), Dec. No. 65.; Dec. No. 23/1990 (X.31) (Hungary 1990); Case No. 1-33/99 (Ukraine 1999), par. 3; Case No. 2/98 (Lithuania 1998).

with the new culture of human rights, which had been enshrined by South Africa's new constitution. Having committed to a legal structure premised on the primacy of human rights, the court determined that the state was required to value such rights. *Makwanyane* established that proportionality was an important lens through which to consider the constitutionality of punishments—and, in particular, to consider whether a punishment is cruel, inhuman or degrading. The court determined that, whilst imprisonment still interfered with human dignity, it could be a proportionate response to crime. In contrast, the court held that capital punishment lacked all such proportionality by destroying rights altogether, and therefore could not be a lawful punishment.

15. A similar framing of the right to life was important in the constitutional court decisions of Ukraine, Lithuania, Albania, and Hungary, abolishing the death penalty in each jurisdiction. These decisions interpreted the right to life, enshrined in their constitutions, in a broad and purposive manner.

16. *Ukraine.* In 1999, the Constitutional Court of Ukraine held that the right to life enshrined within its constitution is "*guaranteed and may not be abolished*," and that application of the death penalty violated that constitutional protection.[7] It considered "*each person's inseparable right to life . . . integrally related with his right to human dignity*."[8] Respecting such fundamental human rights and acknowledging that they may not be restricted or abolished, the court held that the death penalty "*cannot be justified as an effective way of fighting against crime*," as further confirmed by criminological studies which indicated no decline in the number of crimes against human life resulting from an increased application of capital punishment.[9] The court recognized the possibility of judicial error and that the death penalty disturbed Ukraine's obligation to uphold the rule of law and recognition of "*human life and health, honour and dignity, inviolability and security . . . as the highest social value*."[10]

17. *Lithuania*. In 1998, the Lithuanian Constitutional Court decided that capital punishment was inconsistent with two constitutional provisions: the protection of the right to life (Art. 19) and the prohibition of torture and inhuman punishment (Art. 20).[11] In the court's view, the death penalty was an outlier to a criminal justice system, which should both protect the public and re-educate or rehabilitate wrongdoers. It also found that the exceptional regard for human life and dignity under the ICCPR and ECHR was at odds with the necessary extinction of life caused by the death penalty.

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[7] Case No. 1-33/99 (Ukraine 1999), par. 3.

[8] *Id.* at par. 6. Articles 27 and 28 are respectively (a) "the inalienable right to life" and (b) the right to respect for dignity and the prohibition against torture, cruel, inhuman or degrading treatment or punishment that violates a person's dignity.

[9] *Id.* at par. 5.

[10] *Id.* at pars. 5 & 6.

[11] Case No. 2/98, On the death penalty provided for by the sanction of Article 105 of the Criminal Code (Lithuania 1998).

18. *Albania*. The Albanian Constitutional Court ruled in 1999 that the death penalty violated Article 21 of the Albanian Constitution, which protected the right to life.[12] The court noted that, although its Constitution provided for exceptions for the right to life—namely, the use of reasonable force in preventing the use of unlawful force, making an arrest, or combatting rebellion—the death penalty was not such an exception.[13] It further considered that Albania's constitutional protections had to be interpreted against the backdrop of the European Convention on Human Rights.[14] Ultimately, the court concluded that the death penalty violated the essence of both the right to life and human dignity. Finally, the court expressed doubt that the death penalty served a useful punitive purpose, particularly as imprisonment and the possibility of fines were alternative punishments that did not preclude the prospect of societal reintegration.[15]

19. *Hungary.* As with other European jurisdictions, the Hungarian Constitutional Court abolished the death penalty because the punishment violated the right to life enshrined in the Hungarian Constitution (Article 54, which reads "*...every human being has the inherent right to life and human dignity of which no one shall be arbitrarily deprived*").[16] The court took the view that capital punishment was arbitrary.[17] Given Hungary's domestic law and international obligations, including its ratification of the ICCPR, the court held that capital punishment would arbitrarily prioritise criminal justice concerns over the inherent dignity of human life. Like Albania and Ukraine, the Constitutional Court's decision referenced the lack of deterrent effect of the death penalty.[18]

20. In 1972, the United States Supreme Court in *Furman v. Georgia*, 408 U.S. 238 (1972), concluded that the death penalty constituted cruel and unusual punishment based on its arbitrary and discriminatory effects. In *Furman*, the court held that:

> "*The calculated killing of a human being by the state involves, by its very nature, a denial of the executed person's humanity. . . . [T]he deliberate extinguishment of human life by the state is uniquely degrading to human dignity*.
>
> . . .
>
> *In sum, the punishment of death is inconsistent with all four principles: death is an unusually severe and degrading punishment; there is a strong probability that it is inflicted arbitrarily; its rejection by contemporary society is virtually total; and there is no reason to believe that it serves any penal purpose more effectively than the less severe punishment of imprisonment. The function of these principles is to enable a court to determine whether a punishment comports with human dignity. Death, quite simply,*

[12] ALB-1999-3-008 (1999), Dec. No. 65.
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] Dec. No. 23/1990 (X.31) (Hungary 1990).
[17] *Id.*
[18] *Id.*

does not."[19]

21. Thus, based on its findings of the punishment's "*unusually severe and degrading"* nature, the strong possibility of arbitrary infliction, its rejection by contemporary society and lack of any evidence to believe it served any penal purpose, the Court held that the death penalty was a "*cruel and unusual punishment*" under the US Constitution. That 1972 decision invalidated all existing death penalty statutes in the United States, although a narrower scheme of capital punishment was later reaffirmed by the Supreme Court.

22. Despite the current stance of the U.S. Supreme Court towards capital punishment, the highest courts in Rhode Island, New York, Connecticut, Delaware, and Washington State have declared the death penalty regime in their states unconstitutional.[20] In particular, the Washington Supreme Court declared the state's death penalty statute unconstitutional because it was applied in an arbitrary and racially discriminatory manner.[21]

23. Like in the United States, there is an ever-increasing body of authority elsewhere that confirms that the death penalty no longer has any place in a civilised democracy, given its cruel, inhuman, and degrading nature. This sentiment was also expressed by the South African Constitutional Court in *Makwanyane* by Justice Kentridge, who stated that:

> "[*T*]*here is ample objective evidence that evolving standards of civilisation demonstrate the unacceptability of the death penalty in countries which are or aspire to be free and democratic societies. ... in general in civilised democratic societies the imposition of the death penalty has been found to be unacceptably cruel, inhuman and degrading, not only to those subjected to it but also to the society which inflicts it*."[22]

24. That sentiment is shared across Europe, where there is now near-universal recognition that the death penalty serves no purpose in a society governed by respect for human rights and the rule of law. In 2005, the European Court of Human Rights referred to capital punishment as "*no longer having any legitimate place in a democratic society*,"[23] a concern echoed by the Council of Europe two years later.[24] In similar fashion, the majority of the Canadian Supreme Court in *Burns* agreed that capital punishment "*engage[d] the underlying values of the prohibition against cruel and unusual punishmen*t,"[25] and, in South Africa, the lead judgment in *Makwanyane* expressed that the

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[19] 408 U.S. at 290-291 (majority opinion), 305 (J. Brennan, concurring).
[20] State by State, Death Penalty Information Center (2023), https://deathpenaltyinfo.org/state-and-federal-info/state-by-state.
[21] *Id.*
[22] *Makwanyane* at par. 199.
[23] *Ocalan v Turkey* European Court of Human Rights (First Section) Application 46221/99, Judgement of 12 May 2005 at paragraph [169]
[24] *"Death is not Justice"*, Directorate General of Human Rights, Council of Europe, January 2007, Ref 1997GBR1270 available at *https://edoc.coe.int/en/death-penalty/5477-death-is-not-justice.html*
[25] *Burns*, at par. 78.

death penalty is "*a cruel, inhuman and degrading punishment*" because it "*annihilates human dignity..., elements of arbitrariness are present in its enforcement... and it is irremediable*."[26] Comparable statements were made in the rulings of Constitutional Courts of Albania, Hungary, Lithuania and Ukraine, all of which also found that the death penalty violates the prohibition on inhuman and degrading treatment.

25. Each of the constitutional decisions summarised above are predicated on common themes and factors. We highlight four themes upon which current and former *per se* challenges are based:

(i) *First,* the death penalty violates the fundamental human rights to life, dignity of person and the right not to suffer torture or inhuman or degrading punishment. Such foundational rights must be given particular weight because all other civil rights are predicated on their existence.

(ii) *Second,* the death penalty is necessarily at odds with rehabilitative aims, which are common to criminal justice frameworks. The function of a criminal justice system is to balance some interference with liberty against the need to protect the public and reform offenders. The death penalty does not undertake this balancing exercise as it extinguishes all prospects of rehabilitation.

(iii) *Third,* no criminal justice system is infallible. There is always the possibility of error and the criminal justice systems might be operated in an arbitrary manner. Justice systems are required to have protections to account for the possibility of mistake, which the finality of a death sentence does not permit.

(iv) *Fourth*, the imposition of the death penalty no longer has any place in a civilised democratic society, given its cruel, inhuman, and degrading nature, not only for those subjected to it but also for the society which inflicts it.

[26] *Makwanyane* at par. 95.

C. The Effect of the International Covenant on Civil and Political Rights

26. Taiwan has incorporated the International Covenant on Civil and Political Rights (ICCPR) into domestic law.[27] Its obligations under the Covenant are therefore relevant to the interpretation of fundamental rights in the Constitution. Article 2 of the Act to Implement the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights (hereinafter the "Taiwan Act") states that the "[*h*]*uman rights protection provisions in the two Covenants have domestic legal status*."[28]

27. Because Taiwan has given these Covenants domestic legal status through the Taiwan Act, it must respect its obligations under the Covenants, "*take the responsibility for preparing, promoting and implementing"* its provisions, and interpret the Constitution in such a way that gives effect to the rights and freedoms enshrined in the Covenants.[29] In this section, we focus on two foundational rights protected under these Covenants and under the Taiwan Constitution, namely the right to life and the rule of law.

I. The Right to Life

28. Advocates in several jurisdictions have relied on the right to life provision to argue—successfully—that a system of capital punishment violates this fundamental, non-derogable constitutional right. A challenge to the death penalty based on a violation of the right to life relies on both domestic and international legal principles and obligations.

29. The duty to protect the right to life implies that State parties must establish a legal framework to ensure the full enjoyment of the right to life. As such, the right to life should "*not be interpreted narrowly*" but broadly, and states are obligated to respect the right to life and "*refrain from engaging in conduct resulting in arbitrary deprivation of life*."[30] Indeed, the Human Rights Committee (HRC) has made clear that "*deprivation of life*" by state authorities "*is a matter of the utmost gravity*."[31] With that recognition, the HRC has also made clear that "*any substantive ground for deprivation of life must be prescribed by law and must be defined with sufficient precision to*

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[27] Act to Implement the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, art. I (promulgated Apr. 22, 2009), Laws & Regulations Database of the Republic of China, MINISTRY OF JUSTICE, http://mojlaw.moj.gov.tw/EngLawContent.aspx?id=3. *See also* The Judicial Yuan Reviews Regulations in Response to the Promulgations of the Covenants; It also Promotes Legislation on Speedy and Fair Trials, Jud. Yuan (Nov. 5, 2009), *available at* http://jirs.judicial.gov.tw/GNNWS/engcontent.asp?id=36952&Muchlnfo=l.

[28] *Id.*

[29] *Id*. at Art. 4.

[30] Human Rights Committee, General Comment No. 36, Section I.7 (3 September 2019).

[31] *Id.* at Section 3.19.

avoid overly broad or arbitrary interpretation or application," and must be non-arbitrary in both law and practice.[32]

30. To clarify the contours of this provision, the HRC has defined an arbitrary deprivation of life in the following manner:

> *Deprivation of life is, as a rule, arbitrary if it is inconsistent with international law or domestic law. . . . The notion of "arbitrariness" . . . must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality.*
> . . .
> *The right to life must be respected and ensured without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or any other status, including caste, ethnicity, membership of an indigenous group, sexual orientation or gender identity, disability, socioeconomic status, albinism and age. . . Any deprivation of life based on discrimination in law or in fact is ipso facto arbitrary in nature.*[33]

31. The HRC also refers to the obligations of countries party to the ICCPR who have not ratified the Second Optional Protocol and retain the death penalty. For those countries, the HRC states that they are prohibited from applying capital punishment to any but the "*most serious crimes, subject to a number of strict conditions*."[34] Equally important, the HRC has required that death sentences comply "*with the law in force at the time*" of the crime and not violate the present provisions of the ICCPR.[35]

II. The Rule of Law and Protection of the Law

32. The rule of law has been recognised as a foundational concept in constitutional litigation. In particular, the Caribbean Court of Justice has recognised the existence of the principle in the Constitutions of Guyana, Belize, and Barbados. Regarding Barbados, the Court noted that:

> *"Protection of the law is therefore one of the underlying core elements of the rule of law which is inherent to the Constitution. It affords every person, including convicted killers, adequate safeguards against irrationality, unreasonableness, fundamental unfairness or arbitrary exercise of power."*[36]

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[32] *Id.*
[33] *Id.* at Section V.61.
[34] *Id.* at Section II.16.
[35] *Id.* at Section IV.38.
[36] *Per Wit JCCJ in A-G v Boyce and Joseph [2006] CCJ 1*, cited with approval by the majority in *Nervais v. The Queen* [2018] CCJ 19 at [44] and *Quincy McEwan and others v the Attorney General of Guyana* [2018] CCJ 30 at [119] and adopted by Saunders J in *Lucas v Chief Education Officer* [2016] 1 LRC 384, [138].

33. The Caribbean Court of Justice also reinforced that the rule of law embraces concepts such as the principles of natural justice, procedural and substantive due process, and the protection of the law. The right to the protection of the law therefore requires laws "*of sufficient quality, affording adequate safeguards against irrationality, unreasonableness, fundamental unfairness or arbitrary exercise of power*"[37] as well as the availability of effective remedies.

34. The right to protection of the law also imposes a duty on the State to comply with its international obligations. This includes the obligation not to act arbitrarily when depriving citizens of their life under Article 6(1) of the ICCPR. In General Comment No. 36, the HRC observed that "[*t*]*he notion of 'arbitrariness' must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability, and due process of law as well as elements of reasonableness, necessity, and proportionality*."[38]

35. Indian jurisprudence sheds light on the intellectual grounding for rooting this substantive conception of the rule of law in the recognition of human dignity as a fundamental principle of a sovereign democracy. In *Rajesh Kumar v Government of New Delhi*, the Indian Supreme Court reflected a "*paradigm shift in [their] jurisprudence*" from a colonial, formalistic notion of the rule of law, which did not prioritize "*the worth and dignity of human life*," to a substantive "*due process of law*" consistent with the core constitutional value of post-independence India of the "*dignity of the individual*."[39] And, in turn, the fundamental nature of the substantive rule of law embedded within the Indian constitution a prohibition on cruel and unusual punishments in recognition of "*fundamental respect for human dignity*."[40]

36. Thus, in India, a statutory provision for capital punishment does not easily satisfy the requirement that any execution or 'sentence' ordering execution must still comply with the condemned man's right to the protection of the law. As Krishna Iyer J explained in *Maneka Ghandi v Union of India and anr*, "*Procedure established by law . . . will reduce life and liberty to a precarious plaything if we do not ex necessitate import into those weighty words an adjectival rule of law, civilized in its soul, fair in its heart and fixing those imperatives absent which the processual tail will wag the substantive head*."[41]

37. The right to life, the rule of law, and the protection of the law are firmly grounded in international instruments and jurisprudence. Taken together, in the context of the death penalty, the right to life and the right to the protection of the law require State parties to adopt a measured approach to the

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[37] *Id.*
[38] Human Rights Committee, General Comment No. 36, par. 12.
[39] *Rajesh Kumar v Government of New Delhi,* Crim Appeal Nos. 1871-1872 of 2011, pars. 35, 66, 77.
[40] *Id.* at par. 76.
[41] *Id.* at par. 74 (quoting *Maneka Ghandi v. Univ. of India and anr,* AIR 1978 597, 1978 SCR (2) 621).

use of capital punishment, taking care to avoid irrelevant considerations forming a part of a decision to deprive an individual of their fundamental right to life.

D. Expert Evidence

38. In this section we submit that the expert evidence confirms two persistent features in capital sentencing: (I) arbitrariness and (II) the lack of deterrent effect. By arbitrariness, we mean the factors leading to inconsistent and immeasurable outcomes in individual cases, which we sub-divide into six mutually re-enforcing reasons.

39. Separately, the expert evidence demonstrates that the death penalty cannot be empirically shown to have a measurable downward impact on serious crime. The data, indicates that the death penalty simply has no bearing on incidents of serious offending.

40. Appended to these submissions are the Reports of Professor Carolyn Hoyle ("Hoyle") and Professor Jeffrey Fagan ("Fagan").

    (i) Professor Hoyle is Professor of Criminology in the Centre of Criminology, Faculty of Law at the University of Oxford, and is Director of the Oxford Death Penalty Research Unit. Her *curriculum vitae* is annexed to her report.

    (ii) Professor Jeffrey Fagan is Isidor and Seville Sulzbacher Professor of Law at Columbia Law School, Professor of Epidemiology at the Mailman School of Public Health at Columbia University, and Senior Research Scholar at Yale Law School. His *curriculum vitae* is annexed to his report.

I. Arbitrariness

41. To avoid arbitrariness, capital punishment would have to be administered impartially, equitably, and pursuant to legal procedures capable of protecting the rights of the accused from unfairness in the investigation, trial, sentencing, appeals and post-appellate processes in a way that not only avoids mistaken judgments, but also accounts for the possibility of bias, discrimination, or arbitrariness in its infliction.

42. It is a trite proposition of law that the mandatory imposition of capital punishment is unconstitutional and a flagrant breach of the rule of law based on its incompatibility with judicial independence and, significantly, its arbitrary application. The rejection of an arbitrary deprivation of life has now been so firmly established as abhorrent to the rule of law and fundamental principles of a democratic society that the prohibition of the mandatory death penalty amounts, in essence, to a *jus cogens* norm of international law.[42]

[42] *See, e.g., Thompson v St Vincent and the Grenadines* (2000) Comm. No. 806/1998, UN

43. Whilst the adoption of discretionary sentencing regimes avoids some of the specific forms of arbitrariness associated with a mandatory regime, this alone does not lead to a system which is free from arbitrariness. Taiwan, having abolished the mandatory death penalty in 2006, (Hoyle §12) still operates a far-from-perfect criminal justice system. Numerous judicial authorities have recognized that the unavoidable imperfections within any legal system will *always* give rise to the risk of inconsistent and arbitrary enforcement of the death penalty. The frailties in any discretionary system, which individually and cumulatively give rise to arbitrary outcomes, include the following six reasons below:

(1) Inadequate safeguards against unequal and discriminatory application based on personal circumstances of the victim and/or the offender.

44. Characteristics such as race, gender, socio-economic status, and an offender's mental health have been shown to have a powerful determinative effect on the outcome of a capital case, regardless of the severity of the particular crime. Socio-economic status as a determinant is self-evident: those with greater resources and influence are likely to have access to more effective representation, including access to investigative resources and quality of counsel which increase chances of acquittal and lesser punishment, as well as improved access to (and prospects in) appeals. Professor Hoyle notes this trend, and based on available statistics, concludes that Taiwan is not an outlier in this regard (Hoyle §§33 -35 & 39).

45. Biases, unconscious and deliberate, occur at every stage of the criminal justice process. It is not just judges who may be influenced by their views of defendants. Police and prosecutors exercise their professional judgment as to the persons who will enter the criminal justice process; expert witnesses form opinions about defendants which make their way into reports. At every stage of the process where an individual exercises professional judgment, the potential for bias exists.

46. Studies undertaken in the United States of America, South Africa, and Caribbean states such as Trinidad and Tobago indicate that discrimination arises across capital proceedings and include the unconscious biases of police, prosecutors, tribunals, judges, and politicians, and can be the result of attitudes to particular 'types' of homicides that disproportionately affect different groups or sectors of society.[43] This trend is similarly observed by Professor Hoyle. For example, Professor Hoyle notes that studies in the United States of America have found the legally non-relevant characteristic of race, both of victim and defendant, as an indicator of a defendant's likelihood of being sentenced to death (Hoyle §§31-32). Professor Hoyle also emphasizes that, across

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Doc.CCPR/C/70/D/806/1998, 18 October 2000; *Kennedy v Trinidad and Tobago* (2002) Comm. No. 845/1998, UN Doc CCPR/C/74/D/845/1998, 26 March 2002.

[43] David Baldus, Charles Pulaski and George Woodworth, 'Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience,' 74 *J. of Crim. Law and Criminology* 3 661-753 (1983); National Law University Delhi, Project 39A, *Death Penalty India Report* (2016) at https://www.project39a.com/dpir; *Makwanyane*, at pars. 48-49; Roger Hood and Florence Seemungal, *A Rare and Arbitrary Fate: Conviction for Murder, the Mandatory Death Penalty and the Reality of Homicide in Trinidad and Tobago* (London: The Death Penalty Project 2006).

jurisdictions, other non-legally relevant factors will bear on the likelihood of receiving a death sentence. In support, she states that, in India "…*class and caste also shape sentencing*" in Asia, and in parts of the Middle East "…*foreign nationals* [are] *not afforded the same rights as citizens when arrested for capital offences*" (Hoyle § 35).

47. In South Africa, the four often-intersecting factors which accounted for an increased likelihood of a capital sentence, despite their lack of connection to the crime itself, were poverty, race, gender, and being allocated a *pro bono* defence counsel.[44] The inevitable difficulties of arbitrariness inherent within any system administering capital punishment were also outlined by Justice Mahomed of the South African Constitutional Court in *Makwanyane,* where he states:

> "[*T*]*here is an inherent risk of arbitrariness in the process, which makes it impossible to determine and predict which accused person guilty of a capital offence will escape the death penalty and which will not. . . . The ultimate result depends not on the predictable application of objective criteria, but on a vast network of variable factors*."[45]

48. In Kenya, the arbitrariness of being subjected to capital punishment is evident by the facts that a person's socio-economic status and lack of formal education beyond primary school accounted for a statistically significant number of offenders on death row. Professor Hoyle notes that there is a similar statistical trend on death row in Taiwan (Hoyle §§38 - 39), indicating that the criminal justice system in Taiwan disproportionately sentences those to death based, at least in part, on non-legally relevant factors.

49. Relatedly, although legal protections, in principle, prevent execution of mentally disordered offenders and require courts to be informed as to the mental health of a capital defendant, those protections are undermined in practice due to the inability of those with mental illness or disabilities to access medical evidence demonstrating their impairments whether due to poverty, or systemic lack of adequate mental health provision and expertise.[46] Further, as the U.S. Supreme Court recognised in *Atkins v Virginia*, 536 U.S. 304 (2002), characteristics of mental illness are liable to undermine procedural protections including reduced ability to navigate the legal process, work effectively with counsel, and effectively communicate information about the offence or in mitigation.[47] Mental illness may also affect a court's perception of an offender's motives and capacity for rehabilitation.

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[44] *Makwanyane*, at pars. 48-49 per President Chaskalson.
[45] *Makwanyane*, at par. 273.
[46] *See, e.g.,* World Health Organization, WHO-AIMS Report on Mental Health Systems in the Caribbean Regions (2011).
[47] 536 U.S. at 320-321.

50. Professor Hoyle's report highlights this phenomenon in Taiwan. Whilst the Criminal Code, in principle, prohibits a death sentence being imposed on a mentally disordered offender, Professor Hoyle asserts that those suffering from mental illness and/or intellectual disability in Taiwan have still been sentenced to death (Hoyle §§70 -71). The evidence therefore suggests that despite legal protections, systemic disadvantages mean that legal principles and safeguards fail to prevent the imposition of death sentences upon offenders who are mentally ill, and that mental illness continues to be a determining factor increasing the prospect of execution in any capital system.

51. The available evidence makes clear that there are unlikely to be safeguards capable of eliminating the role played by personal factors in this process. Once this reality is recognized, the arbitrariness of capital punishment is inescapable. As summarized by Justice Douglas in *Furman v. Georgia*, 408 U.S. 238, 242 (1972), "[*i*]*t would seem to be incontestable that the death penalty inflicted on one defendant is 'unusual' if it discriminates against him by reason of his race, religion, wealth, social position, or class, or if it is imposed under a procedure that gives room for the play of such prejudices.*"

52. Taiwan is no different from other countries in this regard. Notwithstanding safeguards implemented since the ratification of the ICCPR, Taiwan's capital punishment system is flawed in many respects. The system is not free from error or arbitrariness and will lead to capital sentences based on legally irrelevant factors (Hoyle §§97 -99).

(2) Lack of adequate objective thresholds to determine which cases should attract the death penalty.

53. The legal principles designed to restrict the use of the death penalty to the 'rarest of the rare' cases—involving the "most serious" cases, as well as cases in which there is deemed to be no capacity for rehabilitation—are inadequate to remove the risk of inconsistent, and thus the imposition of arbitrary, death sentences.[48] The application of these principles is inevitably subjective and is susceptible to variations as a result of human biases, attitudes, experiences or beliefs which in turn gives rise to the real risk of arbitrary application. Professor Hoyle describes the subjective views of sentencing judges giving rise to the risk of a defendant being caught in "*the 'shifting sands' of the jurisprudential contexts in which they find themselves*" (Hoyle §82).

54. The 'subjective judgment' involved in the imposition of a death sentence arises at numerous stages in the capital process including: the legislative definition of what crimes merit capital punishment; prosecutorial discretion; and judges deciding whether the facts before them render the imposition of capital punishment inevitable.

[48] The 'rarest of the rare' formulation was introduced by the Indian Supreme Court in *Bachan Singh v State of Punjab* (1980) 2 SCC 684.

(3) Inadequate guarantee of investigative resources, and lack of access to adequate representation.

55. As the death penalty is irrevocable, the adequacy of counsel in capital cases to protect against miscarriages of justice is paramount. For instance, in the U.S. state of Texas, it was only after Todd Willingham had been executed for an arson that killed his three children that it was determined that the fire was not arson but started accidentally.[49] His court-appointed counsel at trial and in post-conviction review lacked the requisite experience and resources to mount a sufficient defence, leading to this tragic outcome. Experience shows that where counsel is insufficiently competent or experienced, there are simply no procedural safeguards capable of eradicating the risk of error or caprice and the unequal application of fair trial protections. Similar deficiencies may exist where counsel is competent but unable to mount a full defence of a client due to limitations caused by a system of legal aid.

56. While Article 31 of Taiwan's Code of Criminal Procedure prescribes a mandatory defence for defendants, Article 388 of the Code eliminates this right at the trial of third instance. Thus, if the defendant has not retained defence counsel for his trial of third instance, and the presiding judge does not appoint a public defender or lawyer for the defendant, that case will become final—absent any aid from a professional defender. From 2000 to 2011, the Supreme Court affirmed 93 death sentences, despite the lack of legal representation at that stage for 61 of the defendants sentenced to death.[50] Further, Article 289 of the Code provides the judge with discretion to conduct oral arguments on the defendant's sentence, meaning that, at the trial of the third instance, oral arguments may not always be permitted even in capital cases.

57. The Taiwan Constitutional Court rendered a decision in 2010 regarding these issues.[51] It found that the creation of a legal aid system remedied the lack of mandatory defence at the third level of trial and that Article 388 should not be deemed unconstitutional, so long as there remains a chance under domestic law for defendants to receive counsel. Further, it stated that criminal defendants are still afforded the opportunity to present arguments and state their opinion about their potential sentence before sentencing, even if oral argument is not provided at sentencing.[52]

58. However, these proclamations reduce the right to counsel and due process from a "right" to a chance and misread the provisions of the ICCPR. The ruling contradicts Article 8 of the Taiwan Constitution, which provides due process protections. Failing to permit capital defendants to retain the same mandatory defence as in lower-court proceedings and to argue at every stage of the proceedings also violates Article 14 of the ICCPR, which guarantees the defendant the right to counsel throughout the entire criminal process.

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[49] David Grann, Trial by Fire: Did Texas Execute An Innocent Man? The New Yorker, Sept. 7 2009, at 42.
[50] Jaw-Perng Wang, *The Current State of Capital Punishments in Taiwan*, 6(1) NTU L. Rev 143, 156 (2011).
[51] J.Y. Dismissal of Petition No. 9741 (2010).
[52] *Id.*

(4) The inevitable role of political decision-making.

59. Even if the investigation, charging, and trial process involved in capital cases were capable of being free of arbitrary decision making, the decisions involved in executing offenders are necessarily arbitrary. Decisions made by the executive to sign a death warrant, pardon an offender, impose a formal (or informal) moratorium on executions, or even resume executions after a moratorium, can be based on prevailing political factors which may be subject to change. These reasons have been described by the United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions as akin to being decided 'at random' (Hoyle §§87 -88), in that they are not based on legally relevant factors.

60. Earlier decisions vulnerable to political reasoning include the selection by legislators of cases in which capital punishment will be available, and decisions of prosecutors and police as to where to focus investigative and prosecutorial resources. Further, decisions as to the timing and selection of prisoners for execution inevitably involve either politically motivated decision-making or decisions 'at random', which are definitionally arbitrary.

61. Taiwan is no stranger to these political decisions. In March 2010, former Minister of Justice Ms. Wang Ching-feng resigned from office after refusing to sign execution orders for 44 death row prisoners. Less than two months later, the Ministry of Justice shocked the public by breaking its four-year moratorium on executions. Four of the individuals on death row were executed without previously notifying the media and without providing them the required process under the law.[53]

62. Such decisions can come after a period of significant delay. Professor Hoyle notes that only "…*one or two of the 37 people on death row in Taiwan have been there for less than five years. The vast majority have been there for more than 11 years, with just under half having been there for more than 20 years*" (Hoyle §83). There is no objective method for determining when and in what circumstances an offender will be executed.

(5) Low incidence of punishment

63. As Justice Brennan observed in his concurring judgment in *Furman*, "*when the punishment of death is inflicted in a trivial number of the cases in which it is legally available, the conclusion is virtually inescapable that it is being inflicted arbitrarily. Indeed, it smacks of little more than a lottery system.*"[54]

64. The same is true in Taiwan. From 2000 to 2011, although over one thousand individuals in Taiwan committed offenses statutorily punishable by death, only 93 (8.4% of the total) were sentenced to

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[53] *See* Vincent Y. Chao, *Legality of Capital Punishment Upheld*, Taipei Times (May 29, 2010); Chang Wen-Chen, *Case Dismissed: Distancing Taiwan from the international human rights community*, Judicial Reform Foundation (Sept. 2010).

[54] *Furman*, 408 U.S. at 293 (J. Brennan, concurring).

death.[55] This low rate of punishment suggests not only the inefficiency of any deterrent threat, but the spectre of arbitrariness of capricious death sentences.

(6) Impossibility of designing and administering an infallible system removing risk of error or arbitrariness.

65. The inherent level of risk involved in capital punishment is illustrated by the noted failure to prevent the conviction (and sentencing to death/execution) of innocent people. In 2016, at least 60 death row prisoners were exonerated around the world. In the United States, one death row prisoner has been exonerated for every eight executed.[56] Having reviewed the operation of the death penalty in the three different jurisdictions, the Canadian Supreme Court in *United States v Burns* [2001] SCC 7 recognised that:

> "[T]he *recent and continuing disclosures of wrongful convictions for murder in Canada, the United States and the United Kingdom provide tragic testimony to the fallibility of the legal system, despite elaborate safeguards for the protection of the innocent*."[57]

66. The court in *Burns* also emphasized that concerns about wrongful convictions are unlikely to be resolved by advances in the forensic sciences, welcome as those advances are, for wrongful convictions frequently arise from "*frailties that perhaps may never be eliminated from our system of criminal justice*" and that "*there is always the chance that the judicial system will fail an accused*."[58]

67. Even in countries, such as the United States of America, where stringent safeguards are implemented in capital cases,[59] the effect of error and mistake cannot be wholly eradicated. There are relevant examples in Taiwan of those executed who were later exonerated through fresh evidence. Professor Hoyle cites the example of Chiang Kuo-ching, a soldier who had been wrongly executed in 1997 for the rape and murder of a 5-year-old girl, later offered a posthumous pardon.[60] Professor Hoyle goes on to note that of the 62 capital convictions recorded in Taiwan between 2006 and 2015, approximately 50% were flawed in their approach to the evidentiary and/or legal threshold for a capital sentence. Moreover, over 15% of the judgments were "…*seriously flawed, with no significant inculpatory evidence to support the prosecution's key claims concerning guilt*" (Hoyle §§62-64).

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[55] Wang, *The Current State of Capital Punishments in Taiwan*, at 162.
[56] American Civil Liberties Union, A Question of Innocence (Dec. 2003), https://www.aclu.org/documents/question-innocence.
[57] *United States v Burns* [2001] SCC 7.
[58] *Burns* at par. 116.
[59] Professor Hoyle refers to the "super due-process" requirements of the US system, described at (Hoyle §54).
[60] Other examples of miscarriages of justice are provided in Professor Hoyle's report (Hoyle §§58 -61).

68. Although many of these concerns may apply equally to the imposition of other punishments, the consequences of arbitrary enforcement are particularly egregious in the context of the death penalty. As reflected in *Furman*, given the severity and finality of capital punishment, "[*d*]*eath, in these respects, is in a class by itself*."[61]

II. Absence of evidence demonstrating that capital punishment serves a valid penological purpose

69. Death penalty jurisprudence has historically advanced two justifications for the death penalty: "*retribution, and deterrence*."[62] The former justification, neatly captured by the biblical phrase 'an eye for an eye,' has long been rejected as a permissible basis for the imposition of capital punishment. To permit the taking of a life on this basis alone is inherently degrading to the society which authorizes it and is fundamentally inconsistent with the principle of human dignity upon which democratic societies are based. Thus, the South African and Lithuanian Constitutional Courts roundly rejected the principle of punitive equivalence when considering how a modern democratic society should act towards its citizens.[63] The Lithuanian court further elaborated that the "*psychological basis*" of the retributive stance is "*understandable*," but when that:

> [*L*]*ogic is applied to other categories of crimes, it becomes clear that the principle that "a criminal action must be punished by the same action" is unacceptable. The criminal who has maimed his victim may not be maimed in a similar manner. This is unacceptable to modern civilisation*."[64]

70. Rejection of retributive equivalence is also demonstrated in the development of international sentencing principles that require focus not only on the severity of the particular offence, but also on the circumstances of the offender and prospects of rehabilitation.[65] Coercive acts justified solely by a desire for societal 'vengeance' cannot be reasonably brought within the scope of legitimate protection of the rights and freedoms of others—particularly when viewed in the context of the framework of the constitution as an instrument based on the rule of law.

71. The only possible remaining justification for the death penalty holding any jurisprudential legitimacy is the notion that it may protect the rights and freedoms of other citizens by deterring further crime. However, unless there is a sound evidentiary basis to demonstrate that capital punishment effectively deters serious crime, the deliberate deprivation of life is not rationally connected to its intended objective. Without such a connection, capital punishment is necessarily arbitrary and contrary to the right to protection of the law, both under the Taiwanese Constitution and under Article 6(1) of the ICCPR.

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[61] *Furman*, 408 U.S. at 289.
[62] *See, e.g.*, *Gregg v. Georgia*, 428 U. S. 153, 183 (1976).
[63] Case No. 2/98 (Lithuania 1998); *Makwanyane* at par. 129.
[64] Case No. 2/98 (Lithuania 1998).
[65] *See, e.g., Santosh Bariyar v State of Maharashtra* [2009] INSC 1056.

72. The lack of a deterrent effect greater than other forms of serious punishment has been repeatedly cited as a reason to depart from capital punishment in international jurisprudence. As the U.S. Supreme Court expressed in *Atkins,* when abolishing the death penalty for juveniles: "*unless the imposition of the death penalty measurably contributes to [a valid penological purpose] it is nothing more that the purposeless and needless imposition of pain and suffering and hence a [cruel and unusual] punishment*."[66]

73. Justice Madala further elaborated on the lack of a deterrent effect involved in capital punishment in *Makwanyane,* stating that:

> "*The death penalty is a punishment which involves so much pain and suffering that civilised society ought not to tolerate it even in spite of the present high rate of crime. And society ought to tolerate the death penalty even less when considering that it has not been proved that it has any greater deterrent effect on would-be murderers than life imprisonment*."[67]

74. Capital punishment is necessarily arbitrary in the absence of clear evidence of its efficacy. This was the reasoning of the majority and concurring opinions of the Hungarian Constitutional Court, including Judge Dr Zlinzky who held:

> "*I think it has been an impliedly accepted . . . constitutional principle . . . that punishment has preventive purposes:.... It may prevail only where it fulfils its objective, it loses its legal basis when it can no longer serve its purpose or can serve that only at the expense of a more serious injury than which it prevents.[...] In this regard, thus, the necessity of capital punishment is not confirmed today, therefore, the use of capital punishment is based on the prerogative decisional power of the legislature - or on the maintenance of the status quo: arbitrary*."[68]

75. These views are supported by the expert report of Professor Jeffrey Fagan, appended to these submissions. Broadly, Professor Fagan concludes that the prevailing opinion in the field is that the deterrent theory of punishment is "*unreliable, and in many instances, simply wrong*" (Fagan II/D/§§1-2). In the United States, since 1999, death sentences and executions have all been declining at the same time and at the same pace for a 15-year period. The comparable murder rate, both in retentionist and abolitionist states was unaffected by these changes in execution or death sentence risk. Professor Fagan suggests that this is a strong indicator that the sentence of death is unrelated to the crime rate, for serious offences (Fagan II/D/§§6-8).

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[66] 536 U.S. at 319 (quoting *Enmund v. Florida*, 458 U. S. 782, 798 (internal quotations omitted)).
[67] *Makwanyane* at par. 239.
[68] Decision No. 23/1990 (X. 31.) AB of the Constitutional Court, per Constitutional Court, at pp 31-32.

76. In other countries the murder rate has decreased following abolition, a moratorium, or a significant reduction in executions.[69] During a sharp reduction in executions in Taiwan from 2005 to 2009, homicide rates also declined.[70] And the analysis of murder rates in comparable retentionist and abolitionist countries (e.g., between Singapore and Hong Kong), shows that there is no appreciable difference either in the rate of homicide, or in the long-term trajectory of declining homicide rates.[71]

77. Studies in countries where executions have increased in particular periods show that such increases also had no impact at all on murder rates. The authors of a comprehensive study in Trinidad and Tobago concluded that: "[o]*ver a span of 50 years, during which these sanctions were being deployed in degrees that varied substantially, neither imprisonment nor death sentences nor executions had any significant relationship to homicides*."[72]

78. When turning to consider Taiwan, Professor Fagan does not find outlier data from this trend. Taiwan has seen a steady decline in the homicide rate since 2002, regardless of the fluctuation of death sentences being handed down and executions being carried out. Moreover, a similar trend was found in robbery offences. Professor Fagan's findings are that homicide, murder and robbery rates are unaffected by the declining execution rate in Taiwan, and there is no empirical evidence that death sentences deter serious crime (Fagan II/F/§§1-11). Comparative research in recently abolitionist states demonstrates no evidence of a subsequent increase in murder rates after abolition.[73] Even in Taiwan, after abolition of the mandatory death penalty in 2006 and replacement with a discretionary system, there was no increase in either the general crime rate nor the violent crime rate.[74]

79. In sum, there is no compelling evidence internationally or in Taiwan to demonstrate the efficacy of capital punishment as a deterrent. The consensus amongst social scientists, academics, and legal scholars, as well as a growing body of judicial and political authority, that capital punishment serves no valid penological or deterrent purpose weighs against finding the death penalty consistent with human rights protections. Even the most sophisticated quantitative studies have failed to demonstrate any clear evidence of a deterrent effect from the use of the death penalty. Specifically,

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[69] U.N. Office of Drugs and Crime, 2011 Global Study on Homicide: Trends, Contexts and Data (Vienna, Austria, 2011). Homicides declined by 61% from 2000-2008 in Czech Republic, Poland, Moldova, Hungary and Romania. U.N. Report at 33.

[70] David T. Johnson and Franklin E. Zimring, The Next Frontier: National Development, Political Change, and the Death Penalty in Asia (New York: Oxford University Press, 2009).

[71] Franklin E. Zimring, Jeffrey Fagan, and David T. Johnson, "Executions, Deterrence, and Homicide: A Tale of Two Cities," 7 Journal of Empirical Legal Studies 1-29 (2010).

[72] David Greenberg and Biko Agozino, "Executions, Imprisonment, and Crime in Trinidad and Tobago," 52 British Journal of Criminology 113 (2012).

[73] Dane Archer, Rosemary Gartner, Marc Beittel, "Homicide and the Death Penalty: A Cross-National Test of a Deterrence Hypothesis," 74 J. of Crim. Law & Criminology 991, 1013 (1983) (comparing evidence from 13 countries and city substudies to conclude that "there is no overwhelming evidence for deterrence, and the contrary conclusions of existing research suggest that such evidence for deterrence will not be forthcoming").

[74] Wang, *The Current State of Capital Punishments in Taiwan*, at 147.

empirical research across five decades indicates that the scientific evidence supporting a belief in deterrence—whether the offence is a homicide, drug offense, or act of terrorism—is both unreliable and often inaccurate.[75] Rather, the most robust studies into the effects of capital punishment across many different jurisdictions have consistently shown that there is no reliable basis for the belief that capital punishment has even a "marginal" deterrent effect when compared with less extreme sanctions such as life-imprisonment.[76]

80. As above, this empirical trend mirrors the growing body of judicial and political acknowledgments that the death penalty serves no penological purpose. For instance, the Secretary General of the United Nations observed in 2019 that "[*t*]*here is little evidence that the death penalty has an impact on reducing levels of crime, so resumption of use of the death penalty is inconsistent with the aim of crime reduction.*"[77] The Constitutional Courts in Ukraine, Lithuania, South Africa, Canada, and Washington State also supported their conclusions that capital punishment served no valid penological purpose with both international and domestic examples.[78]

81. There is further judicial authority supporting that, far from deterring serious harm, the death penalty may have a detrimental effect on efforts to maintain law and order. For example, Justice Zlinzky of the Hungarian Constitutional Court observed that continued reliance on capital punishment "*diverts attention from*" addressing the roots of criminality and the "*prerequisites of safe coexistence*."[79] According to the court, maintaining capital punishment therefore harms society by "*disguis[ing] the delay in absolutely necessary steps to be taken by the State*."[80]

82. Evidence also supports the proposition that capital punishment harms the communities that retain it. First, a state's application of the death penalty endorses violence as an acceptable means by which to address other violent behaviour. In that sense, as the Directorate General of the Council of Europe has declared, capital punishment "*legitimises cold-blooded, pre-meditated killing as justice. In so doing it undermines humane and civil relations in society and the dignity of all the people who live in it. That violence begets violence cannot be disputed*."[81]

83. Second, capital punishment deprives society of any opportunity to make amends in the inevitable cases where mistakes are made. Having reviewed numerous examples in which innocent citizens

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[75] National Research Council, Deterrence and the Death Penalty (D. Nagin and J.V. Pepper, eds.) (2012); *see also* John J. Donohue, "Empirical Analysis and The Fate of Capital Punishment," 11 DUKE J. CONST. L. & PUB. POL'Y 51(2016).

[76] Dieter Dolling, Horst Entorf, Dieter Hermann, and Thomas Rupp, "Is Deterrence Effective? Results of a Meta-Analysis of Punishment," 15 European J. of Crime Policy Research 201 (2009).

[77]2019 Yearly Supplement to his quinquennial report on capital punishment, A/HRC/42/28 [47]

[78] *See* Case No. 1-33/99 (Ukraine 1999), par. 3; Case No. 2/98 (Lithuania 1998); *Makwanyane; United States v Burns* [2001] SCC 7 (in the extradition context); *State v. Gregory*, 427 P.3d at 621.

[79] Decision No. 23 / 1990 (X.31) AB pf the Constitutional Court of the Republic of Hungary.

[80] *Id.*

[81] *"Death is not Justice,"* Directorate General of Human Rights, Council of Europe, January 2007, Ref 1997GBR1270, *https://edoc.coe.int/en/death-penalty/5477-death-is-not-justice.html.*

were convicted, the Canadian Supreme Court observed that: "*had capital punishment been imposed, there would have been no one to whom an apology and compensation could be paid in respect of the miscarriage of justice . . . and no way in which Canadian society with the benefit of hindsight could have justified to itself the deprivation of human life in violation of the principles of fundamental justice*."[82] By foreclosing reversal of perhaps the most devastating wrong a society could inflict on its members, capital punishment not only harms the executed person and their loved ones – it damages society itself. The killing of an innocent member of the community diminishes constitutional faith and public trust, and hence democratic legitimacy in the administration of justice itself.

84. Absent clear evidence to demonstrate that the death penalty is effective in achieving valid penological goals, and faced with evidence that the death penalty has no greater deterrent effect than imprisonment, it is evident the death penalty necessarily lacks the qualities of necessity, proportionality and 'reasonableness' required under both the Constitution and international law. Without those qualities, it is not "due law" which must be rooted in principles of justice.

E. The Effect of the Rights Enshrined in the Constitution of Taiwan

85. We submit that capital punishment breaches the core constitutional guarantees of the right to life, equality before the law and the rule of law. Capital punishment violates these fundamental rights by failing to comply with requirements to be non-arbitrary, rationally connected to its objective, proportionate and compliant with international law.

I. Right to Life / Right to Existence

86. Article 15 of the Constitution guarantees the "right to existence"—or in other words, the right to life—in Taiwan.[83] Under international law, the right to life is regarded as a "*non-derogable*" right.[84] According to Article 6(1) of the ICCPR, the right "*shall be protected by law*."[85] Having ratified and passed an act to implement the ICCPR into its domestic law, Taiwan is obligated to respect its provisions.

87. The death penalty axiomatically interferes with the right to life under Article 15 of the Constitution and wee submit that there cannot be a serious challenge to this proposition. The relevant question is whether any interference with Article 15, occasioned by a death sentence, can be rendered constitutional by operation of Article 23. We explain below, at **Section E IV** why Article 23 does not preserve the death penalty from judicial attack.

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[82] *Burns* at par. 103.
[83] Zhonghua Minguo Xianfa [Minguo Xianfa] [The Constitution of the Republic of China], Art. 15 (1947) ("Constitution").
[84] *See* Art. 4, ICCPR (". . . No derogation from article[] 6 [prohibiting the arbitrary deprivation of the right to life] . . . may be made under this provision.").
[85] *Id.* at Art. 6(1).

II. Right to Equal Treatment / Right to Equal Protection Under the Law

88. Article 7 of the Constitution provides for the principle of equality. "*All citizens of the Republic of China, irrespective of sex, religion, race, class, or party affiliation, shall be equal before the law*." Consistent with the rule of law and the protection of the law, equality before the law also protects the individual from arbitrary laws and those which operate irrationally and rob the individual of his or her dignity. As Bhagwati J said in *Ghandi v Union of India*:

> "[*E*]*quality is antithetic to arbitrariness. In fact, equality and arbitrariness are sworn enemies; one belongs* to *the rule of law in a republic, while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law*."

89. Professor Hoyle concludes her report by stating that it is "…*highly unlikely that any system could be designed which would entirely guarantee the absence of arbitrariness from every stage of the criminal justice system in the use of the death penalty*." (Hoyle §106) The risk of arbitrariness and error in capital cases arises at every stage of the process by which a person comes to be executed. The outcome of any given case will inevitably be influenced by a multitude of intersecting (and legally irrelevant) elements including caprice, political exigencies, unconscious biases, individual attitudes and beliefs, personal characteristics of the parties, and available resources.

90. The impossibility of designing and administering an infallible system capable of removing the risk of error and arbitrariness is most starkly illustrated by the failure to prevent the conviction (and sentencing to death/execution) of innocent people. In the face of the severity and finality of capital punishment, ***any*** risk of arbitrariness must be unconstitutional. There is no principled distinction between the existence of arbitrariness and inequality before the law, prohibited by Article 7 of the Constitution.

III. Rule of Law

91. Due to its inherent arbitrariness, capital punishment is also contrary to the core constitutional principle of the rule of law. Like the constitutions in other jurisdictions where the death penalty has been invalidated, the Constitution of Taiwan safeguards the rule of law.

92. The preamble to the Taiwan Constitution reflects the value of "*faithful and perpetual observance*" of the constitution by all citizens.[86] It states that the Constitution aims to "…*safeguard the rights of the people, ensure social tranquillity, and promote the welfare of the people*."[87] This frames

[86] Const. Preamble.
[87] *Id.*

how courts should view the rights and freedoms enshrined within the Constitution and guides the adjudication of human rights complaints, as preambular principles have been "*widely recognised and accepted as having jurisprudential functions, both interpretatively and substantively*."[88] The preamble to the Constitution therefore incorporates the rule of law and the safeguarding of the rights of the people.

93. Not only is the rule of law fundamentally embedded within the preamble of the Constitution, but there is a separately enforceable provision reflecting the right to the protection of the law. Article 1 of the Constitution provides that "*The Republic of China . . . shall be a democratic republic of the people, to be governed by the people and for the people*." That statement is a self-assertion of the legitimacy of the democratic government, one governed for the people and by the laws it promulgates. Moreover, the Judicial Yuan has provided an interpretation stating that "[t]*he objective of Article 16 of the Constitution, which protects the people's right of instituting legal proceedings, is to guarantee the people the said right in accordance with legal procedures and the right to a fair trial*."[89] Under these articles, the Constitution reflects a commitment to the procedurally fair rule of law.

IV. Effect of Article 23 of the Constitution

94. Based on the analysis of comparable constitutional and international law, it is evident that imposing the death penalty breaches core constitutional guarantees to protection of the right to life, equality before the law and the rule of law. However, a key provision in the Taiwan Constitution still requires consideration: Article 23, which provides that "*all enumerated freedoms and rights shall not be restricted by law except as may be necessary to prevent infringement upon the freedoms of other persons, to avert an imminent crisis, to maintain social order, or to advance public welfare*." This section addresses the limits of Article 23 and why it is incapable of preserving the death penalty under the Taiwan Constitution.

95. Broadly speaking, a protective provision contained in a country's constitution cannot operate to prevent citizens from the full realization of their fundamental rights to freedom from inhuman and degrading treatment or punishment to the protection of the law and equality before the law and to the core rights to dignity and the rule of law provided for in other provisions of the Constitution. If the death penalty can convincingly be shown to be arbitrary, irrational, disproportionate and contrary to the rule of law, the limitation clause within Article 23 does not protect the death penalty from judicial attack.

96. There are two reasons why Article 23 does not shield the death penalty from judicial attack. First, capital punishment *extinguishes* the constitutionally protected right to life, moving beyond than

[88] *McEwan v Attorney General of Guyana* [2018] CCJ 30 (AJ) at par. 61.
[89] J.Y. Interpretation No. 512 (Date 2000/9/15).

simply 'restrict[ing]' that right as is narrowly permitted by Article 23 under certain conditions. Second, there is no evidence that capital punishment has a particular deterrent effect on serious crime. The requirement in Article 23 that restricting a right "*prevents infringement upon the freedoms of others*" therefore is simply not fulfilled.

97. It is a well-established principle of constitutional interpretation that derogations or exceptions to fundamental rights and freedoms must be narrowly construed, particularly when the right itself—such as the right to life—must be construed broadly.[90] The Constitutional Court should therefore give effect to the interpretation which is least restrictive and affords every citizen of Taiwan the full benefit of the fundamental rights and freedoms. Because Article 23 seeks to limit the fundamental guarantees of the right to life and equality under the law, the article should be construed narrowly and must be subject to the founding constitutional provisions that form the "deep" structure of the Constitution.

98. Several principles become axiomatic when Article 23 is properly construed narrowly. Article 23 provides that enumerated constitutional rights shall not be "*restricted*" unless "*necessary . . . to maintain social order or to advance public welfare*." Narrowly construing the word "restrict," however, requires that the provision does not provide a power to the state to further "deprive" the people of their basic rights. There is judicial support for a distinction between the notion of abridging or limiting a right and extinguishing it altogether. A restriction of the right must not be such as to destroy the very essence of the right. A death penalty system extinguishing life therefore goes beyond the ambit of Article 23's permission to "restrict" the enumerated right to life and is contrary to the principle of proportionality.

99. Three cases illustrate this point. In the Hungarian Constitutional Court, it was held that capital punishment "*imposed a limitation on the essential content of the right to life and to human dignity, eliminating them irretrievably*."[91] On that basis, the death penalty was held inconsistent with the right to life.

100. Similarly, in *Makwanyane,* the South African Constitutional Court decided that the death penalty was inconsistent with the right to life because it did not just limit the right to life but negated the "*essential contents of the right*."[92] The Constitutional Court also distinguished the implication that the "right to life" allowed for the state's exercise of the right to self-defence in times of emergency, from the lack of limitation that the "right to life" had to allow for capital punishment for serious offences, lacking any emergency.

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[90] *Nervais*, *[2018] 4 LRC 545,* at paragraph [39]. See also *Reyes v R [2002] 2 AC 235,* at paragraph [26] and *State v Petrus [1985] LRC (Const) 699,* at 720D-F *(Botswana CA), referring to Corey v Knight (1957) 150 Cal App 2d 671; Makwanyanye per Didcott J at paragraph [174]*; Human Rights Committee, General Comment No. 36, Section I.3.

[91] Dec. No. 23/1990 (X.31) (Hungary 1990).

[92] *Makwanyane* at pars. 103 &146.

101. Finally, the Constitutional Court of Ukraine recognised the right to life as the foundation to other civil rights. The court found that the right to life is a necessary precondition for other rights, containing "…*the possibility of realization of all other human and citizen's rights and freedoms*."[93] That the right to life is 'foundational' or 'essential' places a particular burden on the state not to extinguish the right.

102. Article 23 must also be construed with regard to Taiwan's's obligation under Article 6(6) of the ICCPR not to impede progress towards abolition. The ICCPR is of particular importance given that the judiciary is required to uphold its obligations by virtue of its incorporation into domestic law. In its most recent General Comment on Article 6, the Human Rights Committee confirmed the abolitionist objective of the Covenant, reaffirming that;

> "*States parties that are not yet totally abolitionist should be on an irrevocable path towards complete eradication of the death penalty, de facto and de jure, in the foreseeable future. The death penalty cannot be reconciled with full respect for the right to life, and abolition of the death penalty is both desirable and necessary for the enhancement of human dignity and progressive development of human rights*."[94]

103. In 2010, the Constitutional Court in Taiwan dismissed a petition regarding the constitutionality of the death penalty. However, its dismissal was not directly responsive to Taiwan's obligations under international human rights law, including the ICCPR. The Constitutional Court did concede that, when the implementation act took effect, the rights ensured in the Covenants became part of Taiwan's domestic laws binding to all levels of government, including the judiciary and the Constitutional Court. The Court was willing to examine the constitutionality of the death penalty in light of the ICCPR, but it failed to grasp the meaning of Article 6 of the ICCPR and the Human Rights Committee's General Comments.[95]

104. In particular, the Constitutional Court's discussion of the ICCPR focused on Article 6(2), determining that capital punishment is permissible so long as the sentence complies with laws in force when the crime was committed and does not violate the ICCPR. However, Article 6(2) was not intended to justify and set in stone the continuance of the death penalty as the Constitutional Court appeared to have assumed, but rather to limit its application. The term "*the most serious crimes"* has been given a restrictive interpretation in the Safeguards established to Guarantee Protection of the Rights of Those Facing the Death Penalty, which were adopted with no opposition by the UN Economic and Social Council in 1984. Article 6(2) was intended only as a *'marker'* to signal that the scope of capital punishment should be restricted until it has been fully abolished. The Constitutional Court failed to heed Article 6(6) of the ICCPR and the Human Rights Committee's General Comments about Article 6. The goal of Article 6 was categorically stated in

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[93] Case No. 1-33/99 (1999), par. 6.
[94] Human Rights Committee, General Comment No. 36, par. 50.
[95] Chang Wen-Chen, *Case Dismissed: Distancing Taiwan from the international human rights community,* Judicial Reform Foundation (Sept. 2010).

Article 6(6) namely that: "*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*." In addition, Article 7 of the ICCPR embodied Article 5 of the Universal Declaration of Human Rights, protecting people from torture or cruel, inhuman or degrading treatment and punishment. Thus, the ICCPR was intended to be a *'living document'* embodying an aspiration to move towards complete abolition of the death penalty. The ICCPR provides no justification for states merely to pursue a policy of restricted use of capital punishment, as confirmed by General Comment No. 36 which restates the abolitionist objective of the Covenant, reaffirming that State parties "*should be on an irrevocable path towards complete eradication of the death penalty*".[96] These comments "*represent an authoritative determination by the organ established under the Covenant itself charged with the interpretation of that instrument*."[97] By failing to grasp these dispositive sections and the spirit and intent of the ICCPR and instead by creating a narrow interpretation, the Constitutional Court erred in its interpretation of international law. That oversight deserves reconsideration.

105. The Constitutional Court of Taiwan previously reasoned that the death penalty is justified under Article 23 because it is "necessary" "*to maintain national security, the social order, and to promote public welfare.*" The emphasis in the Judicial Yuan Interpretation No 476—and other similar rulings—is on the deterrent efficacy of the death penalty. However, the "necessity" of taking a life in the interests of the state must be empirically demonstrated. Professor Fagan's report finds no statistical trend which could support such a conclusion, showing no evidence of a special deterrent effect of the death penalty over 20 years of data (Fagan II/F/§§ 3 -6) Given Professor Fagan's expert evidence to this Court and the growing judicial and general consensus of informed sociological experts that the deterrent effect of the death penalty has not been established, it is no longer credible to suggest that the death penalty has a greater deterrent effect than the alternative penalty of life imprisonment.

106. The deterrent justification—that capital punishment effectively deters serious crime—must therefore be rejected, due to the lack of a sound evidentiary basis demonstrating any efficacy as a deterrent. *See, e.g., Atkins,* 536 U.S. at 319 (2002) ("*unless the imposition of the death penalty measurably contributes to [a valid penological purpose] it is nothing more that the purposeless and needless imposition of pain and suffering and hence a [cruel and unusual] punishment*"); *Makwanyane* at par. 239 ("*society ought to tolerate the death penalty even less when considering that it has not been proved that it has any greater deterrent effect on would-be murderers than life imprisonment.*").

107. The retributive justification for capital punishment has long been rejected as a permissible basis for the imposition of the punishment, given the inconsistency of a modern democratic society and a punitive system based on vengeance. In any event, it would not be permissible under the

[96] Human Rights Committee, General Comment No. 36, par. 50.

[97] Human Rights Committee, General Comment No. 33, Section 13.

Constitution as the retributive theory by definition is not "necessary". Absent either justification, capital punishment is necessarily arbitrary.

108. For Article 23 of the Constitution to provide a justification for the death penalty, that second premise—a deterrent effect—would have to be empirically proven. The State would have to demonstrate that capital sentences were "necessary to prevent" some other putative harm to the citizens of Taiwan. However, the State would bear the burden of showing such a statistical trend to the court. The wording of Article 23 is not permissive and requires that the infringements of rights are justified. As such, the State would have to adduce evidence showing that the death penalty in Taiwan, unlike every other jurisdiction, had a deterrent effect on serious crime. The evidence adduced here does not support that proposition. As Professor Fagan notes in the conclusion of his report:

> "[Taiwan's National Police Agency data] *strongly suggest that there is no evidence that death sentences or executions are associated with increases in the homicide, murder or robbery rates in Taiwan. The trends in three categories of violent crime are unaffected by declines over time in the imposition of death sentences or executions. Accordingly, there appears to be no evidence of the deterrent effects of death penalty sanctions generally*." (Fagan II/G/§1)

109. In abolishing the death penalty in South Africa, the Judges of the Constitutional Court in *Makwanyane* examined volumes of research across different jurisdictions and gave great weight to one clear conclusion: "*the statistical evidence comes nowhere near establishing that the death penalty is an effective deterrent against murder*."[98] Members of the court explained the various reasons as to why the penalty is unlikely ever to have real deterrent value in practice. Didcott J stated:

> "*A very large proportion of murderers were in no mood or state of mind at the time to contemplate or care about the consequences of their killings which they might personally suffer. Those rational enough to take account of them gambled by and large on their escape from detection and arrest, where the odds in their favour were often rather high. The prospect of conviction and punishment was much less immediate and seldom entered their thinking*."

110. The Constitutional Courts in Ukraine, Lithuania and the U.S. state of Washington have also emphasized, when abolishing the death penalty, both international and domestic experience showing that capital punishment serves no valid penological purpose. In *State v Gregory***,** 427 P.3d 621 (Wash. 2018), the Washington State Supreme Court held that the death penalty contributed nothing to the State's valid interests in retribution and deterrence and amounts to a wanton infliction of punishment that is unquestionably "cruel" within the meaning of the State

[98] *Makwanyane* at par. 202.

Constitution. Similarly, the Ukrainian court rejected justifying the death penalty as an effective means of crime reduction. It stated that this rejection:

> "[*I*]*s confirmed by criminological studies: the number of crimes against human life does not decline when the number of judicial sentences which envisage death penalty increases. In the course of about 40 years (since 1 April 1961 when the Criminal Code of Ukraine entered into force), the number of premeditated murders has been growing, in spite of application of the exceptional kind of punishment*".[99]

111. For these reasons, should the court find that the death penalty represents an interference with rights under the Constitution, Article 23 does not preserve the legality of the death penalty.

F. Conclusion

112. To conclude, we would revisit the questions posed by the Court in this case. We take these questions in turn below:
Question (i) *In addition to depriving an individual of the right to life, does the death penalty also interfere with other constitutional rights, such as the right to freedom from torture, human dignity, etc.?*

113. We submit that the answer to this question is yes. The very nature of the death penalty as inherently inhuman and degrading is fundamentally incompatible with the core constitutional principle of human dignity. Human dignity also underpins, and flows from, other constitutional commitments to the protection of fundamental freedoms including the rights to life, freedom from inhuman and degrading treatment (which cannot be derogated from under any circumstances), rights to equality before the law and protection of the law, freedom of conscience and expression, freedom of movement and association, freedom from discrimination and rights to participate in society. Human dignity can be seen as the starting point by which other rights are justified and without which they cannot be accessed. As the Lithuanian Constitutional Court recognised in abolishing capital punishment:

> "*The innate human rights are innate opportunities of an individual which ensure his human dignity in the spheres of social life. They constitute that minimum, that starting point from which all the other rights are developed and supplemented, and which constitute the values unquestionably recognised by the international community. Thus, human life and dignity, as expressing the integrity and unique essence of the human being, are above law. In view of this, human life and dignity should be deemed to be exceptional values. In such a case, the aim of the Constitution is to ensure the protection and respect of these values.*"[100]

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[99] Case No. 1-33/99 (1999), par. 5.
[100] Decision No. 2-98.

114. The international law instruments to which Taiwan has committed itself unanimously recognise human dignity as a foundational principle, and the right to life as one that cannot be diminished arbitrarily. The right to life is a core constitutional principle of Taiwan and operates alongside and in conjunction with the rule of law as an overarching supra-constitutional requirement with which all executive, legislative, judicial and other constitutional measures must be consistent.

115. In summary, the death penalty violates Article 15 of the Constitution, which enshrines the right to life; it violates Article 7 of the Constitution, which safeguards the right to equality before the law; and it violates the right to the protection of the law, enshrined by the preamble to the Constitution.

116. The next questions posed by the Court are:

Question (ii) *What are the goals pursued by the death penalty system? Are they all constitutional? And;*

Question (iii) *Is using the death penalty as a means to achieve the above-mentioned goals, resulting in the deprivation of people's constitutional rights, allowed by the Constitution of our country? If the death penalty is considered unconstitutional, what other criminal sanctions are sufficient to replace the death penalty? Alternatively, what supporting measures should be taken?*

117. These questions assume that it is the goal or aim of a policy which bears on its constitutionality. We respectfully submit that this is the wrong approach. Article 23 of the Constitution requires that policy aims are pursued to the extent *necessary* to address social ills. This must entail that a policy must be proportionate to its social aim. Thus, in response to both questions, we submit that a death penalty system does not achieve any valid penological goals and is not lawful under the constitutional system in Taiwan.

118. Absent clear evidence to demonstrate that the death penalty is effective in achieving the penological goals permitted and required under the Constitution, and in the presence of evidence that the death penalty has no greater deterrent effect than imprisonment, the death penalty lacks the qualities of necessity, proportionality and 'reasonableness' required under both the Constitution and international law. Without those qualities it is not "due law" rooted in principles of justice.

119. Where there is fundamental inconsistency with these principles, lesser, textual provisions (such as the limitations found in Article 23) cannot operate to deny the people the protection of the courts in upholding those principles under the Constitution, unless clear evidence of a social good is provided. There is no evidence that the death penalty confers a social good, maintains public order or has a deterrent effect on crime. The most compelling evidence suggests that the death penalty has no significant effect on public order.

120. For the reasons above, the death penalty does not address the penological goals of deterrence and rehabilitation in a manner permitted by the Constitution.

THE DEATH PENALTY PROJECT

17 March 2024

本譯文僅供參考，如有疑義，請以原文為準。

台灣憲法法庭

「死刑專案」（DPP）支持國家人權委員會（NHRC）陳述意見書

SUBMISSIONS OF THE DEATH PENALTY PROJECT IN SUPPORT OF THE NATIONAL HUMAN RIGHTS COMMISSION *BRIEF*.

雷紹爾（Saul Lehrfreund）
基利安·莫蘭（Killian Moran）
梅格·古爾德（Meg Gould）
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「死刑專案」（DPP）陳述意見書

簡介

1. 本意見書係針對　貴法庭在審議死刑是否違憲此一上位問題之下的三個主要子題進行陳述，分別是：

   死刑作為法律規定的刑罰之一是否違憲（unconstitutional）？
   (1)除了剝奪個人生命權之外，死刑是否還干預了其他憲法權利，例如免於酷刑的權利、人性尊嚴等面向？
   (2)死刑制度追求的目標為何？這些目標都合憲嗎（constitutional）？
   (3)我國《憲法》是否允許將死刑視為達成前述目標的手段，進而剝奪人民的憲法權利？如若死刑違憲，是否有其他刑罰可以替代死刑？又或者，應採取哪些相關配套措施？

2. 針對「死刑是否合憲」此一核心問題，我們的答案必然是否定的。法界普遍認為，細讀中華民國（台灣）憲法（以下簡稱「憲法」）就會發現死刑是不合法的。

3. 這些意見代表「死刑專案」(DPP)，連同國家人權委員會的法庭之友意見書一併提交。DPP是總部位於英國的非營利法律機構組織，擁有《刑法》、《憲法》及國際人權法（尤其是與死刑相關的人權法）方面的專業知識。DPP為全球面臨死刑判決之人提供免費的法律代理(以大英國協為主)，利用法律保障面臨死刑判決的受刑人，並致力於推動平等尊重所有人權的刑事司法制度。DPP的工作主要著眼於強化及落實刑事司法系統中的人權標準。三十餘年來，DPP的推動工作已橫跨三十餘國。

4. 聯合國經濟及社會理事會(United Nations Economic and Social Council)已於2016年授予DPP特別諮詢地位(special consultative status)。

5. DPP的目標是廢除死刑以及其他殘忍和非尋常的刑罰。為實現此一目標，DPP針對個人提供訴諸司法的機會，以保障遭指控犯下死刑罪之人的人權。DPP揭露司法不公，制定及推動刑事司法系統中的人權標準，鼓勵並促進以實證為依據的死刑討論，並與全球政策制定者共同倡議刑法改革。

6. 在代表個人挑戰死刑的判決和執行上，DPP擁有豐富經驗，包含向國內法院提出合憲性質疑，以及在區域和國際法庭上努力捍衛國際標準。例如，DPP就死刑判決與適用性問題向蓋亞那憲法法院提出訴訟合憲與否的質疑，還包含聖文森、聖露西亞、貝里斯、聖克里斯多福及尼維斯、牙買加、千里達及托巴哥、巴哈馬、巴貝多、馬拉威、烏干達、孟加拉、肯亞及坦尚尼亞等國的案件。[1] 特別是涉及侵犯生命權的案件，以及禁止殘忍、不人道及有辱人格之待遇和處罰、公平審判權、死刑本身在法律之前的平等性、唯一死刑之罪、死刑長期推遲、死刑犯的精神障礙、從寬處理程序以及死刑案件的量刑等問題。[2]

7. 根據《公民與政治權利國際公約》（ICCPR）及其《第一任擇議定書》，[3]DPP也向區域和國際法庭提起涉及這些問題的訴訟，包含美洲人權委員會(IACHR)、美洲人權法院(IACtHR)、非洲人權法院(ACHR)以及聯合國人權事務委員會(HRC)。

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[1] 例如，請參見Harte與Greenidge訴國家案(蓋亞那)(案號CCJ 9 (AJ) GY) [2023年]；Spence與Hughes訴女王刑事上訴案(案號20/1998、14/1997)[2001年] （聖文森與聖露西亞）；White訴女王案(案號UKPC 22)（貝里茲）[2010年]；Fox訴女王案(案號2 AC 284)（聖克里斯多福及尼維斯）[2002年]；Lendore訴千里達及托巴哥總檢察長案(案號1 W.L.R. 3369)[2017年] ；Pitman訴國家案以及Hernandez訴國家案(案號UKPC；3 LRC 407)(千里達及托巴哥)[2017年]；Lewis訴牙買加總檢察長案(案號2 AC 50)[2001年]；Boyce訴女王案(案號1 A.C. 400)(巴貝多) [2005年]；Bowe訴女王案(案號1 WLR 1623)（巴哈馬）[2006年]；Kafantayeni與Ors訴總檢察長案(第12號，案號46 ILM 566)（馬拉威)[2015年] ；檢察總長訴Kigula與Orula案(案號UGSC 15)(烏干達) [2008年] ；孟加拉法律援助及服務信託訴國家案(案號AD 1)[2015年]；Muruatetu與Anor訴肯亞案(第15和16號) [2015年]；Jebra Kambole訴總檢察長民事上訴案(第236號)（坦尚尼亞）[2019年]。

[2] 同上。

[3] 例如，請參見Kennedy訴千里達及托巴哥案，聯合國文件CCPR/C/74/D/845/1998；Johnson訴加納案，聯合國文件CCPR/C/110/D/2177/2012；Baptiste訴格瑞納達案，I/A Comm HR，案號11.473，報告編號38/00 (1999年)；Hilaire、Constantine與Benjamin等人訴千里達及托巴哥案，I/A Court HR，C系列第94號 (2002年)；Errol Johnson訴牙買加《公民與政治權利國際公約》案，第588/1994號；RS訴千里達及托巴哥《公民與政治權利國際公約》案，第684/1996號；Mackenzie訴牙買加案，I/A Comm HR，案號12.023，報告編號41/00 (2000年)。

8. DPP同時委託學術研究單位提供完整可靠的數據來支持廣泛及建設性的辯論，並據此提出對死刑謬誤的質疑並加深對死刑的理解。DPP委託了多個學術研究單位分析台灣的死刑執行。

A. 執行摘要/意見精華濃縮

9. 我們認為若按台灣的國際法律義務來解讀《憲法》，死刑並非國家可以施加的合法刑罰。死刑違反了《憲法》第七條、第十五條以及法律所賦予的保障權利。《憲法》第二十三條不能做為死刑合法化的依據，因為沒有可靠證據表明，死刑比其他嚴重刑罰具有更大的嚇阻效果，因此，國家無法證明可以透過死刑判決實現任何社會福利或利益。

10. 針對前述問題，我們懇請　貴法庭以最高標準來解釋《憲法》對於生命權保障、法律保障及法律之前人人平等的觀念。我們認為，按照國際法及判例從寬解讀這些權利的方式來解釋《憲法》是適當的。同時，為符合國際法規定，我們也會努力證明，必須提出證據證明其正當性，才能說死刑合憲。我們認為尚未出現這類證據，我們也會透過專業的學術證據來證明這類證據並不存在。

11. 提交的意見內容架構如下：

(1) B部分針對已判定死刑違反《憲法》保障的其他國際憲法法院進行了比較審查。我們審查了南非、阿爾巴尼亞、匈牙利、立陶宛以及烏克蘭憲法法院的廢除死刑判決。我們針對各項判決基礎做出說明，並強調法院的調查結果：(a)死刑侵犯了生命權的本質；(b)沒有證據可以支持死刑具有特殊嚇阻效果的論點；(c)死刑不符合刑罰的矯正目的。
(2) C部分針對《公民與政治權利國際公約》(ICCPR) 所規定的權利進行審查。台灣已將ICCPR納入國內法秩序，因此我們審查了以下權利：ICCPR第六條規定的生命權；ICCPR第七條規定的禁止殘忍、不人道或有辱人格之待遇或處罰，以及ICCPR第十四條規定的公平審判及平等權利之義務。我們審查了聯合國人權事務委員會(HRC)的法律實踐，建議ICCPR簽署國必須證明他們正走在「無可改變的完全廢除死刑之路上」。[4]
(3) D部分提供學術研究以及專家報告方面的經驗證據。內容站在是否可以透過非恣意性的方式運作死刑，以及死刑是否具有嚇阻效果等面向思考。證據內容以Carolyn Hoyle教授和Jeffrey Fagan教授撰寫的專家報告形式呈現。
(4) E部分提供《憲法》[5] 所載相關權利的當代解釋，內容納入了[1]Hoyle教授和Fagan教授的專家結論，[2]台灣在ICCPR之下的法律義務，[3] 回顧憲法法庭廢除死刑的過往判決。這部分內容亦探討《憲法》第二十三條的效力，並進一步說明，如按該條款解釋，死刑制度將受到司法上的挑戰。

B. 國際憲法法院的比較分析

12. 廢除死刑是一個多面向的進程，在所有廢除死刑的國家中，幾乎都仰賴獨立的司法體系，維護基本人權以逐步達成廢除死刑的目標。雖然少見透過單一的憲法案例即可廢除死刑，但此情形確實曾在一些歐洲國家、南非、及美國發生過。

13. 在歐洲，阿爾巴尼亞、匈牙利、立陶宛與烏克蘭等國的憲法法院都已宣布廢除死刑。這些判決都是以《歐洲人權公約》為依據，主要是基於對生命權的重視、沒有證據顯示死刑具有明確的嚇阻效果(deterrent effect)、死刑與刑罰矯正的目標相悖，以及死刑有違現代民主文明的核心價值。[6]

14. 1995年南非憲法法院在國家訴馬克萬亞(Makwanyane)案(案號ZACC 3 [163]) [1995年]（以下簡稱「Makwanyane」案）中做出廢除死刑的判決。在缺乏證據支持的情況下，死刑對於犯罪率的影響可以逕行忽略，因此法院認為，消滅生命權不符比例原則。Makwanyane案廢除死刑的判決是基於死刑背離了南非新憲法所揭示的新人權文化精神。法院致力於建立人權至上的法律架構，同時確定國家必須重視這些權利。對Makwanyane案的判決是從比例原則的角度出發，思考懲罰的合憲性問題，尤其考量懲罰本身是否殘忍、不人道或有辱人格。法院認為，雖然監禁仍然侵犯了人性尊嚴，卻是針對犯罪行為的適當回應。反之，法院認為死刑澈底破壞了權利，不符比例原則，因此不能作為合法性懲罰。

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[4] 聯合國人權事務委員會(HRC)，第36號一般性意見。2019年9月3日，第50段。

[5] 第七條提供平等原則；第八條提供正當程序保障；第十五條保障「生存權」，即生命權；至於法治則是受《憲法》保障的基本概念，包含《憲法》第一條及第十六條。

[6] 案號ALB-1999-3-008（1999年），12月，第65號；12月，第23號/1990年(X.31)（匈牙利，1990年）；案號1-33/99（烏克蘭，1999年），第3段；案號2/98（立陶宛，1998年）。

15. 在烏克蘭、立陶宛、阿爾巴尼亞及匈牙利憲法法院的廢除死刑判決中，類似的生命權框架至關重要。這些判決站在廣泛性以及目的性角度解釋了該國《憲法》所揭示的生命權意義。

16. 烏克蘭憲法法院於1999年指出，《憲法》珍視的生命權*「須獲得保障，不得廢除」*，而死刑的適用卻違反了《憲法》保障。[7]法院認為，「每個人的生命權不可分割……與人性尊嚴基本之權密不可分。」[8]法院尊重這些基本人權，並且承認這些權利不得予以限制或廢除。法院認為死刑「無法被證明是打擊犯罪的有效方式」，這一點已經獲得犯罪學研究的進一步證實，該研究指出，提高死刑適用並未降低危害人類生命的犯罪數量。[9]法院意識到司法存在著錯誤的可能性，而死刑擾亂了烏克蘭維護法治的義務，以及對「人類的生命及健康、榮譽及尊嚴不可侵犯並應予以保障……此為最高社會價值」的承諾。[10]

17. 立陶宛憲法法院於1998年做出死刑不符合兩項《憲法》條款的判決：保障生命權（第十九條）和禁止酷刑及不人道處罰（第二十條）。[11]法院認為，死刑是刑事司法制度中的一個例外，刑事司法制度既該保護公眾，也該針對犯罪者進行再教育或矯正。法院還發現，ICCPR和《歐洲人權公約》(ECHR)特別重視人類生命與尊嚴，這部分與死刑消滅生命的作法背道而馳。

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[7] 案號1-33/99（烏克蘭，1999年），第3段。

[8] 同上。第6段。第二十七條和第二十八條分別是(a)「不可剝奪的生命權」和(b)人性尊嚴受到尊重的權利，以及禁止酷刑、殘忍、不人道或有辱人格之待遇或處罰侵犯人性尊嚴的權利。

[9] 同上，第5段。

[10] 同上，第5及第6段。

[11] 案號2/98 ，《刑法》第105條關於死刑的制裁規定（立陶宛，1998年）。

18. 阿爾巴尼亞。阿爾巴尼亞憲法法院於1999年判決，死刑違反了《阿爾巴尼亞憲法》第二十一條保障生命權的規定。[12] 法院指出，儘管憲法規定了生命權的例外情況，即透過逮捕或鎮壓叛亂等合理武力來防止非法武力，但死刑並不屬於例外情況。[13]法院進一步指出，阿爾巴尼亞的憲法保障必須在《歐洲人權公約》的背景下進行解釋。[14]最終，法院得出的結論：死刑侵犯了生命權以及人性尊嚴的本質。最後，法院對於死刑能否發揮有效的懲罰目的表示懷疑，但認為監禁及處以罰款極有可能成為替代性懲罰選項，而且這類懲罰無礙於罪犯重新融入社會。[15]

19. 一如其他歐洲司法管轄區，匈牙利憲法法院也廢除了死刑，因為死刑侵犯了《匈牙利憲法》珍視的生命權（第五十四條規定「……每個人都享有固有的生命權以及人性尊嚴，沒有人可以恣意剝奪這些權利」）。[16]法院認為死刑具有恣意性。[17]鑑於匈牙利國內法及其國際義務(包含批准了ICCPR)，法院認為死刑的恣意性將凌駕於刑事司法對人類生命固有尊嚴的重視。一如阿爾巴尼亞及烏克蘭，匈牙利憲法法院的判決也提及死刑缺乏嚇阻作用。[18]

20. 1972年，美國最高法院在Furman 訴喬治亞州案（408 U.S. 238（1972））中判決，死刑構成了殘酷和非尋常的懲罰，原因是其具有恣意和歧視的影響。法院認為：

> *「國家蓄意殺害人類，本質上就是否定了被執行人的人性。國家對人類生命蓄意扼殺，並且對人的尊嚴造成獨特的侮辱……死刑被認為與以下四個基本原則不相容：死刑是一種特別嚴酷和侮辱性的懲罰；有很大的可能性是恣意性的；當代社會幾乎完全拒絕死刑；且沒有證據顯示它比監禁懲罰更有效。這些原則旨在幫助法院判斷某種懲罰是否符合人類尊嚴，但死刑沒有這些作用。」*[19]

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[12] 案號ALB-1999-3-008（1999年），12月，第65號。
[13] 同上。
[14] 同上。
[15] 同上。
[16] 案號23/1990（X.31），12月（匈牙利，1990年）。
[17] 同上。
[18] 同上。

21. 因此，由於發現死刑具有「異常嚴酷和侮辱性」、高度恣意性的可能、當代社會普遍反對，以及缺乏證明其達到刑罰目的的證據，美國法院判決死刑為憲法下的「殘酷和非尋常的懲罰」。1972年的這一判決宣告了當時所有死刑法律的無效性，即使後來最高法院又重申了一個更嚴格的死刑規定。

22. 儘管美國最高法院目前對死刑仍保持其立場，但羅德島、紐約、康乃狄克州、德拉瓦州和華盛頓州的最高法院已宣布死刑制度違憲。[20]特別是，華盛頓州最高法院宣布該州的死刑法案違憲，因為它在應用上是恣意和種族歧視的。[21]

23. 正如美國出現的趨勢，全球越來越多的權威機構也確認，鑑於死刑的殘忍、不人道和有辱人格的本質，它已不再適合文明民主社會。這一觀點在南非憲法法院對Makwanyane案的判決中得到了明確表達，肯特里奇(Kentridge)法官指出：

> *「有充足的客觀證據顯示，隨著文明標準的提升，在追求自由與民主的國家中，死刑被認為是不可接受的。在文明的民主社會裡，死刑不僅對於被處決的個人來說是一種殘酷、不人道和有辱人格的行為，對施行死刑的社會本身也是有害的。」*[22]

24. 這一觀點在整個歐洲引起了廣泛共鳴，目前幾乎普遍認同在一個重視人權和法治的社會裡，死刑已失去其存在的意義。2005年，歐洲人權法院表示死刑「在民主社會中已不具有合法地位」[23]，這一點在兩年後得到歐洲理事會的迴響。[24]同樣地，在加拿大最高法院對Burns案的多數意見中，明確認為死刑違背了禁止殘酷和非尋常懲罰的基本價值觀。[25]南非的Makwanyane案的主要判決也表達了相同的觀點。[26]

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19 408 U.S. at 290-291（多數意見）、305（J. Brennan, 同意意見）。
20 死刑資訊中心（2023），https://deathpenaltyinfo.org/state-and-federal-info/state-by-state。
21 同上。
22 關於Makwanyane，第199段。
23 Ocalan 訴土耳其，歐洲人權法院（第一部分）46221/99，2005年5月12日判決第[169]段。
24 「死亡不是正義」，歐洲理事會，2007年1月，參考號1997GBR1270，詳閱 https://edoc.coe.int/en/death-penalty/5477-death-is-not-justice.html。
25 Burns，第78段。死刑是一種「殘酷、不人道和有辱人格的懲罰」，因為它「摧毀人性的尊嚴……存在恣意性的因素……且無法挽回。」
26 阿爾巴尼亞、匈牙利、立陶宛和烏克蘭的憲法法院的判決中也有類似陳述，它們都認為死刑違反了禁止不人道和有辱人格待遇的規定。

25. 上述提及的各項憲法判決都圍繞著幾個共同的主題和因素。我們強調當前和先前的挑戰所基於的四個主題：

(1) 首先，死刑違反了包括生命權、人格尊嚴以及不受酷刑或不人道或侮辱性處罰等基本人權。這些權利是至關重要的，因為所有其他的公民權利都是建立在它們的存在之上。

(2) 其次，死刑與犯罪司法系統追求的矯正目標背道而馳。犯罪司法體系旨在保護公共安全和促進罪犯改過自新之間尋求平衡，而死刑則澈底剝奪了任何改過自新的機會。

(3) 第三，沒有任何刑事司法系統是絕對無誤的，錯誤的風險始終存在，且司法系統可能會受到恣意性的影響。因此，司法制度中必須設置相應的保障措施來防止錯誤發生，但死刑的不可逆轉性卻使得這些保護措施變得無效。

(4) 第四，考慮到死刑的殘忍、非人道和侮辱性的本質，它對於被處決者以及實行死刑的社會都造成了傷害，因此在一個文明民主社會中，死刑已無立足之地。

[26] 關於Makwanyane，第95段。

C. 《公民與政治權利國際公約》的影響

26. 台灣已經將《公民與政治權利國際公約》（ICCPR）納入國內法[27]，因此公約中的義務與權利，與台灣憲法對基本權利的解釋及保障密切相關。《公民與政治權利國際公約及經濟社會文化權利國際公約施行法》（以下簡稱「台灣法案」）提到*「兩公約所揭示保障人權之規定，具有國內法律之效力。」*[28]

27. 因為台灣已經透過「台灣法案」(兩公約施行法)將兩公約國內法化，因此必須尊重公約規定的義務，有責任「準備、促進及實施」公約規定的義務，並且解釋憲法以落實公約規定的權利與自由。[29]在此部分，我們關注兩公約與台灣憲法保障的兩個基本權利，也就是生命權及法治原則。

I. 生命權

28. 有些司法管轄區內的支持者以生命權為依據，成功論證死刑制度侵犯這項基本且不得克減(non-derogable)的憲法權利。以侵害生命權為由而對死刑提出挑戰，不僅基於國內法的規定，也依據國際法律的原則與義務，強調生命權的重要性。

29. 締約國有責任建立法律框架以確保人民充分享有生命權，因此，生命權不應該被狹義解釋，而是要給予廣義地解釋，國家有義務尊重生命權且「避免任何導致恣意剝奪生命的行為。」[30] 事實上，聯合國人權事務委員會（HRC）明確指出，國家當局「剝奪生命」將是「一種極其嚴重的問題」。[31]基於這樣的認知，聯合國人權事務委員會也明確指出，「任何剝奪生命的理由都必須有法律依據，必須足夠明確的定義，避免過度廣泛或恣意的解釋與應用」，確保在法律及實務上都不會出現恣意性。[32]

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[27]《公民與政治權利國際公約及經濟社會文化權利國際公約施行法》第1條（2009年4月22日頒布），中華民國法務部法律與條例資料庫，網址：http://mojlaw.moj.gov.tw/EngLawContent.aspx?id=3。請參閱司法院回應公約施行法頒布後的條例；促進快速及公平審判的立法，司法院（2009年11月5日），網址：http://jirs.judicial.gov.tw/。

[28] 同上。

[29] 同上，第4條。

[30] 聯合國人權事務委員會，一般性意見第36號，第1.7部分（2019年9月3日）。

[31] 同上，第3.19段。

30. 為明確勾勒出此規定的輪廓，聯合國人權事務委員會對於恣意剝奪生命給予如下定義：

> *照慣例，如果剝奪生命不符合國際法或國內法，通常就是恣意的行為。所謂「恣意性（arbitrariness）」必須要廣義定義以涵蓋不適當、不公正、缺乏可預見性及正當法律程序，以及缺乏合理性、必要性及比例原則等要素。*
>
> *生命權必須受到尊重且確保不會受到種族、顏色、性別、語言、政治或其他意見、國籍或社會出生、財產、出生或其他身分地位、包含種性、種族、原住民身分、性傾向或性別認同、身心障礙、社經地位、白化病及年齡等的歧視，任何基於法律或事實上的歧視而剝奪生命的行為都具有恣意性。*[33]

31. 聯合國人權事務委員會(HRC)還提到尚未批准《第二任擇議定書》及保留死刑的《公民與政治權利國際公約》的締約國義務。針對這些締約國，HRC指出，禁止對任何其他犯罪適用死刑，除了「最嚴重且受到一些嚴格條件限制的犯罪。」[34] 同樣重要的是，HRC也要求死刑判決符合「犯罪發生時有效的法律」，不違反《公民與政治權利國際公約》的現存規定。[35]

II. 法治與法律保護

32. 法治已被視為是憲法訴訟中的基本概念，尤其是，加勒比海法院承認圭亞那、貝里斯及巴貝多憲法中存在的原則。其中巴貝多法院指出：

> 「法律保護是基於憲法法治的基本核心要素之一。它為每個人，包含被定罪的殺人犯，提供充分的保障，使其免受不理性、不合理、根本上不公平或恣意的侵害[36]。

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[32] 同上。

[33] 同上，第V.61部分。

[34] 同上，第II.16.部分。

[35] 同上，第IV.28部分。

[36] A-G訴Boyce及Joseph案[2006]CCJ 1，在Nervais訴女王案中多數法官贊同引用該判決[2008]CCJ19[44]以及Quincy McEwan及其他訴圭亞那檢查總長案[2018]CCJ30[119]並且在Lucas訴教育長案，Saunders法官同意此觀點。

33. 加勒比海法院進一步強調法治包含自然正義原則、程序性及實質性正當程序，以及法律保護等概念。受法律保護的權利因此要求法律，需具備足夠的質量並且提供充分的保障，以防止非理性、不合理、基本上的不公平或恣意性的權力行使[37]，同時提供有效的救濟(remedies)。

34. 法律保護權利也要求國家有遵守國際義務的責任，包含根據《公民與政治權利國際公約》第6(1)條非恣意剝奪公民生命的義務。第36號一般性意見中，聯合國人權事務委員會指出，「『恣意性』必須要廣義定義以涵蓋不適當、不公正、缺乏可預見性及正當法律程序，以及缺乏合理性、必要性及比例原則等要素。」[38]

35. 印度法學強調承認人性尊嚴作為主權民主的基本原則上，為實質法治概念奠定思想基礎，在*Rajesh Kumar*n訴新德里政府案中，印度最高法院提出一個「法學典範的轉移」，亦即從殖民地時期形式主義的法治概念（不優先考慮「生命的價值與尊嚴」）轉變為實質的「正當法律程序」，這與獨立後的印度的憲法核心價值「個人尊嚴」是一致的。[39]此外，反過來說，實質法治的基本性質也在印度憲法中納入禁止酷刑及不常見的懲罰的規定，認同「對於人性尊嚴的基本尊重。」[40]

36. 因此，在印度，死刑的法律規定並未能滿足上述要求，任何執行死刑或下令執行死刑的「判決」仍必須符合死刑犯受法律保障的權利。如同Krishna Iyer法官在Maneka Ghandi訴印度公會及其他案所解釋的，「程序由法律制定，如果我們不在這些沉重的字句中加入一個形容詞般的法規，他的靈魂是文明的、他們內心的公正的，他還規定一些必要條件，如果沒有這些必要條件，程序的尾巴就會動搖實質性的大腦，那麼生命與自由就會淪為危險的玩物。」[41]

37. 生命權、依法而治、以及法律保障等原則，都明確奠基於國際文獻及法理論述之中。總之，在死刑問題上，生命權與法律保護權都要求締約國應謹慎行使死刑權限，並且注意避免在作出剝奪個人基本生命權的決定時不受無關因素的干擾影響。

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[37] 同上。

[38] 聯合國人權事務委員會，一般性意見第36號，第12段。

[39] Rajesh Kumar訴新德里政府案，犯罪申訴第1871-1872號，2011年，第35、66、66段。

[40] 同上，第76段。

[41] 同上，第74段（引用Maneka Ghandi訴印度公會與其他案，AIR 1978 597, 1978 SCR (2) 621）。

D. 專家證據

38. 在這一部分，我們根據專家證據指出死刑判決存在兩個問題：（一）恣意性（二）缺乏嚇阻效果。所謂恣意性，指的是導致個案結果出現不同且無法確切衡量的因素，我們歸納為六個原因。

39. 專家證據顯示，從實證數據來看，死刑並沒有明顯降低重大犯罪的效果。從數據來看，死刑與重大犯罪之間似乎沒有直接的關聯性。

40. 附上卡羅琳・霍伊爾（Hoyle）教授及傑佛瑞・費根（Fagan）教授的報告。

（一）Hoyle教授是牛津大學法學院刑事學中心的刑事學教授，並且是牛津死刑研究單位(Oxford Death Penalty Research Unit)的主任。她的履歷已附在她的報告中。

（二）Fagan教授是哥倫比亞法學院的伊西多爾與賽維爾－蘇爾茨巴赫法學教授，哥倫比亞大學梅爾曼公共衛生學院流行病學系教授，以及耶魯法學院的資深研究學者。他的履歷已附在他的報告中。

I. 恣意性

41. 為了避免死刑的恣意執行，必須確保整個過程公正、公平，並且根據保障被告權益的法律程序來進行，遵循調查、審判、判決、上訴到上訴後的所有程序，從而防止任何對被告的不公正對待。這不僅可以避免誤判的發生，也可以預防在死刑執行過程中可能出現的偏見、歧視或恣意行為(arbitrariness)。

42. 唯一死刑之罪除了違憲之外，也公然違反了司法獨立的法治精神，這樣的法律論點早已存在許久。更重要的是，該罪刑具有恣意性方面的適用性問題。如今，反對恣意剝奪生命的立場已極為堅定，因為恣意剝奪生命違背了法治與民主社會的基本原則，本質上相當於國際法上的強制法規範（jus cogens）。[42]

[42] 例如，請參見Thompson訴聖文森案(2000年)，聯合國第806/1998號意見。文件編號CCPR/C/70/D/806/1998，2000年10月18日；Kennedy訴千里達及托巴哥案(2002年)，聯合國第845/1998號意見。

43. 自由裁量量刑制度雖然避免了與強制性制度有關的某些特定形式的恣意性，但僅是如此無法形成一個沒有恣意性的制度。台灣於2006年廢除了唯一死刑（Hoyle，第12段），但其刑事司法體系在運作上仍未臻完善。許多司法機構已經意識到，任何存在於法律體系中不可免除的缺陷總會導致死刑執行的不一致以及恣意性風險，而任何自由裁量制度中存在的缺陷都會導致個別或累積性的恣意性結果，包含以下六項風險因素：

(1) 針對受害者和/或犯罪者個人狀況的不平等與歧視性，適用的保障措施不足。

44. 無論個別案件的罪行嚴重度如何，已證實種族、性別、社經地位與罪犯心理健康等特性對死刑案件的判決結果具有強大的決定性影響。社經地位成為決定性因素理由不言可喻：那些擁有更多資源與影響力的人更有可能獲得更有力的代理人為其效力，包含取得調查資源及高品質的律師，增加無罪釋放及減輕懲罰的機會，並能獲得上訴（及上訴成功）機會。Hoyle教授留意到此一趨勢，並根據現有的統計數據得出結論，這方面台灣並無不同（Hoyle，第33-35段及39段）。

45. 刑事司法程序的每一個階段都存在著無意識及故意的偏見。不僅法官可能受到個人對被告看法的影響；警察及檢察官會針對即將進入刑事司法程序的人員作出專業判斷；專家證人針對被告提出意見，並將意見寫入報告中。在所有個人做出專業判斷的過程中，每個階段都存在著潛在偏見。

46. 在美國、南非與千里達及托巴哥等加勒比海國家進行的研究指出，死刑訴訟過程中存在著歧視，包含警察、檢察官、法庭、法官以及政治人物的「無意識偏見」(或譯為「隱性偏見」，Unconscious biases)，可能是對特定「類型」兇殺案所抱持的態度導致出這樣的結果，而這個結果對社會中的不同群體或行業產生了不成比例的影響。[43] Hoyle教授同樣觀察到這種趨勢。例如，Hoyle教授指出，美國的研究發現，雖然受害者與被告的種族特性在法律上不具關聯性，卻可能成為判處被告死刑的指標（Hoyle，第31-32段）。Hoyle教授同時強調，在各司法管轄區內，其他非法律相關因素也可能影響死刑判決。為支持此一論點，她指出，在印度「……階級和種姓制度也會影響量刑」；在亞洲和中東部分地區「……外國公民因死刑罪遭到逮捕時，無法享有等同於該國公民的權利」（Hoyle，第35段）。

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[43] David Baldus、Charles Pulaski及George Woodworth，「死刑判決的比較審查：喬治亞實證經驗研究」，《刑法與犯罪學期刊》第74(3)期，第661-753頁（1983年）；德里國立法律大學，計畫39A，《印度死刑報告》（2016年），請參見網址：https://www.project39a.com/dpir； Makwanyane案，第48-49段；Roger Hood與Florence Seemungal，《罕見而恣意的命運：千里達及托巴哥的兇殺定罪、唯一死刑之罪與殺人現況》（倫敦：死刑專案，2006年）。

47. 在南非，儘管與犯罪本身缺乏連結，但導致死刑判決可能性提高的四個經常性交織因素是貧困、種族、性別，以及分配到的公益辯護律師。[44] 針對Makwanyane案，南非憲法法院Mahomed法官簡略說明了任何死刑執行制度難免存在著固有的恣意性，他指出：

> 「這個過程存在著固有的恣意性風險，因此無法確定及預測哪些死刑罪被告將逃脫死刑懲罰，哪些不會……。最終結果並不取決於可預測的客觀標準，而是大量的可變因素。」[45]

48. 在肯亞，死刑的恣意性顯而易見。根據統計，死刑犯牢房中，低社經地位和並未接受小學以上正規教育的犯罪者占比明顯偏高。Hoyle教授指出，台灣的死刑犯也有類似的統計趨勢（Hoyle，第38－39段），這代表台灣的刑事司法系統不成比例地判處死刑，至少有部分原因是基於非法律因素。

49. 與此相關的是，雖然法律原則上保障精神障礙罪犯，避免判處這類罪犯死刑，並要求法院了解死刑被告的心理健康狀況，但這些保護措施的作用卻在實務中被削弱了，因為精神疾病或身心障礙者無法取得證明其缺陷的醫學證據，不論無法取得證明的原因是由於貧困，或是因為缺乏足夠的心理健康服務和專業知識等系統性因素。[46] 此外，一如美國最高法院在Atkins訴維吉尼亞州案(536 U.S. 304 (2002))中所承認的，精神疾病此一特性很容易破壞程序保障，這部分包含因應法律程序的能力下降、無法與律師有效合作，以及缺乏涉及犯罪或減輕懲罰資訊的有效溝通能力。[47] 精神疾病也可能影響法院對犯罪者動機及矯正能力方面的看法。

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[44] Makwanyane案，根據憲法法院院長Chaskalson的意見，第48-49段。

[45] Makwanyane案，第273段。

[46] 例如，請參見世界衛生組織，WHO-AIMS加勒比地區精神健康系統報告（2011年）。

[47] 案號536 U.S.，第320-321頁。

50. Hoyle教授的報告強調台灣有此現象。雖然《刑法》原則上禁止對精神障礙之罪犯判處死刑，但Hoyle教授指出，精神疾病和/或智力障礙患者在台灣仍然被判處死刑（Hoyle，第70-71段）。證據顯示，儘管具有法律保障，但是系統性缺陷卻使得法律原則及保障措施都無法阻止精神疾病罪犯被判處死刑，而精神疾病仍然是所有死刑制度中死刑執行增加與否的決定性因素。

51. 現有證據清楚表明，任何保障措施都不太可能消除個人因素在過程中所發揮的作用。意識到此一現實，就代表死刑的恣意性不可避免。一如Douglas法官在Furman訴喬治亞州案(408 U.S. 238, 242 (1972)) 中所做出的總結，「如果一名被告是因為種族、宗教、財富、社會地位或階級因素而被判處死刑，又或者是因為司法程序基於這類偏見而對其做出死刑判決，都是不尋常的判決結果，這一點似乎無可爭議。」

52. 在這一點上，台灣與其他國家並無不同。儘管自《公民與政治權利國際公約》(ICCPR)批准以來已實施了保障措施，但台灣的死刑制度在許多方面仍存在著缺陷。該制度並非沒有錯誤或恣意性存在，而這將導致非關法律因素的死刑判決（Hoyle，第97-99段）。

(2) 缺乏適足的客觀門檻來決定哪些案件應該判處死刑

53. 將死刑的使用限制在「極其罕見」案件（涉及「最嚴重」的案件以及被認為沒有教化可能的案件）的法律原則，並不足以消除不一致的風險，以至於產生恣意性的死刑判決。[48]在應用這些原則的過程中無可避免地具有主觀性，並且容易因為人類偏見、態度、經驗或信仰等因素而發生變化，導致恣意性引發真正的風險。Hoyle教授描述了量刑法官的主觀觀點，這些觀點導致被告陷入「法理學中的『流沙』。」（Hoyle，第82段）。

54. 判處死刑所涉及的「主觀判決」會出現在死刑判決過程的多個階段之中，包含：哪些罪行應該判處死刑的立法定義、檢察官的自由裁量權，以及法官是否認為擺在眼前的事實無可避免地應該做出死刑判決。

[48] 印度最高法院在Bachan Singh訴旁遮普邦案(案號2 SCC 684) (1980年)中引用了「極其罕見」一詞。

(3) 調查資源的保障性不足，以及缺乏適足的法律代理(辯護)

55. 由於死刑屬於不可挽回之刑罰，因此，死刑案件中的律師是否有足夠的能力防止誤判至關重要。例如，美國德克薩斯州的Todd Willingham因為縱火導致自己的三名孩子死亡而被判處死刑，之後才確定火災的發生原因並非縱火，而是意外。[49] 法院指定的律師在審判以及定罪後審查等過程中因為缺乏必要的經驗與資源進行充分辯護，釀成了悲劇性結果。經驗顯示，如若律師的能力或經驗不足，那麼程序保障措施也就無法消弭錯誤或任意性風險，也無法保障公平審判。如若律師有能力但礙於法律援助制度而無法為委託人提供充分辯護，也可能存在類似的缺陷。

56. 台灣的《刑事訴訟法》第三十一條強制規定被告必須接受辯護，但該法第三百八十八條於三審時取消了這項權利。因此，如若被告進入三審審判而未曾聘請辯護律師，審判長也不曾為被告指定公設辯護人或律師，則該案在缺乏專業辯護人的協助下將成為終審案件。自2000年至2011年，儘管遭求處死刑的六十一名被告缺乏法律代理人，最高法院仍維持了九十三項死刑判決。[50] 此外，《刑事訴訟法》第二百八十九條規定，法官得斟酌情形就被告之死刑判決進行言詞辯論。這意味著，即便是死刑案件，在三審階段的審理中也不一定會允許進行言詞辯論。

57. 針對這些問題，台灣憲法法庭於 2010年做出了判決。[51]法庭認為，法律援助制度的設立彌補了第三級審判中強制辯護的不足，只要符合第三百八十八條規定就不以違憲論。而根據國內法，被告仍有機會獲得律師協助。此外，判決指出，即便量刑時未曾進行口頭辯論，刑事被告仍有機會在量刑之前提出他們對可能量刑結果的意見陳述。[52]

58. 不過，這些聲明卻將獲得律師協助以及正當程序之「權利」降格為機會，並且誤解了ICCPR條款的真諦。該項判決違反了《憲法》第八條規定的正當程序保障，理由是不允許死刑被告保有等同於下級法院訴訟以及每個訴訟階段享有辯論之權的強制辯護之權，同時也違反了ICCPR第十四條規定，該條款保障被告於整個刑事訴訟過程中享有律師協助之權利。

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[49] David Grann，《火災審判：德州處決了一名無辜者？》， 《紐約客雜誌》，2009年9月7日，第42頁。

[50] Jaw-Perng Wang，《台灣死刑現況》，台大法律學院6(1)修訂版，第143及156頁(2011年)。

[51] 司法院大法官駁回第9741號上訴(2010年)。

[52] 同上。

(4) 政治決策產生的必然作用

59. 即便死刑案件的偵查、控告、審判過程可以排除恣意性決策，但處決罪犯的判決必然具有恣意性。行政部門簽署死刑執行令、赦免罪犯、正式（或非正式）暫停執行死刑，甚至暫停執行後恢復執行之決定，都可以根據普遍性的政治因素而改弦易轍。聯合國法外處決、即行處決或任意處決問題特別報告員將這些因素稱之為「隨機」決定（Hoyle，第87-88段），因為這些決定並未涉及法律因素。

60. 早期，容易受政治因素影響的決策包含立法者選擇死刑適用案件，以及檢察官和警方決定調查及起訴資源集中於何處。此外，執行死刑的時間以及選擇死刑犯等決定不可避免地涉及到政治動機或「隨機」決策，本質上這些決策都具有恣意性。

61. 對於這些政治性決策，台灣並不陌生。2010年3月，前法務部長王清峰女士因為拒絕簽署四十四名死刑犯的執行令而請辭下台。不到兩個月時間，法務部即打破四年暫停執行死刑的狀態，震驚各界。其中有四名死刑犯在事先未曾通知媒體也未曾被告知法律規定程序的情況下遭到處決。[53]

62. 可能會在一段長時間的明顯延遲後做出這類決定。Hoyle教授指出，「……台灣三十七名死刑犯中，只有一、兩名死刑犯入獄時間不超過五年。絕大多數入獄時間超過十一年，只有不到一半的死刑犯入獄時間超過二十年。」（Hoyle，第83段）。沒有客觀的方法可以確定罪犯何時以及會在何種情況下遭到處決。

(5) 科處死刑比例低 (Low incidence of punishment)

63. 正如美國大法官布倫南(Brennan)在Furman 案的協同意見書(concurring judgment)中所述：「當法律上可判處死刑的案件中，只有極少數科處死刑時，無可避免地會出現這樣的結論：死刑是恣意性判決。」布倫南以「宛如抽中彩券（*lottery*)」來形容死刑判決的不可預測性。[54]

64. 台灣的狀況亦然。自2000年至2011年間，儘管台灣有千餘名犯罪者符合法定死刑要件，但實際被判處死刑的僅有93件（占總數的8.4%）。[55]如此低的死刑判決率，一方面讓人質疑死刑是否能有效嚇阻犯罪，更令人擔憂的是恣意判決死刑的不可預測性(capricious)。

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[53] 請參見Vincent Y. Chao，《維持死刑的合法性》，《台北時報》（2010年5月29日）；Chang Wen-Chen，《案件遭駁回：拉遠台灣與國際人權界的距離》，民間司法改革基金會（2010年9月）。

[54] Furman案，案號408 U.S.，第293段(Brennan法官，協同意見）。

(6) 設計和執行一個沒有誤差、無恣意性風險的完美系統是不可能的

65. 未能明顯阻止無辜者被定罪（和判處死刑/處決）可以用來說明死刑涉及的固有風險程度。2016年，全球至少有六十名死刑犯被無罪釋放。在美國，每八名死刑犯遭處決便有一名被無罪釋放。[56] 審查三個不同司法管轄區的死刑執行狀況後，加拿大最高法院在美國訴Burns SCC 7案[2001年]中承認：

> 「儘管加拿大、美國和英國為保護無辜者而制定了詳盡的保障措施，但近期不斷爆出的兇殺案錯誤定罪事件仍悲慘地證明了法律體系具有易錯性的事實。」[57]

66. 伯恩斯(Burns)一案的法院也強調，儘管各界樂見鑑識科學出現長足的進步，但錯誤定罪卻不太可能透過先進的鑑識科學獲得解決，因為錯誤定罪通常是源自於「可能永遠無法消除的刑事司法系統弱點」，而「司法系統總是有可能辜負被告的期望。」[58]

67. 即使在如美國等對死刑案件執行嚴格保障措施的國家，[59]也無法完全排除錯誤以及錯誤所產生的影響。台灣也有相關的案例發生，已遭處決的罪犯後來透過新證據而被證明無罪。Hoyle教授引用了江國慶的案例。士兵江國慶於1997年因強姦及殺害一名五歲女童而遭誤判處決，其冤案後來獲得死後平反。[60]Hoyle教授接著指出，2006年至2015年期間，台灣記錄了六十二起死刑判決，其中約有半數在死刑證據和/或法律門檻方面具有缺陷。此外，超過 15%的判決「……存在嚴重缺陷，沒有重要的罪證可以支持檢方的有罪關鍵主張」（Hoyle，第62-64段）。

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[55] Wang，《台灣死刑現況》，第162頁。

[56] 美國公民自由聯盟，《無罪的問題》（2003年12月），請參見網址：
https://www.aclu.org/documents/question-innocence。

[57] 美國訴Burns SCC 7案[2001年]。

[58] 參見Burns案第116段。

[59] Hoyle教授提及美國體系的「嚴格正當法律程序」要求，如（Hoyle，第54段）所述。

[60] Hoyle教授於報告中提及其他誤判案例（Hoyle，第58-61段）。

68. 儘管許多擔憂可能同樣適用於其他懲罰，但在死刑背景下，恣意執行的後果尤為嚴重。鑑於死刑具有嚴厲性與終極性特質，一如Furman案引發的省思，「所有刑罰中，死刑自成一格。」[61]

II. 缺乏證據證明死刑具有有效的刑罰目的

69. 死刑法學論述傳統上會提出兩個支持死刑的正當化論述：「報復與嚇阻」，聖經中以「以牙還牙、以眼還眼」一詞概述報復的理由[62]，但長期而言，這個理由並不被視為是同意死刑的依據，只憑這個理由就允許剝奪一個人的生命，從本質上來說是對社會的侮辱，根本上也不符合民主社會的人性尊嚴原則。因此，南非及立陶宛憲法法院在考慮現代民主社會該如何對待其公民時， 都堅決拒斥以牙還牙式的應報等身（punitive equivalence）原則。[63]立陶宛法院有進一步表示，出於「心理因素」的報復立場是「可以理解的」，但當產生：

> 這種邏輯適用到其他犯罪類型，就可以知道「犯罪行為必須受到（與其犯罪行為）同等懲罰」的原則是不被接受的。不能將受害者受到的傷害同樣加諸在犯罪者身上，這是現代文明社會所不被接受的。[64]

70. 國際量刑原則的制訂同樣體現對於上述應報等身思維的拒斥，這些原則不僅要求關注特定犯罪的嚴重程度，也要求關注罪犯的情況以及改過自新的可能。[65] 僅憑社會「報復」慾望作為理由的脅迫行為，不同被合理納入對於他人權利與自由合法保障的範圍－特別是在憲法內容作為法治工具時。

71. 死刑在法學上唯一可能存在的合法理由是，它可以透過嚇阻進一步的犯罪來保護其他公民的權利及自由。然而，除非有充分的證據證明死刑能有有效嚇阻重大犯罪，否則故意剝奪生命與其欲達嚇阻目的之間並無合理關聯。

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[61] Furman, 408 U.S.，第289段。
[62] 詳見Gregg訴Gerogia案，428 U.S.153,183 (1976)。
[63] 第2/98號(立陶宛1998); Makwanyane案第129段。
[64] 第2/98號(立陶宛1998)。
[65] 詳見Santosh Bariyar訴Maharashtra國家案[2009]INSC 1056。

72. 在國際法學中，缺乏比其他嚴重懲罰形式更強的嚇阻效果已被反覆引用作為不執行死刑的理由，如同美國最高法院在Atkins案件所述，「廢除對於青少年的死刑時：除非判處死刑對於[有效的刑罰目的]有重大的貢獻，否則死刑不過只是沒有目的且沒有必要的痛苦與折磨，因此是種殘忍且非尋常的懲罰。」[66]

73. Madala法官進一步說明死刑在Makwanyane案缺乏嚇阻效果：

> 死刑是一種帶來巨大痛苦與折磨的懲罰，即使在目前犯罪率居高不下的情況，文明社會也不應該容忍死刑。如果考慮到死刑對於潛在殺人犯的嚇阻效果並沒有比終身監禁更大，那麼社會就更不應該容忍死刑。[67]

74. 在缺乏明確證據證明死刑有效的情況下，死刑必然是恣意的。這就是匈牙利憲法法院多數及贊成意見的推論，包含Dr Zlinzky法官主張：

> 「我認為，懲罰必須具有預防犯罪的目的，這已是一項被默認接受的憲法原則。它只有在能達成其目的時才具備正當性，當它無法達到預防犯罪的目的、或是只有在付出更大的代價才能達到目的時，它就失去了其法律依據。[...] 有鑑於此，死刑的必要性到目前依然未經確認，而死刑的使用或存廢究竟是基於立法機構的決策權，還是只是為了維持現狀(status quo)，而讓它恣意的(arbitrary)存在。」[68]

75. 這些觀點受到Jeffrey Fagan教授專業報告的支持，更廣泛地說，Fagan得出結論認為，該領域的普遍觀點是懲罰的嚇阻理論是「不可信的，而且在許多情況下是錯誤的。（Fagan II/D/§§1-2）」自1999年起的15年間，美國的死刑判決及執行都以同樣的速度下降，無論是保留死刑還是廢除死刑的州，其殺人率都沒有受到這些死刑執行或死刑判決風險變化的影響，Fagan教授認為可以強烈推測，死刑判決與犯罪率之間沒有關係，特別是針對重大犯罪。（Fagan II/D/§§6-8）

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[66] 536 U.S.，第319段（引用Enmud訴佛羅里達案，458 U.S.782, 798（省略內部引文））。

[67] Makwanyane案，第239段。

[68] 根據憲法法院判決第23/1990號(X.31.)，第31-32頁。

76. 在其他國家，謀殺率在廢除、暫停或大量減少死刑處決後有所下降[69]，台灣在2005年至2009年期間大幅降低死刑的執行，在這期間殺人犯罪率出現下降。[70]對比保留死刑及廢除死刑國家（例如新加坡及香港）的謀殺率，顯示無論是在殺人犯罪率或是殺人犯罪率長期下降的軌跡上，都沒有明顯的差異。[71]

77. 針對死刑執行在特定期間有上升的國家進行研究，顯示死刑執行的增加對於謀殺率沒有任何影響，針對千里達及托巴哥進行一項綜合性研究的作者得出結論：「過去50年的期間，無論是監禁、死刑判決或死刑執行，與兇殺案的發生都沒有明顯的關係。」[72]

78. 觀察台灣的數據時，Fagan教授也沒有發現與這趨勢產生差異。台灣自2002年來，無論死刑判決或死刑執行的數量有沒有變動，兇殺案件的發生率都有穩定的下降。此外，謀殺率與竊盜率在台灣並沒有因為死刑執行的下降而有所影響，也沒有經驗證據證實死刑能夠阻止重大犯罪（Fagan II/F/§§1-11）。針對廢除死刑的國家進行比較研究，也沒有證據顯示廢除死刑後謀殺率有所增加[73]，即便在台灣，2006年廢除唯一死刑之罪，以自由裁量體系取代之後，一般犯罪率與暴力犯罪率都沒有增加。[74]

79. 總而言之，國際上及台灣都沒有具說服力的證據能夠表示死刑具有嚇阻效果，社會學家、學者、法律專家的共識，以及越來越多司法及政治權威也都認為，死刑並不能達到有效的懲罰或嚇阻目的，因此死刑與人權保護並不一致。[75]即使是透過複雜的量化研究也沒有明顯證據證明死刑具有嚇阻效果，具體而言，五十年來的實證研究指出科學證據支持嚇阻的信念－無論犯罪是否屬於殺人、毒品犯罪或恐怖主義行為－都是不可信且通常是錯誤的。相反地，橫跨不同 jurisdictions（司法管轄區）的嚴謹研究一再顯示，相較於諸如終身監禁等較不極端的刑罰，並沒有可信的證據顯示死刑具有「一丁點」更好的嚇阻效果。相反的，對於許多不同司法管轄區的死刑嚇阻效果研究都一致顯示，相較於諸如終身監禁等較不極端的刑罰，並沒有可信的證據顯示死刑具有更高的嚇阻犯罪效果。[76]

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[69] 聯合國毒品犯罪辦公室，2011全球兇殺問題研究：趨勢、內容與數據(維也納、奧地利，2011)。捷克、波蘭、摩爾多瓦、匈牙利及羅馬尼亞於2000年至2009年期間兇殺率下降61%。

[70] David T. Johnson與Franklin E. Zimring，下一個前線:亞洲國家的發展、政治變化與死刑(紐約:牛津大學出版社，2009）。

[71] Franklin E. Zimring, Jeffrey Fagan, and David T. Johnson，「死刑執行、嚇阻與殺害:兩個城市的故事」，實證法學研究期刊，1-29(2010）。

[72] David Greenberg and Biko Agozino，「千里達與托巴哥的死刑執行、監禁與犯罪」，52英國犯罪學期刊113(2012）。

[73] Dane Archer, Rosemary Gartner, Marc Beittel，「兇殺與死刑:嚇阻假設的跨國研究」，74J犯罪法與犯罪學991，1013(1983)(13個國家與城市的比較證據研究的結論「沒有壓倒性的證據證明存在嚇阻，現有的研究的相反結論表示這種嚇阻證據不會出現」）。

[74] Wang，台灣目前的死刑狀況，417。

[75] 國家研究理事會，嚇阻與死刑(D. Nagin and J.V. Pepper編撰)(2012)；也可見於John J. Donohue，「實務分析與死刑的命運」，11 DUKE J. CONST. L. & PUB. POL'Y 51(2016)。

80. 實證趨勢顯示有越來越多的司法界與政界人士承認死刑沒有任何刑罰目的，例如，2019年聯合國秘書長觀察到「沒有證據表示死刑能夠降低犯罪，因為恢復死刑與降低犯罪的目的並不一致」。[77]烏克蘭、立陶宛、南非、加拿大與美國華盛頓州的憲法法院也支持此結論，認為死刑在國際及國家內部都沒有達到有效的刑罰目的。[78]

81. 司法機關認為死刑非但不能嚇阻嚴重的傷害，反而可能對於維護法律與秩序產生不利影響，例如，匈牙利憲法法院的Zlinzky法官觀察到，持續依賴死刑會「轉移」解決犯罪問題根源與「安全共存的先決條件」的焦點。[79]根據法院的說法，維持死刑將影響國家採取必要步驟，進而危害社會。[80]

82. 證據也支持死刑危害社會的觀點。首先，國家適用死刑是認同暴力，接受死刑作為處理其他暴力行為的手段，基於此觀點，歐洲理事會理事長表示，死刑「將冷血、預謀殺害合法化，並視為正義。這樣做將破壞社會的人道及公民關係，損害所有人的人性尊嚴，不可否認暴力將導致更多暴力。」[81]

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[76]「嚇阻是否有效?對於懲罰進行分析之結果」(Dieter Dolling, Horst Entorf, Dieter Hermann, and Thomas Rupp)，15歐洲犯罪政策研究期刊201(2009) 。

[77] 2019，死刑問題五年期年度報補充，A/HRC/42/28 [47]

[78] 詳見第1-33/99號案，第三部分；第2/98號案(立陶宛1998)；Makwanyane案；美國訴Burns案[2001]SCC 7(引渡內容)；國家訴Gregory案，427 P.3d at 621 。

[79] 第23/1990號決定(第31章)匈牙利憲法法院。

[80] 同上。

[81] 「死刑並不是正義」，人權理事長，歐洲理事會，2007年1月，參考1997GBR1270，網址：https://edoc.coe.int/en/death-penalty/5477-death-is-not-justice.html

83. 第二點，死刑剝奪社會在不可避免地犯錯時進行彌補的機會，看過各種無辜公民被判刑的案例，加拿大最高法院認為：「假使已經判決死刑，就沒有人可以因為司法誤判而得到道歉或賠償……事後來看，加拿大社會根本沒有理由違反基本正義原則而剝奪生命。」[82]死刑對於社會成員產生無法逆轉的嚴重錯誤，不僅侵害被處決的人及其親人，也破壞社會本身。殺害無辜的社會成員將削弱憲法的信仰與大眾信任，也因此破壞司法本身的民主正當性。

84. 缺乏明確證據證明死刑能夠有效達到刑罰目的，且證據顯示死刑不比監禁更具嚇阻效果，顯然死刑必然缺乏憲法及國際法所要求的必要性、比例原則以及「合理性」。缺少這些要素，死刑就不是正義原則下的「正當法律」。

E. 台灣憲法所保障的權利

85. 我們認為死刑違反憲法核心的生命權、平等權以及法治原則等保障。由於死刑無法符合非恣意性(non-arbitrary)，無法符合國際法規範的比例原則，因此侵害這些基本權利。

I. 生命權/生存權

86. 憲法第15條規定「生存權」的保障，也就是台灣的生命權。[83]國際法規範下，生命權被視為是一個「不能克減」權利。[84]公民與政治權利國際公約（ICCPR）規定此權利必須受到法律的保障。[85]台灣既然已經批准並通過法律將公民與政治權利國際公約納入國內法，因此有義務遵守這些規定。

87. 死刑很明顯地違反憲法第15條規定的生命權，我們認為任何對此一立場提出挑戰的立論，都是站不住腳的。與此相關的問題，則是：死刑判決對於憲法第15條的侵害是否可以透過憲法第23條的運作而使其合憲。以下第IV部分將說明為何憲法第23條的運作無法使死刑免於在司法審查下被認定為是侵害憲法的理由。

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[82] Burnm 第103段。

[83] 中華民國憲法[民國憲法]，第15條（1947年）。

[84] 詳見第4條，公民與政治權利國際公約（……[第6條禁止恣意剝奪生命權]不得克減，可以根據此規定做出。）

[85] 同上，第6(1)條。

II. 平等對待權/平等保護權

88. 憲法第7條規定平等權原則，「中華民國人民，無分男女、宗教、種族、階級、黨派，在法律上一律平等。」與法治原則及法律保障相同，法律之前人人平等同時也保護個人免受恣意的法律侵害，以及遠離那些不理性及剝奪個人尊嚴的人。如同巴格瓦蒂(Bhagwati J)在甘地訴印度案中提到：

> 平等與恣意性是相互對立的。事實上，平等與恣意性是相違背的，一個屬於共和國的法治，然而另外一個則是絕對專制君主的隨心所欲。如果一種行為是恣意的，那麼根據政治邏輯與憲法，這種行為就是不平等的。

89. Hoyle教授在她的報告結論提到「要設計出一種制度來完全保證刑事司法系統在使用死刑的每個階段都不存在恣意性，這是極不可能的」(Hoyle，第106段)。恣意性的風險以及死刑案件中的錯誤出現在一個人被處決過程中的每個階段。任何特定案件的結果都會不可避免地會受到多重交織（且與法律無關）的因素影響，包含善變的想法、政治需求、無意識的偏見、個人態度與信念、派系的個人特質以及擁有的資源。

90. 設計及管理一個能夠消除錯誤及恣意性風險達到萬無一失的系統是不可能的，無法防止無辜的人被定罪（判處死刑/執行死刑）就是最明顯的證明。面對死刑的嚴重性及不可挽回性，任何恣意性風險都必須是違憲的。憲法第7條所禁止的恣意性與法律前人人平等之間不存在原則性的差別。

III. 法治原則

91. 由於本質上的恣意性，死刑同時也違背憲法的核心原則，亦即法治。與其他已經廢除死刑的司法管轄區的憲法一樣，台灣憲法也保障法治原則。

92. 台灣憲法的前言彰顯憲法受到所有公民「忠誠與永遠遵守」的價值。[86]憲法前言提到目的在於「保障民權，奠定社會安寧，增進人民福利」。[87]這就規定法院該如何看待憲法所規定的權利與自由，並且針對人權申訴做出判決。因為前言部分的原則已經「被廣泛地承認且接受為一個具有解釋性及實質性的法理學職能」[88]，憲法的前言因此將法治及保障人民權利結合在一起。

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[86] 憲法前言。

[87] 同上。

93. 法治原則不僅根本上體現在憲法的前言，還有一項單獨具有強制的規定，顯示受到法律保障的權利。憲法第1條規定「中華民國基於三民主義，為民有民治民享之民主共和國。」此生命是對民主政府正當性的自我肯定，民主政府是一個為人民治理的政府，並且規範其法律。此外，司法院也進一步解釋「憲法第16條保障人民訴訟權的目的在於保障人民享有根據法律程序，公平審判的權利。」[89]根據這些條文，憲法體現對於法治程序公平的承諾。

IV. 憲法第23條之效力

94. 基於憲法與國際法之比較分析，證據顯示執行死刑將會侵害生命權保護、平等權以及依法治國的憲法核心保障。然而，其中台灣憲法的關鍵規定仍需要予以思考：憲法第23條規定「以上各條列舉之自由權利，除為防止妨礙他人自由、避免緊急危難、維持社會秩序，或增進公共利益所必要者外，不得以法律限制之。」本段將討論憲法第23條的限制，以及為何縱使在憲法第23條的運作下，死刑在台灣憲法當中仍無立足之地。

95. 更廣泛的說，國家憲法中的保護性規定不能阻止公民充分實現其基本自由權利，亦即不受不人道及有辱人格的待遇或處罰、受到法律保護、法律面前人人平等以及憲法其他關於尊嚴及法治的核心權利。如果死刑既經證明是恣意的、不合理的、不符合比例原則且違反法治原則的，那麼憲法第23條的限制條款，並不能使死刑制度免受司法審查的汰除。

96. 有兩個理由可以說明憲法第23條為何不能使死刑制度免於司法審查的汰除。第一、死刑會使受憲法保障的生命權完全消失，將超越第23條在特定條件下狹義允許「限制」這項權利。第二、沒有證據顯示死刑對於嚴重犯罪有嚇阻效果，因此，第23條關於限制某項權利「防止侵犯他人自由」的要求根本沒有得到滿足。

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[88] *McEwan訴蓋亞那檢察總長案[2018]* CCJ 30 (AJ)第61段。

[89] J.Y.第512號解釋(2000/9/15) 。

97. 對於基本權利與自由的剝奪或例外必須進行狹義的解釋，但對於權利本身－例如生命權，必須做廣義的解釋，這是憲法解釋的既定原則。[90]因此，憲法法庭應該利用限制性最小的解釋，使台灣的公民都能充分享有基本權利與自由。因為憲法第23條試圖限制生命權及平等權的基本保障，因此應該對於該條進行狹義的解釋，並且必須遵守構成憲法「深度」架構的基本憲法規定。

98. 針對第23條進行適當狹義的解釋時，其他原則也會更趨昭然若揭。憲法第23條規定列舉的憲法權利都不應該受到「限制」，除非是「有必要……維持社會秩序或增進公共利益」。上述憲法文字狹義的解釋「限制」，然而規定要求不能讓國家有權力去進一步「剝奪公民的基本權利」。法律上支持將刪減或限制權利與讓權利消失的概念加以區分，對於權利的限制不等同是對於此基本權利的摧毀，因此，死刑規定讓生命消失已超越第23條允許「限制」所列舉的生命權範圍，違背比例原則。

99. 三個案例將說明這一點。匈牙利憲法法庭認為死刑「對於生命權與人性尊嚴的基本內容都施加限制，不可逆轉的消除這兩項權利」[91]，據此，死刑並不符合生命權。

100. 同樣地，在Makwanyane案，南非憲法法院判決認為死刑不符合生命權，因為死刑不僅限制生命權也否定權利的基本內容。[92]法庭還區分「允許國家在緊急情況下行使自衛權的生命權」以及「缺乏任何緊急情況，允許對於嚴重罪行處以死刑的生命權」的含意，後者缺乏限制。

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[90] *Nervais，[2018] 4 LRC 545，第39段，詳見Reyes訴R案[2002] 2 AC 235，第26段以及國家訴Petrus案[1985] LRC(憲法)699，*720D-F *(Botswana CA)，意指Corey訴騎士案(1957)150 Cal App 2d 671；Makwanyanye第174段；聯合國人權事務委員會，一般性意見第36號，第I.3.段。*

[91] 12月第23/1990號(X.31)(匈牙利1990)。

[92] *Makwanyane第103與146部分。*

101. 最後，烏克蘭憲法法庭承認生命權是公民權利的基礎。法庭認為生命權是其他權利的先決條件，包含「實現所有其他公民權利與自由的可能性」。[93]生命權是「基本的」或「不可或缺的」，賦予國家一個不得消除權利的特別責任。

102. 在解釋憲法第23條時，也必須考慮台灣根據公民與政治權利國際公約第6(6)條所承擔之義務，不得阻礙死刑的廢除。鑒於公民與政治權利國際公約的重要性且該公約已國內法化，司法機關必須履行其義務。最近有關ICCPR第6條的一般性意見，聯合國人權事務委員會確認公約的廢除死刑目標，重申；

> 尚未廢除死刑的締約國在可預見的未來，應該要走向這條不可逆的道路，在事實上及法律上澈底廢除死刑。死刑與充分尊重生命之間是不相容的，廢除死刑對於強化人性尊嚴及人權的推動發展是值得期待且必要的。[94]

103. 2010年，台灣憲法法庭駁回一項有關死刑釋憲的申訴， 然而，這項駁回並未直接回應台灣在公民與政治權利國際公約下的義務。憲法法庭確實認為，施行法生效時，公約所保障的權利都將成為台灣國內法的一部分，對於各級政府包含司法機構及憲法法庭都有拘束力。法庭有意願根據公民與政治權利國際公約審查死刑的合憲性，但卻沒有辦法理解公民與政治權利國際公約的涵義及聯合國人權事務委員會一般性意見。[95]

104. 特別是，憲法法庭對於公民與政治權利國際公約的討論主要集中在第6(2)條，確定只要死刑判決符合犯罪時有效的法律，且不違反公民與政治權利國際公約，那麼就允許死刑。然而，公政公約第6(2)條的目的並非如憲法法庭所假設的，將持續執行死刑之行為予以合理化，而是為了限制死刑的運用。1984年，聯合國經濟社會理事會在沒有反對意見的情況下通過《保護死刑犯權利的保障措施》，其中對於「最嚴重犯罪」給予限制性解釋。第6(2)條只是作為一個「標示（marker）」表示在死刑尚未完全廢除之前的死刑限制範圍。憲法法庭並沒有注意到公民與政治權利國際公約第6(6)條與聯合國人權事務委員會關於第6條的一般性意見，第6(6)條明確規定第6條的目標：「本公約任何締約國不得援引本條的任何規定來延遲或阻礙死刑的廢除。」此外，公民與政治權利國際公約第7條體現世界人權宣言第5條規定，保護人們免受酷刑或殘忍、不人道或有辱人格的待遇或處罰，因此，公民與政治權利國際公約試圖要做為一個「活文書」體現邁向完全廢除死刑的抱負。如同第36號一般性意見所確認的，公民與政治權利國際公約沒有為單純採取限制性使用死刑政策的國家提供辯護，該意見重申廢除死刑的目標，重申締約國「都應該走向完全根除死刑的不可逆的道路」[96]，這個意見「代表根據公民與政治權利國際公約下負責解釋該文書的機構的權威性決定。」[97]憲法法庭在未能理解這些決定性意見以及公民與政治權利國際公約的精神與目的而做出狹義的解釋，因而在解釋國際法時犯錯，這個疏失值得重新考慮。

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[93] 第1-33/99號(1999)，第6段。

[94] 聯合國人權事務委員會，一般性意見第36號，第50段。

[95] Chang Wen-Chen，撤銷案件：台灣與國際人權社會的距離，司法改革基金會（2010年9月）。

105. 台灣憲法法庭曾論述認為死刑根據憲法第23條有其正當性，因為它是維護國家安全、社會秩序及促進公共福利所「必須」。而司法院釋字第476號及其他類似判決的重點則在於死刑的嚇阻效果。然而，為了國家利益而剝奪生命的「必要性」必須要得到驗證。Fagan教授的報告指出，沒有任何數據可以支持死刑具有特別嚇阻效果的論點，顯示超過20年的資料均未能證明此論點（Fagan II/F/§§ 3-6）。鑑於Fagan教授向　貴法庭提供的專家證據，以及司法界及社會學專家日益達成的普遍共識，死刑的嚇阻效果並未得到證實，因此，死刑相較於終身監禁這個替代性懲罰更具嚇阻效果的說法已不可信。

106. 嚇阻的正當理由－認為死刑能夠有效的嚇阻重大犯罪－的說法必須要被否決，因為缺法實質的證據基礎說明嚇阻的效力。詳見Atkins案，536 U.S. at 319（2002）（「除非判處死刑對於刑罰目的有重大貢獻，否則死刑不過是個沒有目的且沒有必要的痛苦跟折磨，因而是一種殘忍且非尋常的懲罰」）；Makwanyane 案第239部分（「沒有證據證明死刑比終身監禁對潛在殺人犯具有更大的嚇阻效果，社會更不應該容忍死刑。」）

107. 以報復作為施用死刑正當化基礎的說詞，向來早已遭到拒斥，因為現代民主社會與以報復為基礎的懲罰制度並不相容，無論如何，憲法都不允許這麼做，因為根據報復理論的定義，死刑並非「必須的」。缺少正當理由的情況下，死刑一定是恣意的。

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[96] 聯合國人權事務委員會，一般性意見第36號，第50段。

[97] 聯合國人權事務委員會，一般性意見第33號，第13部分。

108. 要使憲法第23條作為死刑的正當化說法的第二個前提－嚇阻效果－必須要經過驗證。國家應該要能證明死刑的存在對於台灣公民得以因而免於遭受無謂傷害而言，是「必要的防止」手段。國家更必須負擔起對法庭證明前述統計學上趨勢的舉證義務。憲法第23條的用詞並非開放許可式（permissive）的用語，而是明確要求對於憲法基本權的侵害行為，必須要提出正當合理的依據。因此，國家必須提出證據證明，台灣的死刑制度與其他司法管轄區不同，對於重大犯罪可以發生嚇阻效果。而本文下列引用的證據，則不支持前述主張。一如Fagan教授在報告結論中指出：

> [台灣的警政署資料]強烈表示，沒有證據證明死刑判決或執行與台灣的殺人案、謀殺案或搶劫案發生率的上升有關，這三類暴力犯罪的趨勢並沒有因為死刑判決或執行數量隨時間減少而有影響，因此，似乎沒有證據證明死刑裁處具有一般性的嚇阻效果。

109. 在南非廢除死刑的過程當中，憲法法院的法官在Makwanyane案中審查不同司法管轄區的大量研究後，認為此一明確結論極為重要：「統計證據往往不能證明死刑對於殺人罪具有有效的嚇阻效果」[98]，法院成員也解釋了死刑事實上不可能具有真正嚇阻效果的各種原因：Didcott法官表示：

> 「絕大多數的殺人犯在犯罪當下，根本沒有心思或精神去思考或擔心他們的殺人行為可能遭受的後果。那些夠理性去考慮到這一點的人通常會賭一把，賭他們有很高的機率能逃過偵查與逮捕。而對於被定罪及懲罰的預期往往不會那麼直接進入他們的思緒。」

110. 烏克蘭、立陶宛及美國華盛頓州憲法法院也強調，若廢除死刑，國際及國內的經驗都顯示，死刑並不會達到有效的刑罰目的。在國家訴Gregory案427 P.3d 621 (Wash. 2018)，華盛頓州最高法院認為死刑對國家在報復及嚇阻方面都毫無助益，死刑相當於是恣意施加懲罰，毫無疑問地是國家憲法中定義的「殘忍」。同樣地，烏克蘭法院拒絕認可死刑作為一種減少犯罪的有效手段，該法院拒絕認可死刑效用之見解如下：

> 犯罪學研究證實：當判處死刑的判決增加時，侵害生命的犯罪數量並沒有減少，大約40年的時間（自1961年4月1日烏克蘭刑法生效以來），儘管適用特別刑罰，預謀殺人的案件數量依然不斷增加。[99]

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[98] Makwanyane案，第202段。

111. 基於上述理由，一旦法院認為死刑侵害了憲法第23條所保障的基本權利，那麼主張死刑合憲的論述便無立足之地。

F. 結論

112. 最後，我們將重新審視法院在本案中的問題，下面將依序討論：

問題(1)除了剝奪個人生命權之外，死刑是否還干預了其他憲法權利，例如免於酷刑的權利、人性尊嚴等面向？

113. 針對這個問題，我們認為答案洵屬肯定。死刑本質上是不人道且有辱人格的，從根本上不符合憲法對於人性尊嚴保障的核心原則，人性尊嚴也是保護基本自由的其他憲法承諾所賴以存在的基石，這些基本自由包含生命權、免受不人道且有辱人格待遇的自由（任何情況下都不得克減），法律之前人人平等及受法律保護的權利、言論自由、集會結社自由、不受歧視的自由及社會參與的權利。人性尊嚴可被視為其他基本權的基礎，沒有人性尊嚴，其他權利也無從立足。如同立陶宛憲法法院在廢除死刑時所承認的：

> 「與生俱來的人權是個人與生俱來的機會，它確保個人在社會生活領域的人性尊嚴，它建構根本，從此根本上發展及補充其他權利，並且建立國際社會承認且無庸置疑的價值。因此，人的生命與尊嚴，表達人類的完整性與獨特的本質，且凌駕於法律之上。有鑑於此，人的生命與尊嚴應該被視為是特殊價值，在此情況下，憲法的目的是確保這些價值的保護與尊重。」[100]

[99] 第1-33/99號案(1999)，第5段。

[100] 第2-98號決定。

114. 台灣承諾遵守的國際法文獻都一致承認人性尊嚴是基本原則，且生命權是一項不得恣意削弱的權利。生命權是台灣憲法規定的核心，與法治原則並肩而行，法治原則是超憲法的上位誡命，所有行政、立法、司法及其他憲法措施都必須要遵守法治原則。

115. 總而言之，死刑制度違反憲法第15條關於生命權的規定，也違反憲法第7條關於保障法律之前人人平等的規定，也違背憲法前言關於法律保障的基本權利。

116. 法院提出的次兩個問題：

問題(2)死刑制度追求的目標為何？這些目標都合憲嗎（constitutional）？

問題(3)我國《憲法》是否允許將死刑視為達成前述目標的手段，進而剝奪人民的憲法權利？如若死刑違憲，是否有其他刑罰可以替代死刑？又或者，應採取哪些相關配套措施？

117. 這些問題都假定政策的合憲性(constitutionality)取決於政策的目標或目的，就此，本意見書則敬表不同意見。憲法第23條要求政策目的之追求，應限於針砭社會弊病的「必要」範圍。這必然表示政策本身所持的手段必須與其所追求之社會目的合乎比例。因此，回應上述兩個問題，我們認為死刑在台灣的憲法制度下是不合法的，而且死刑無法達成任何有效的刑罰目的。

118. 缺乏明確證據證明死刑能夠有效達成憲法所認可與要求的刑罰目的，且證據顯示死刑不比監禁更具嚇阻效果，顯然死刑必然缺乏憲法及國際法所要求的必要性、比例原則以及「合理性」。缺少這些要素，死刑就不是正義原則下的「正當法律」。

119. 在與上述憲法基本原則存在根本歧異的情況下，地位較低的憲法文本（例如憲法第23條當中所存在的限制）不應該在維護憲法基本原則的法庭中，被用於剝奪公民所應享有的基本權保障，除非有明確證據得以證明有社會利益存在。沒有證據證明死刑能夠帶來社會利益、維護公共秩序或對犯罪產生嚇阻效果。最具說服力的證據顯示，死刑對於公共秩序沒有任何顯著影響。

120. 綜上所述，死刑制度根本未能以憲法所容認的方式，達成犯罪嚇阻與矯治犯罪人等刑法上目的。

「死刑專案」（DPP）
THE DEATH PENALTY PROJECT

2024年3月17日

EXPERT REPORT OF PROFESSOR CAROLYN HOYLE

ARBITRARINESS OF THE DEATH PENALTY

Qualifications

1. I am Professor of Criminology and Director of the Death Penalty Research Unit in the Centre for Criminology, Faculty of Law at the University of Oxford. My academic research has covered a range of criminological topics, incorporating both empirical and theoretical perspectives, including extensive work on the death penalty, with a particular focus on Asia over the past decade, including research and engagement on the death penalty in Taiwan.
2. Along with peer-reviewed journal articles and reports on the death penalty, I am the co-author, together with Professor Roger Hood, of the book *The Death Penalty: A Worldwide Perspective* (5th edn, Oxford University Press 2015; 4th edn, Oxford University Press 2008). The fourth edition of the book was cited by the Supreme Court of India in the appellate review of a death sentence in the case of *Kumar v State through Govt. of NCT of Delhi* [2011] INSC 1002 (28 September 2011).[1]
3. My *curriculum vitae* is annexed to this report.
4. I was instructed by The Death Penalty Project to provide a report in relation to the arbitrariness of the death penalty, with reference to the practice and procedure in Taiwan, as well as evidence from other jurisdictions**.** I understand that my report will be provided to the Constitutional Court of Taiwan as part of an amicus curiae brief to be submitted by the National Human Rights Commission of Taiwan. I also understand that my overriding duty is to the Court and to provide impartial evidence in my field of expertise.

5. ISSUES ADDRESSED

6. In this Expert Report, I provide analysis of the inherent arbitrariness of the death penalty by reference to global evidence, with particular relevance to Taiwan. I address the highly unlikely possibility that any criminal justice system could be designed which would guarantee the absence of arbitrariness in the use of the death penalty.

7. OPINION

Introduction to the death penalty in Taiwan

8. Over the past thirty years, the number of countries abolishing capital punishment—in law or in practice—increased dramatically, from just 52 countries in 1988 to 124 countries by the end of 2023. Furthermore, only 20 countries carried out executions during 2022, although some of these, such as China, Iran and Saudi Arabia, were responsible for a disproportionate share of the world's executions.[2]

[1] See paras 100-104. The citation from this case was cited again by the Supreme Court in *Deepak Rai v State of Bihar* [2013] INSC 901 (19 September 2013).

[2] Amnesty International, *Death Sentences and Executions 2022* (2023).

9. The death penalty is now all but abolished across Europe and Central Asia, and hardly applied across sub-Saharan Africa (with only Botswana, Somalia, South Sudan and Sudan carrying out executions in the past few years). A handful of death sentences continue to be imposed in the Caribbean; and the only jurisdictions across all the Americas that execute death sentences are certain states within the United States. Even in the United States, the annual number of executions has declined from a peak of 98 in 1999 to 24 in 2023, as more US states have embraced abolition.[3]
10. An international abolitionist movement which began in Europe has now been embraced by many different political systems, religious faiths and cultures, including within the Asia-Pacific region, where 21 countries have joined the ranks. The People's Republic of China, Afghanistan, North Korea and Vietnam carry out thousands of executions annually. Singapore and Bangladesh do so occasionally.[4]
11. In recent years, Taiwan has made little use of the death penalty. Since 2016, in some years only one death sentence has been imposed, and in others, none. Only two executions have taken place in the same period. There remain 37 persons on death row, including one woman, but Taiwan has not carried out an execution for four years. It was not always a low executing state. During the 1950s 'White Terror' campaign the execution rates were very high and remained reasonably high from the mid-1980s until the early 2000s, surpassed in Asia only by Singapore[5] (with sudden increases in executions between 1988 and 1992, and in the late-1990s).[6]
12. The declining execution rate since the start of the new millennium (from 24 executions in 1999, to seven in 2003, and no more than six during a year since then) was a product of revisions to the capital statutes, which progressively restricted the death penalty to fewer offences; changes to the Code of Criminal Procedure; and the abolition of mandatory death sentences, which came in 2006. The decline reflected shifting political imperatives towards developing human rights and the nation's desire to dissociate itself from its authoritarian history. Hence, there were no executions between 2006 and 2009 in Taiwan, considered an unofficial moratorium on the death penalty. Additionally, at the beginning of 2007 the Ministry of Justice announced a programme of research seminars and public hearings to encourage national debate on the abolition of the death penalty.[7]
13. A further boost to the abolitionist effort came in 2009, when Taiwan incorporated the International Covenant on Civil and Political Rights (ICCPR) into its domestic law, signalling the government's commitment to international human rights principles and

[3] Death Penalty Information Center, 'The Death Penalty in 2023: Year End Report' (2023) <https://deathpenaltyinfo.org/facts-and-research/dpic-reports/dpic-year-end-reports/the-death-penalty-in-2023-year-end-report>.

[4] In 2022, the military authorities in Myanmar carried out four executions after four decades without any executions following trials that were unfair, secretive and inevitably arbitrary: see Amnesty International, 'Myanmar: First executions in decades mark atrocious escalation in state repression', July 25, 2022 at <https://www.amnesty.org/en/latest/news/2022/07/myanmar-first-executions-in-decades-mark-atrocious-escalation-in-state-repression/ >.

[5] Amnesty International, *Singapore: The death penalty: A hidden toll of executions*, 2004, ASA 36/001/2004.

[6] These increases were correlated with rising crime, a series of high-profile offences and concerns about corruption; see, Johnson D. and Zimring F., *The next frontier: National development, political change, and the death penalty in Asia* (Oxford University Press, 2009) ch6.

[7] The Death Penalty Project, '*For or Against Abolition of the Death Penalty: Evidence from Taiwan*, Chiu Hei-Yuan (2019, Roger Hood ed.), <https://www.deathpenaltyproject.org/wp-content/uploads/2019/03/Taiwan-Public-Opinion-FINAL-ENG.pdf> 10.

standards, including the injunction in Article 6(6) of the ICCPR not to delay or prevent the abolition of capital punishment.[8]

14. Since 2010, progress towards abolition in Taiwan has faltered. The Constitutional Court of Taiwan declined to hear a constitutional challenge to procedural issues relating to the death penalty filed on behalf of 40 death-row prisoners, a decision that the Taiwan Alliance to End the Death Penalty described as based on 'poor reasoning' and responsible for distancing Taiwan from the international human rights community.[9]
15. Executions resumed in 2010, with a handful each year until 2016 when President Tsai Ing-wen came to office, soon after the execution of Cheng Chieh. The new administration was clear that its goal was abolition.[10] Since 2016, executions have been rare. Each execution since then has generated concerns within the international community that Taiwan has not adhered to the provisions of the ICCPR by undertaking such actions.[11]
16. In 2018, Lee Hung-Chi was executed.[12] While the Ministry of Justice defended the execution by saying there was no domestic consensus on abolition, national and international human rights groups lamented that it had negative consequences for Taiwan's efforts to build stronger relationships with other countries. As Keir Starmer and Saul Lehrfreund put it in an article published in the *Taipei Times*: 'We worry that, in lifting the moratorium and carrying out an execution, Taiwan has taken a huge step backward, putting its international reputation at risk.'[13] The next – and, to date, the last – execution, of Weng Jen-hsien, came in April 2020.[14]
17. Taiwan's National Human Rights Action Plan of 2022-24, the first comprehensive policy to safeguard human rights in the country's history, restates the policy goal of abolition. Its creation of the *Implementation Group on Gradual Abolishment of the Death Penalty* makes clear the government's renewed commitment to abolition by encouraging prosecutors to be cautious in sentencing, to remain mindful of the need to consider Article 6 of the ICCPR, and to formulate an alternative plan to capital punishment.[15]
18. The universal right to protection of law imposes a duty on states to comply with their international obligations, including the obligation not to act arbitrarily when depriving citizens of their life. Article 6(1) of the ICCPR states that 'Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.' In General Comment No. 36, the Human Rights Committee, the international body that monitors and supervises the implementation by state parties of their obligations under the ICCPR, stated that arbitrariness 'must be interpreted more broadly to include elements of inappropriateness, injustice, lack of

[8] For a detailed review of the extent to which Taiwan has met these obligations see 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*', 2014.

[9] Wen-chen C. and Chuan-fen C., *My country kills: Constitutional challenges to the death penalty in Taiwan*, Taiwan Alliance to End the Death Penalty, 2011.

[10] Starmer K. and Lehrfreund S., 'Time to abolish the death penalty', *Taipei Times*, 5 October, 2016.

[11] Lehrfreund S., 'The death penalty: End it, do not mend it', *Taipei Times*, 5 July 2014.

[12] Amnesty International, Taiwan: First execution under President Tsai Ing-wen a crushing setback to abolition hopes (2018) <https://www.amnesty.org/en/latest/news/2018/08/taiwan-dp/>

[13] Starmer K. and Lehrfreund S., 'The risk to Taiwan from executions', *Taipei Times*, 2 October 2018.

[14] FIDH, 'Second execution under President Tsai condemned' (2020) <https://www.fidh.org/en/region/asia/taiwan/second-execution-under-president-tsai-condemned>

[15] Executive Juan, National Human Rights Action Plan 2022-2024. 115-119.

predictability, and due process of law as well as elements of reasonableness, necessity, and proportionality.'[16]

19. As Taiwan has incorporated the ICCPR into domestic law,[17] it must respect its obligations and not retain the death penalty if it is arbitrary, discriminatory or capricious in its administration. Inescapably, evidence that the death penalty is not administered impartially, equitably and with sufficient due process protections for the defendant at each and every stage of the investigation, trial and appellate process, would render the death penalty in breach of Taiwan's domestic law.
20. In the subsequent sections, this report will demonstrate that arbitrariness is an *inevitable* feature of all criminal justice systems where the death penalty continues to be imposed and carried out, including Taiwan. Indeed, on the basis of reliable research evidence, I conclude that it is highly unlikely that *any* system could be designed which would entirely guarantee the absence of or exclude the risk of arbitrariness.

Arbitrariness in mandatory and discretionary death penalty systems

21. Over the past few decades, international standards governing the use of the death penalty have increasingly shifted towards a consensus against its imposition on a mandatory basis.[18] This growing rejection of the mandatory death penalty has been centred on the arbitrariness of the punishment, as it denies domestic courts the discretion to decide if the particular crime and the particular offender is deserving of death.[19] In short, 'constraining discretion is inconsistent with notions of fairness and repugnant to the concepts of humanity.'[20]
22. This shift has been reflected in the decisions of international and regional human rights bodies, not least the United Nations Human Rights Committee (CCPR),[21] and in extensive jurisprudence across the common law world where courts have held that the mandatory imposition of the death penalty constitutes an arbitrary deprivation of life.[22] In Asia, India led the way with the introduction of discretion in some capital cases as early as 1860.[23] There has been no mandatory death penalty in India since 1983, when the Supreme Court of India ruled it unconstitutional and determined that judicial discretion was an essential safeguard for ensuring proportionate

[16] Human Rights Committee, General Comment No. 36 on Article 6: Right to Life, UN Doc. CCPR/C/GC/36 [3 September 2019], par. 12.

[17] Act to Implement the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, art. I (promulgated Apr. 22, 2009), Laws & Regulations Database of the Republic of China, MINISTRY OF JUSTICE http://mojlaw.moj.gov.tw/EngLawContent.aspx?id=3. See also The Judicial Yuan Reviews Regulations in Response to the Promulgations of the Covenants; It also Promotes Legislation on Speedy and Fair Trials, Jud. Yuan (Nov. 5, 2009) <http://jirs.judicial.gov.tw/GNNWS/engcontent.asp?id=36952&MuchInfo=l>

[18] Saul Lehrfreund, 'Undoing the British colonial legacy: the judicial reform of the death penalty' in C Steiker and J M Steiker (eds) *Comparative Capital Punishment* (Edward Elgar 2019) 292.

[19] See also, UN Human Rights Committee, General Comment No. 36 on Article 6: Right to Life, UN Doc. CCPR/C/GC/36 [3 September 2019], para. 37.

[20] P. Jabbar, 'Imposing a 'mandatory' death penalty: a practice out of sync with evolving standards', in C.S Steiker and J.M. Steiker (eds.), *Comparative Capital Punishment* (Elgar, 2019) 138-159

[21] e.g. *Thompson v St Vincent and The Grenadines,* Communication No. 806/1998, CCPR/C/70/D/806/1998 (2000); *Kennedy v Trinidad and Tobago,* Communication No. 845/1998, CCPR/C/74/D/845/1998 (2002).

[22] Andrew Novak, 'The Role of Legal Advocates in Transnational Judicial Dialogue: The Abolition of the Mandatory Death Penalty and the Evolution of International Law' (2017) 25 C*ardozo J of Intl and Comparative L* 179, 204.

[23] The 1860 Penal Code provided for the death penalty for murder but allowed for discretion. In 1973, the Criminal Procedure Code was enacted, requiring special reasons to be given when the death penalty was imposed; see Jabbar (n 18) 140.

punishment.[24] Since then, Bangladesh, drawing on jurisprudence from India, the Commonwealth Caribbean, and parts of Africa, has abolished the mandatory death penalty.[25]

23. In the 1990s, there were more than 50 different offences punishable by a mandatory death sentence in Taiwan.[26] While the abolition of the mandatory death penalty in 2006[27] ended some of the specific forms of arbitrariness associated with mandatory sentencing, this alone does not ensure a system free from arbitrariness. Under discretionary sentencing regimes, the risk of arbitrariness is present at each stage of the criminal justice process, not least in the element of subjectivity involved in determining which offences should be subject to capital punishment and which individuals are considered to be 'death worthy'.
24. This very arbitrariness caused the U.S. Supreme Court to abolish the death penalty temporarily in 1972 in *Furman v Georgia*.[28] Justice Stewart described the arbitrariness of the imposition of the death penalty on a 'random handful' of defendants as a 'wanton and freakish' process, comparable to being struck by lightning. The Court found that such arbitrariness could not be squared with the U.S. Constitution's prohibition on cruel and unusual punishments. As Justice Brennan put it, '[w]hen the punishment of death is inflicted in a trivial number of the cases in which it is legally available, the conclusion is virtually inescapable that it is being inflicted arbitrarily. Indeed, it smacks of little more than a lottery system.'[29]
25. The Indian discretionary system has also been described as a 'lethal lottery'.[30] The sentencing guidelines set out by the Indian Supreme Court in *Bachan Singh*[31] and subsequent judgments attempted to restrict the application of capital punishment solely to the 'rarest of the rare' cases. As discussed below in more detail, while this reduced the proportion of persons convicted of murder in India being sentenced to death, the application of this doctrine has not followed a discernible pattern, and there have been notable inconsistencies, with death sentences often being imposed according to the personal predilections of the judges rather than being based on agreed and sound sentencing principles.
26. India's Supreme Court has, on numerous occasions, expressed concern about arbitrary sentencing in death penalty cases even within the discretionary regime, arguing that the threshold of the 'rarest of the rare' cases has been subjectively, variedly, and inconsistently applied.[32]
27. In its report on the death penalty in 2015, the Law Commission of India similarly noted that different courts, including panels of the Supreme Court, had reached

[24] In *Mithu*, the court ruled that the mandatory scheme under section 303 of the Penal Code, which prescribed a mandatory death penalty for certain murders was unconstitutional: *Mithu v State of Punjab* [1983] 2 SCR 690, 692.
[25] *Bangladesh Legal Aid and Services Trust v Bangladesh (Shukur Ali)* (2010) 30 BLD (HCD) 194; *Bangladesh Legal Aid and Services Trust v The State* [2015] (Appellate Division, Supreme Court of Bangladesh, 5 May 2015).
[26] Jaw-Perng Wang, 'The Current State of Capital Punishments in Taiwan' (2011) 6(1) *NTU L. Rev* 143, 170.
[27] Wen-Chen Chang, 'Case dismissed: Distancing Taiwan from the international human rights community', in *My Country Kills: Constitutional Challenges to the Death Penalty in Taiwan* (2011) 47, 63.
[28] *Furman v Georgia*, 408 U.S. 238 (1972).
[29] *Furman*, 408 U.S. at 293 (J. Brennan, concurring).
[30] Bikram Jeet Batra, *Lethal Lottery: The Death Penalty in India: A Study of Supreme Court Judgments in Death Penalty Cases, 1950-2006 (*New Delhi, Amnesty International and People's Union for Civil Liberties 2008).
[31] *Bachan Singh v State of Punjab* (1980) SCR(1) 145.
[32] See Bikram Jeet Batra, *Lethal Lottery: The Death Penalty in India: A Study of Supreme Court Judgments in Death Penalty Cases, 1950-2006 (*New Delhi, Amnesty International and People's Union for Civil Liberties 2008).

diametrically opposite results in cases which had similar facts and circumstances, creating a lack of consistency.[33] Echoing the sentiments expressed by the US Supreme Court in *Furman*, the Law Commission concluded that, as capital punishment in India is 'arbitrarily and freakishly imposed' and 'there exists no principled method to remove such arbitrariness', the death penalty for ordinary crimes should be abolished.

28. In the U.S. today, the lethal lottery continues: just 0.18% of homicides result in an execution.[34] While legally relevant factors relating to the severity of the offence or the culpability of the offender can partly account for decisions on which offences will result in an execution, politics and the personal circumstances of offenders and their victims can significantly impact the criminal justice process and outcomes. Race and gender are clearly correlated with prosecutorial and judicial decision making, but scrutiny of the data also reveal geographical and temporal arbitrariness that are highly likely to be found in other countries. While the U.S. comes closest to meeting international standards of due process, a thorough review of the empirical evidence concludes that the administration of the death penalty in the U.S. is arbitrary,[35] as it has been found to be in all retentionist countries.[36]
29. In Taiwan, since the abolition of the mandatory death penalty, few defendants have been sentenced to death. In the first decade of the twenty-first century I understand that only 8% of those who committed death eligible offences were sentenced to death. It is highly likely that there is considerable similarity in legally relevant criteria between those cases and others which ended in a life sentence. For this reason, researchers have considered what legally *irrelevant* features influence decision makers in the criminal justice systems of retentionist countries. The following sections consider the different elements of this arbitrariness.

Personal circumstances of the defendant

30. Studies in the U.S. have consistently demonstrated that, despite the promise of 'super due process', it has proved impossible to remove arbitrariness from the pre-trial process.
31. Empirical research consistently finds disparities in death penalty sentencing, based primarily on a 'race-of-victim' effect.[37] An early but exacting empirical study of more than 2,400 murder cases in the U.S. state of Georgia found that when controlling for 230 variables related to the crime and the characteristics of the offender, the race of the victim was a strong predictor of who would receive the death penalty, with the race of the defendant having an additional effect. Indeed, defendants accused of killing white victims were over four times as likely to receive the death penalty than defendants accused of killing black victims, and a black defendant accused of killing a white victim was much more likely than any other type of defendant to receive the death penalty.[38] The persuasiveness and veracity of this study was accepted by the U.S. Supreme Court in the case of *McCleskey v Kemp*, though the Justices did not find that the evidence supported McCleskey's particular case.[39]

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[33] The Law Commission of India, '*The Death Penalty*' Report No. 262, August 2015.
[34] F.R. Baumgartner, M. Davidson, K.R. Johnson, A. Krishnamurthy and C.P. Wilson, Deadly Justice: A Statistical Portrait of the Death Penalty (Oxford University Press, 2018) 348.
[35] Ibid. 340-5.
[36] Roger Hood and Carolyn Hoyle, *The Death Penalty: A Worldwide Perspective* (5th edn, OUP 2015) ch. 7.
[37] Roger Hood and Carolyn Hoyle, *The Death Penalty: A Worldwide Perspective* (5th edn, OUP 2015) 375.
[38] David Baldus, Charles Pulaski and George Woodworth, 'Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience' (1983) 74 *Journal of Criminal Law and Criminology* 3 661-753.
[39] 481 U.S. 279 (1987).

32. A meta-analysis of studies of capital charging and sentencing across the U.S. over different time periods provided conclusive evidence that those who killed white victims were more likely than those who killed black victims to face capital prosecution, and are sentenced to death at higher rates.[40] Even when controlling for aggravating factors,[41] there is evidence of the continuing pervasive impact of racial discrimination and arbitrariness throughout every stage of the criminal process that leads to a death sentence.[42]
33. Race is not the only legally irrelevant feature of death sentencing in the U.S. Indeed, '[t]hose with serious mental illness, those with no family, those with no funds to hire private attorneys to defend them, or those who in various ways are the most vulnerable are more likely to be executed.'[43]
34. Research across Asia, and indeed around the world, also demonstrates that 'those who are sentenced to death and executed are much more likely to be among the least powerful of all who are convicted of capital crimes.'[44]
35. While there is some evidence of the discriminatory impact of race in India and elsewhere, class and caste also shape sentencing.[45] Furthermore, citizenship is correlated with decisions to sentence to death and even to execute in various Asian and Middle Eastern jurisdictions, with foreign nationals not afforded the same rights as citizens when arrested for capital offences, and not given the protections that should be guaranteed by the Vienna Convention on Consular Relations, 1963.[46]
36. Although the *Makwanyane* case that abolished the death penalty in South Africa did not focus on the correlation between race and capital convictions, with the Court's reasons for abolition grounded in the death penalty's irreparable breaches of fundamental human rights, it did hear evidence that four intersecting variables

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[40] Frank R. Baumgartner, '#BlackLivesDon'tMatter: Race-of-victim Effects in US Executions, 1976-2013' (2015) 3 *Politics, Groups and Identities* 209, 212.

[41] Michael Radelet and Glenn Pierce, 'Race and death sentencing in North Carolina, 1980–2007' (2011) 89 *North Carolina Law Review* 2119; Sheri Lynn Johnson, John H. Blume, Theodore Eisenberg, Valerie P. Hans and Martin T. Wells, 'The Delaware Death Penalty: An Empirical Study' (2012) 97 *Iowa Law Review* 1925; Glenn Pierce and Michael Radelet, 'Death Sentencing in East Baton Rouge Parish 1990-2008' (2011) 71 *Louisiana Law Review* 647.

[42] Death Penalty Information Center, *Enduring Injustice: The Persistence of Racial Discrimination in the U.S. Death Penalty* (2020); Steven Shatz, Glenn Pierce and Michael Radelet, 'Race, Ethnicity, and the Death Penalty in San Diego County: The Predictable Consequences of Excessive Discretion', *Columbia Human Rights Law Review* 51, pp. 1070-1098.

[43] F.R. Baumgartner, M. Davidson, K.R. Johnson, A. Krishnamurthy and C.P. Wilson, *Deadly Justice: A Statistical Portrait of the Death Penalty* (Oxford University Press, 2018) 340-5: 349.

[44] Saul Lehrfreund and Roger Hood, 'The inevitability of arbitrariness: Another aspect of victimisation in capital punishment laws' in OHCHR, *Death Penalty and the Victims* (UN 2016) <https://www.ohchr.org/EN/newyork/Documents/Death-Penalty-and-the-Victims-WEB.PDF> 150-151.

[45] National Law University Delhi, Project 39A, *Death Penalty India Report* (2016) at <https://www.project39a.com/dpir>; Roger Hood and Florence Seemungal, *A Rare and Arbitrary Fate: Conviction for Murder, the Mandatory Death Penalty and the Reality of Homicide in Trinidad and Tobago* (London: The Death Penalty Project 2006).

[46] Carolyn Hoyle 'Capital Punishment at the intersections of discrimination and disadvantage: the plight of foreign nationals', in C Steiker and J M Steiker (eds) *Comparative Capital Punishment* (Edward Elgar 2019); L. Harry, C. Hoyle & J. Hutton (2023) 'Migratory dependency and the death penalty: Foreign nationals facing capital punishment in the Gulf', *Punishment and Society*; C. Hoyle, J. Hutton & L. Harry (2023) 'A Disproportionate Risk of Being Executed: Why Pakistani Migrants Are Vulnerable to Capital Punishment in Saudi Arabia', *British Journal of Criminology;* D. Cullen (2021) 'Foreign nationals facing the death penalty: the role of consular assistance', *DPRU Blog* at <https://blogs.law.ox.ac.uk/research-and-subject-groups/death-penalty-research-unit/blog/2021/11/foreign-nationals-facing-death>.

accounted for death sentences there: poverty, race, gender and a pro bono defence counsel.[47]

37. Studies of death sentenced prisoners elsewhere have shown that they are not necessarily the most heinous offenders, but typically those who are the most disadvantaged and, in some cases, vulnerable. As research in both India and Bangladesh has shown, they tend to be economically marginalised, from low social classes, and poorly educated.[48] Their histories leave them exposed to crime and without adequate protections from the criminal justice system, rendering them arguably more likely to be sentenced to death and less likely to have adequate resources to navigate the criminal justice process.
38. Interviews with the majority of death row prisoners in Kenya reveal the low socio-economic status of the vast majority of those sentenced to death: more than one in 10 of the prisoners had never been in formal education, and more than two-thirds had only completed primary school, with almost half of these only completing *some* of their primary education.[49] Partly as a result of being relatively uneducated, they were comparatively poor, and in low-level, precarious jobs, with little financial security when they committed their offences (over half had been convicted for robbery with violence).[50]
39. Statistics on death row prisoners in Taiwan show that they may be similarly situated, with most educated only up to elementary or junior high level and therefore would be likely to be equally vulnerable, particularly during the criminal justice process leading up to conviction.[51]

Due process of law during investigations and trials

40. The risk of arbitrariness in capital cases can be present at every stage of the criminal justice process. This is most concerning in countries that retain the mandatory death penalty, such as Trinidad and Tobago, where the limited abilities of the criminal justice system to resolve cases of homicide means that the general probability of a murder resulting in a conviction is very low and being subject to the death penalty following convicted is both 'a rare and arbitrary fate.'[52]
41. Following abolition of the mandatory death penalty, common law jurisdictions have introduced sentencing guidelines in an effort to ensure consistency in the approach to capital charging and sentencing. Not least, there should be advance notice by the prosecution of their intention to seek the death penalty and the defence should be

[47] S v Makwanyane and Another 1995 (3) SA 391 (CC), paras 48-49 per President Chaskalson.
[48] National Law University of Delhi, *Death Penalty India Report* (2016), available at <https://www.project39a.com/dpir>; Dept. Law, University of Dhaka, *Living Under Sentence of Death: A Study on the Profiles, Experiences and Perspectives of Death Row Prisoners in Bangladesh* (London: The Death Penalty Project, 2022) <deathpenaltyproject.org/knowledge/living-under-sentence-of-death>.
[49] Carolyn Hoyle and Lucrezia Rizzelli, *Living with a Death Sentence in Kenya: Prisoners' Experiences of Crime, Punishment and Death Row*, (London: The Death Penalty Project, 2006).
[50] Ibid.
[51] Taiwan Alliance to End the Death Penalty: Dignity. Justice. International Symposium on the Right to Life - Taiwan Death Penalty Prison Interview Project, TAEDP (20 Nov. 2023) https://deathpenaltyproject.org/taiwan-alliance-to-end-the-death-penalty-dignity-justice-international-symposium-on-the-right-to-life-taiwan-death-penalty-prison-interview-project/
[52] Roger Hood and Florence Seemungal, *A Rare and Arbitrary Fate: Conviction for Murder, the Mandatory Death Penalty and the Reality of Homicide in Trinidad and Tobago* (London: The Death Penalty Project, 2006), 23.

notified of the grounds for that decision.[53] However, subjectivity in decision-making creates patterns of arbitrariness, especially when a high proportion of homicide cases remain unsolved and the majority of convictions are overturned on appeal, such as across the Caribbean.[54] A key variable in regard to pre-trial arbitrariness concerns the energy, quality and intensity of police investigations, which can play a significant role in determining the likelihood of the eventual imposition of a death sentence in a given case. In The Bahamas, for example, during the period 2005 - 2009, a total of 333 homicides were recorded, out of which only 10 cases resulted in murder convictions.[55]

42. International standards for a fair trial guarantee all persons arrested or detained on a criminal charge the right to competent and effective legal counsel from the start of a criminal investigation and as soon as they are deprived of their liberty. This enables defendants to protect their rights and prepare their defence, and serves as an important safeguard against torture and other ill-treatment, and against coerced confessions or other self-incriminating statements.[56] Data from Bangladesh and India, for example, expose justice systems marred by corruption, incompetence, abuses of due process, and arbitrary and inconsistent treatment of defendants from arrest through to conviction and sentencing.[57]
43. The United Nations Human Rights Committee is clear that violations of fair trial guarantees, provided for in Article 14 of the ICCPR, in cases that result in the imposition of the death penalty would render the sentence arbitrary in nature and therefore constitute a violation of the right to life.[58] In many instances, such protections are not ensured in practice,[59] and even where standards are maintained, the risks of wrongful convictions and miscarriages of justice remain significant.[60]
44. Violations include the use of forced confessions; the lack of effective representation; excessive and unjustified delays; general lack of fairness of the criminal process; or lack of independence or impartiality of the trial or appellate court. They also include a failure to promptly inform detained foreign nationals of their right to consular notification and assistance under the Vienna Convention on Consular Relations (1963).[61]
45. In recent years, death sentences have reportedly been imposed after arbitrary arrests, inadequate legal representation, lack of due process and fair trial guarantees in many

[53] Joe Middleton and Amanda Clift-Matthews with Edward Fitzgerald QC, *Sentencing in Capital Cases* (London: The Death Penalty Project 2018).
[54] Arif Bulkan, 'The death penalty in the Commonwealth Caribbean: Justice out of reach?' in OHCHR, *Moving away from the death penalty: Arguments, trends and perspectives* (UN 2014): 136. <https://www.refworld.org/docid/54a684144.html> 149.
[55] Amnesty International, *Death Penalty in the English-speaking Caribbean* (2012) <https://www.amnesty.org/download/Documents/20000/amr050012012en.pdf> 27.
[56] Principle 1 of the UN Basic Principles on the Role of Lawyers, adopted by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.
[57] Carolyn Hoyle and Saul Lehrfreund, 'Contradictions in Judicial Support for Capital Punishment in India and Bangladesh: Utilitarian Rationales'(2019) *Asian Journal of Criminology*.
[58] UN Human Rights Committee, General comment No. 36, para. 41; and General comment No. 32 (2007), para. 59.
[59] Saul Lehrfreund, 'Wrongful convictions and miscarriages of justice in death penalty trials in the Caribbean, Africa and Asia' in OHCHR, *Moving away from the death penalty: Arguments, trends and perspectives* (UN 2014) <https://www.refworld.org/docid/54a684144.html> 48.
[60] ibid 65.
[61] Human Rights Committee, General Comment No. 36, paras. 42-43.

countries, including Bahrain, Iraq, Saudi Arabia, Yemen, China, and Singapore, and Myanmar.[62]

46. Under Taiwan's Code of Criminal Procedure, torture or illegal treatment are prohibited. According to Article 156 of the Code, the confession of an accused extracted by violence, threat, inducement, fraud, exhausting interrogation, unlawful detention, or other improper means shall not be admitted as evidence before the court. Notwithstanding, people have been sentenced to death on the basis of confessions extracted by torture in Taiwan.[63]
47. Evidence from all retentionist countries suggests a gap between protections in law and in practice, not least in relation to the absence or effectiveness of legal representation when indigent defendants are limited to the minimal support provided by legal aid systems,[64] often relying on pro bono or very junior counsel to assist them with the preparation of their defence. In Taiwan, the shortage of lawyers prepared to provide legal assistance to the accused in capital cases has been a significant barrier to fair pre-trial and trial processes.[65]
48. In South Korea and parts of Pakistan, there is no mandatory requirement for an appeal to a higher court in death penalty cases, and in North Korea there is no possibility of appeal at all, making wrongful convictions there, as elsewhere, likely.[66]
49. The death penalty system in Japan is not subject to 'super due process' of the kind that America has adopted in its attempt to ensure some protection against arbitrariness in its death penalty system, albeit without resolving the problem.[67] And in other retentionist countries across Asia, prisoners facing the death penalty have little or no access to a lawyer following arrest or when preparing for trial or appeal. In some cases, lawyers are subject to intimidation, and excluded from legal proceedings.[68]
50. On 4 July 2023, Malaysia repealed the mandatory death penalty and introduced sentencing discretion for all offences, for which the death penalty was applicable.[69] Since then, defendants convicted of capital offences by Malaysian high courts have faced the possibility of being sentenced either to death or to the alternative punishment of terms of imprisonment of between 30 and 40 years and whipping; or of having their existing death sentence commuted as part of their ordinary appeals before the Court of Appeal or Federal Court.[70]

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[62] United Nations General Assembly, Question of the death penalty, A/HRC/51/7 (2022) paras 39, 40, 41.
[63] 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* (2014) 27.
[64] Bulkan (n 49) 133; Saul Lehrfreund, 'Wrongful convictions and miscarriages of justice in death penalty trials in the Caribbean, Africa and Asia' in OHCHR, *Moving away from the death penalty: Arguments, trends and perspectives* (UN 2014) <https://www.refworld.org/docid/54a684144.html> 53.
[64] Saul Lehrfreund, 'Wrongful convictions and miscarriages of justice in death penalty trials in the Caribbean, Africa and Asia' in OHCHR, *Moving away from the death penalty: Arguments, trends and perspectives* (UN 2014) <https://www.refworld.org/docid/54a684144.html> 48.
[64] ibid p.65.
[65] 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* (2014) 35.
[66] Anti-Death Penalty Asia Network, *When Justice Fails,* 31.
[67] David T. Johnson, 'Progress and Problems in Japanese Capital Punishment' in R. Hood and S. Deva (eds) *Confronting Capital Punishment in Asia* (2013) 168-184 at 175-182.
[68] Anti-Death Penalty Asia Network, *When Justice Fails,* 31.
[69] Abolition of Mandatory Death Penalty Act 2023 (Act 846).
[70] Ibid.

51. A report by Amnesty International, published in February 2024, depicts a significant decrease in the number of death sentences imposed or upheld by the Malaysian high courts in the first six months of reconsideration of these cases. However, these cases also gave rise to concerns that systemic flaws and violations of international human rights law and standards continued to be present both in Malaysia's discretionary imposition of the death penalty and its alternatives under the amended laws. Some 28% of defendants had their *charges* amended to a lesser offence or were acquitted, in the High Court or on appeal, suggesting they should never have been convicted of capital cases in the first instance.[71] Just under half (40%) of 50 people who had been sentenced to death, whose cases were examined, had been unrepresented, despite legal aid schemes established across Malaysia to support defendants from less advantaged socio-economic backgrounds.[72]
52. Notwithstanding the incorporation of the ICCPR into domestic law in Taiwan, experts have found that executions in Taiwan fail to comply with the obligations of international law and as such, have violated defendants' right to life.[73] For example, according to Article 6(4) of the ICCPR, the right to seek pardon and amnesty should be guaranteed, and Taiwan is therefore under a strict obligation to provide effective measures for the proper consideration of clemency in all cases.[74] However, no clear rules of procedure have been established for the consideration of a petition for pardon or mercy, let alone the criteria by which such petitions may be reviewed and decided. The Amnesty Law has rendered the decision to grant a pardon or mercy entirely discretionary, even without the necessity to reply to the petitions. Basic principles of natural justice and procedural fairness are absent from the process and the Amnesty Law has been criticised for failing to comply with Article 6(4) of the Covenant.[75] Furthermore, death sentences should not be executed whilst determination of mercy procedures are pending, something that has happened in Taiwan.[76] It is thus evident that Article 6(4) of the ICCPR, guaranteeing the right of death row inmates to seek pardons, is not being complied with.
53. Given this evidence, it should not be surprising that a study of legislators in Taiwan found that fewer than a quarter believed that the criminal justice system typically offers adequate and fair procedural safeguards for defendants in capital cases, with almost half thinking that the police could never or rarely be trusted and significant proportions of interviewees lacking trust in prosecutors and in the courts.[77]

Wrongful convictions

54. The United States has developed a death penalty jurisprudence that recognises that 'death is different' and therefore worthy of 'super due-process'. From the decision to prosecute right through to the right to appeal, and the opportunities for clemency or pardon, capital defendants have different experiences to those facing life imprisonment or other lesser sentences. Despite these enhanced protections, the

[71] Amnesty International ACT 50/7750/2024 Public Statement: 'Malaysia: First six months of sentencing discretion underscore urgent need for indefinite extension of moratorium on executions', 26 February 2024.
[72] Ibid.
[73] 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* (2014) 5.
[74] Ibid p. 20; *see also* Article 6(4) of the ICCPR.
[75] Ibid p. 21-22.
[76] Ibid p. 22.
[77] Carolyn Hoyle and Shiow-duan Hawang, *Legislators' Opinions on the Death Penalty in Taiwan* (London: The Death Penalty Project 2021) 8-9.

most advanced retentionist democracy in the world has been unable to prevent innocent people, as well as those for whom death was not a proportionate penalty, being sentenced to death and executed.[78]

55. If 'super due process' has not eradicated arbitrariness and wrongful convictions in the U.S., it follows that other nations, which do not even promise 'super due process', will not be able to eradicate procedure flaws in the administration of capital punishment, especially where financial and legal resources are inadequate.
56. Because death is not deemed to be 'different' in Japan, it fails to conform to universally agreed standards for special protection and fair-trial guarantees beyond those offered in non-capital cases.[79] Prosecutors are not obliged to state their intention to seek the death penalty until the penultimate day of the trial,[80] denying the defendant the opportunity to prepare an adequate defence. This means that the Japanese Bar Association cannot offer support in preparation for and during the trial that their counterparts in the U.S. can. Moreover, in Japan, unlike the U.S., the trial process is not bifurcated, which results in inadequate mitigation evidence being made available to the court. Nor is there any requirement that judges and 'lay judges' (introduced in 2009) agree on the sentence: all that is needed for a death sentence is for five of the nine judges (including one professional judge) to vote for death.[81]
57. Given the lack of transparency and the failure to ensure equality of arms, it is hardly surprising that Japan has an exceptionally high conviction rate (higher than 99%).[82] Consequently, it is impossible to be confident that death row in Japan does not house innocent persons, or prisoners undeserving of death. The situation is made worse by the absence of automatic appellate review, and by the fact that prosecutors can appeal against sentences less than death.[83] As Professor David Johnson puts it, 'if the law of capital punishment in America fails to fulfil many of its promises, law in Japan fails by refusing to make any promises at all.'[84]
58. Not surprisingly, one of the world's most notorious wrongful convictions occurred in Japan. In March 2014, Iwao Hakamada was freed from death row after spending 47 years in solitary confinement, for the murders of two children and their parents. Hakamada had provided a confession after 20 days of interrogation, with no lawyer present, during which he was tortured. Decades later, following the discovery of new

[78] Anna VanCleave, *The Illusion of Heightened Standards in Capital Cases*, Ill. L. Rev. (2023) 1289, 1332. For a critique of the way that evidentiary rules in the United States fail in preventing wrongful convictions, see generally Jeffrey Bellin, The Evidence Rules That Convict the Innocent, 106 CORNELL L. REV. 305, 306 (2021).

[79] International Federation for Human Rights, *The Death Penalty in Japan: The Law of Silence* (2008), available from <https://www2.ohchr.org/english/bodies/hrc/docs/ngos/FIDHJapan94.pdf>.

[80] In clear violation of Article 14(3)(a) of the ICCPR.

[81] Saul Lehrfreund, 'The Impact and Importance of International Human Rights Standards: Asia in World Perspective' in R. Hood and S. Deva (eds) *Confronting Capital Punishment in Asia: Human Rights, Politics and Public Opinion* (Oxford, Oxford University Press 2013) 23-45 at 34-35. A new Bill drafted by leaders of Japan's Diet Members League for the Abolition of Capital Punishment (the 'Be Cautious about Capital Punishment' Bill, drafted in 2011) proposed a requirement for all judges and lay judges to agree to a death penalty, but the Bill never made it out of committee. See David Johnson, 'Progress and Problems in Japanese Capital Punishment' in Hood and Deva (eds) 168-184 at 172-173.

[82] Hiroko Tabuchi, 'Soul-Searching as Japan Ends a Man's Decades on Death Row' *New York Times* March 27, 2014.

[83] For a thorough review of the failings of the Japanese criminal justice process to achieve anything near reasonable due process protections for defendants, see David T. Johnson, 'Progress and Problems in Japanese Capital Punishment' in R. Hood and S. Deva (eds) *Confronting Capital Punishment in Asia* (2013) 168-184 at 175-180.

[84] David T. Johnson, 'Progress and Problems in Japanese Capital Punishment' in R. Hood and S. Deva (eds) *Confronting Capital Punishment in Asia* (2013) 168-184 at 182.

DNA evidence and proof that prosecutors had fabricated the case against him, Hakamada, an old and ailing man, was released with no apology or official state acknowledgement of accountability.[85]

59. A report by The Death Penalty Project describes the exoneration of four other Japanese men who served between 28 and 33 years in solitary confinement. Like Hakamada, and many other wrongfully convicted persons around the world, Menda, Saitagawa, Matsuyama, and Shimada were all convicted following long and brutal interrogations that produced false confessions.[86]
60. Some of the more notorious wrongful convictions in China have followed pre-trial treatment described by defendants as torture. Nie Shubin was wrongfully executed in 1995 for the rape and murder of a local woman, a crime that another man later confessed to. Similarly, She Xianglin and Teng Xingshan, convicted for murdering their wives, were shown to be innocent when the women reappeared several years later; too late for Teng Xingshan who had already executed. Zhao Zuohai was tortured and forced to confess to the murder of a fellow peasant farmer. His death sentence was commuted to a 29-year prison sentence but after serving 11 years his "victim" returned to the village alive and well. Unfortunately for Zuohai, his wife had left him, married another man and given up his two children for adoption. He claims that while in prison he confessed to this "crime" nine times following severe beatings. China now provides for more than one appeal, but there are concerns that the review process before the Supreme People's Court does not meet the minimum requirements of Article 14 of the ICCPR and only recently have appellants been able to acquire legal representation at this stage.[87]
61. Various human rights organisations and media sources have cited examples of individuals being released from custody after being sentenced to death in a wide range of other jurisdictions worldwide, including Belize, Malawi, Malaysia, Pakistan, Papua New Guinea, the Philippines, Trinidad and Tobago and the United States.[88] In all cases, it was decided by the courts that convictions were unsafe, and in many there was clear evidence that prisoners were factually innocent of the offences of which they had been convicted. In 2010, the United Nations stated: "It appears to be beyond dispute that innocent people are still sentenced to death."[89] All evidence suggests that this continues and is certainly the case in Taiwan.
62. In a dramatic gesture, President Ma Ying-jeou of Taiwan apologised in 2011 to the mother of Chiang Kuo-ching, a soldier who had been wrongly executed in 1997 for the rape and murder of a 5-year-old girl. The president pardoned Chiang and offered his mother reparation after another man had confessed to the crime.[90] Other death row

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[85] The Death Penalty Project, *The inevitability of error: The administration of justice in death penalty cases* (2014) at <https://deathpenaltyproject.org/knowledge/the-inevitability-of-error-the-administration-of-justice-in-death-penalty-cases/> 9-11.

[86] Ibid 8.

[87] Saul Lehrfreund, 'Wrongful Convictions and Miscarriages of Justice in Death Penalty Trials in the Caribbean, Africa and Asia', in OHCHR, *Moving away from the death penalty: Arguments, trends and perspectives* (UN 2014) <https://www.refworld.org/docid/54a684144.html> 61.

[88] Roger Hood and Carolyn Hoyle, *The Death Penalty: A Worldwide Perspective* (5th edn, OUP 2015) 118; Amnesty International, *Death Sentences and Executions in 2012* (2013) <https://www.amnesty.org/download/Documents/8000/act500012013en.pdf>.

[89] UN Secretary-General, 'Capital punishment and implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty' (2009) UN Doc E/2010/10 <https://undocs.org/en/E/2010/10>, para 140.

[90] 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* (2014) 27-28.

exonerations, after trials that relied on false confessions following torture, have resulted in the Taiwanese government paying compensation to wrongfully convicted people and campaigners calling for abolition.[91] Despite this, there have been more than 30 executions in Taiwan since these. As explained below, there is evidence that some of those will likely have been wrongfully convicted.

63. Detailed analysis of the legal processes that led up to convictions in each of the 62 capital convictions recorded in Taiwan between 2006 and 2015 found that ten of the 62 judgments were seriously flawed, with no significant inculpatory evidence to support the prosecution's key claims concerning guilt. In 32 of the judgments, the court failed to establish premeditation, indicating that these were not the 'worst of the worst' crimes, while almost half (28) of the cases contained assertions about criminal intent without supporting evidence. Emotive language was used to support such claims in a number of cases.[92]
64. Such evidence that Taiwan's system of capital punishment is seriously flawed, and that there is a very real danger that innocent people are being sentenced to death and executed, clearly demonstrates the importance of improving procedural safeguards in order that Taiwan meets the necessary international human rights norms and standards to protect people facing the death penalty. However, while this may decrease the likelihood of wrongful convictions, evidence from other developed democracies that retain the death penalty suggests that there is no perfect justice system and wrongful convictions will never be eliminated.
65. In Taiwan, as in all the countries where sophisticated public opinion research has been carried out, concerns about wrongful conviction reduce support for the death penalty considerably among both the public and 'elites' or 'opinion formers'. In a rigorous public opinion survey published in 2014 of a representative sample of 2,039 Taiwanese, almost three quarters of respondents believed that a wrongful conviction could happen, and two thirds believed that some innocent people had been sentenced to death. Perhaps not surprisingly, only a minority (32%) of Taiwanese citizens were *strongly* opposed to abolition. When respondents considered abolition in light of the case of Chiang Kuo-ching (江), an innocent man executed in Taiwan in 1997, the number that *strongly* opposed abolition fell to just 6%.[93] Here, as elsewhere, public support for capital punishment is not entrenched, but is contingent on it being applied fairly and safely. Evidence that it is not, so that innocent or undeserving people can be sentenced to death, reduces support considerably.
66. A 2021 report based on interviews with 38 Taiwanese legislators found that only a small minority (11%) believed that wrongful convictions rarely occur, with the majority convinced that they occurred often.[94] Indeed, as with similar studies of opinion formers elsewhere, it was found that legislators had low trust in the criminal justice system to convict the guilty and protect the innocent. Not surprisingly, the majority of those in favour of abolition cited fear of executing the innocent as one of their key rationales.[95]

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[91] *See, e.g.,* Jason Pan, High Court Acquits Death Row Convict, Taipei Times (Oct. 27, 2017) <https://www.taipeitimes.com/News/front/archives/2017/10/27/2003681122>

[92] Carolyn Hoyle, *Unsafe convictions in capital cases in Taiwan: A report based on the research and findings of Chang Chuan-Fen* (London: Death Penalty Project, 2019).

[93] Chiu Hei-Yuan, *For or against abolition of the death penalty: Evidence from Taiwan* (London: The Death Penalty Project, 2019), edited by Roger Hood.

[94] Carolyn Hoyle and Shiow-duan Hawang, *Legislators' Opinions on the Death Penalty in Taiwan* (London: The Death Penalty Project, 2021) 26.

[95] Ibid 26-27.

Psychiatric and psychological evidence

67. A further area of significant concern in relation to lack of fair trial guarantees, and the consequent risk of arbitrariness, is the provision of psychiatric and psychological medical evidence: whether it is sought, provided and appropriately considered in capital cases. Despite the pivotal importance of evidence relating to defendants' psychiatric state, in many retentionist jurisdictions such evidence is often not admitted, often because it is extremely difficult to acquire.[96]
68. In the 2011 case of *Lockhart v The Queen,*[97] the Privy Council determined that psychiatric reports should be provided in every case in which the death penalty may be imposed, as well as reports from a clinical psychologist where this was considered to be necessary. The provision of such evidence can however be complicated by the lack of availability of qualified experts in some jurisdictions, as well as by the costs involved in procuring expert assessments.[98]
69. Despite established legal principle prohibiting such actions,[99] individuals who had been suffering from significant mental disorders at the time of the offence and/or at the time of sentencing or execution are known to have been sentenced to death and executed in jurisdictions including Japan and Singapore.[100] The continuing possibility of such eventualities has been illustrated by several cases from the region over recent years. Furthermore, a robust study of death row prisoners in India found that 11% had been diagnosed with an intellectual disability that was not assessed during trial.[101]
70. While legal safeguards exist to protect those with mental health issues from the imposition of the death penalty, these cases highlight the arbitrariness of their implementation in practice, particularly for those accused of capital crimes in jurisdictions where funding for mental health assessments is often not available.[102]
71. Article 19 of the Criminal Code of Taiwan provides that an offence is not punishable if it is committed by a person who is suffering from a mental disorder or defect and, as a result, is unable or less able to judge his or her act or lacks the ability to act according to his or her judgment. However, evidence suggests that those suffering from mental illness and/or intellectual disability have been sentenced to death. In criminal trials, such defendants are often portrayed as attempting to deceive the court in order to receive a more lenient sentence. Psychiatric and/or psychological examinations are

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[96] Nigel Eastman, Sanya Krljes, Richard Latham, Marc Lyall*, Casebook of Forensic Psychiatric Practice in Capital Cases* (London: The Death Penalty Project, 2018) <https://www.deathpenaltyproject.org/knowledge/casebook-of-forensic-psychiatric-practice-in-capital-cases/>.

[97] [2011] UKPC 33 (Bahamas), paras. 11-13.

[98] Joe Middleton, Amanda Clift-Matthews and Edward Fitzgerald, *Sentencing in Capital Cases* (The Death Penalty Project, 2018) <https://www.deathpenaltyproject.org/wp-content/uploads/2018/10/Sentencing-in-Capital-Cases-2018.pdf > 58.

[99] Human Rights Committee, General comment No. 36, para. 49. See also Economic and Social Council resolutions 1984/50 and 1989/64.

[100] United Nations General Assembly, *Question of the death penalty*, A/HRC/51/7, 2022, para 56. See also, Saul Lehrfreund, 'Wrongful convictions and miscarriages of justice in death penalty trials in the Caribbean, Africa and Asia' in OHCHR, *Moving away from the death penalty: Arguments, trends and perspectives* (UN 2014) <https://www.refworld.org/docid/54a684144.html> 55.

[101] Project 39A , *Deathworthy: A Mental Health Perspective of the Death Penalty* (2021) at <https://www.project39a.com/deathworthy-a-mental-health-perspective-of-the-death-penalty>.

[102] The Death Penalty Project, 'UK judges uphold death sentence of Trinidad prisoner despite him "more likely than not" having serious mental illness' (2018) at <https://www.deathpenaltyproject.org/uk-judges-uphold-death-sentence-of-trinidad-prisoner-despite-him-more-likely-than-not-having-serious-mental-illness/>.

not always made available to the court and when produced they are often inadequate. Clearly, the assessment of the mental condition of criminal defendants remains a challenging issue in Taiwan and the rights of such defendants are thus being infringed.[103]

The role of the judiciary in discretionary sentencing

72. Notwithstanding considerable reforms introduced into the death penalty systems in many retentionist countries, none have as yet been shown to be free from arbitrariness.[104] From China[105] to the U.S.,[106] sentencing and judicial review procedures remain arbitrary.
73. The adequate consideration of psychiatric and psychological evidence has particular importance in capital cases in the context of the 'rarest of the rare' approach to discretionary death penalty sentencing, which has increasingly been adopted in place of former mandatory death penalty regimes. The intention behind this test is to restrict the imposition of death sentences to exceptional cases.
74. As discussed above, the 'rarest of the rare' doctrine was originally established by the Supreme Court of India in the case of *Bachan Singh v State of Punjab,* in 1980.[107] The Court held that the death penalty would only be constitutional if its imposition were restricted to the most exceptionally serious cases, but that extremely brutal crimes should not *inevitably* result in death sentences. The sentencing framework requires judges to balance aggravating and mitigating factors, giving a 'liberal and expansive construction' to the latter.[108] Included in the mitigating factors is the obligation of the State to show that the accused is beyond the possibility of reformation.[109] If applied as envisioned by the Court, the death penalty would be used in India in only a very few cases where the alternative of life imprisonment is unquestionably foreclosed.
75. The Indian Supreme Court of India sought to restate the 'rarest of the rare' test to clarify its application in the 2009 case of *Santosh Bariyar v State of Maharashtra*.[110] Here, the Court emphasised the importance of the second limb of the test – that the circumstances of the offender and their prospects for reform must always be considered. The Court noted that lower courts had not always examined the two parts of the test as separate elements, in many instances only considering the seriousness of the offence. This decision made clear that the imposition of a death sentence required the prosecution to prove that rehabilitation would be impossible. This restrictive test was subsequently adopted as the framework used by the Eastern Caribbean Court of Appeal[111] and the Privy Council, in the 2009 case of *Trimmingham v The Queen.*[112]

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[103] The Death Penalty Project, *The Death Penalty in Taiwan: A report on Taiwan's legal obligations under the International Covenant on Civil and Policitcal Rights* (2014) 18.
[104] Hood and Hoyle (n 33) ch. 8.
[105] Liu Renwen, 'Recent Reforms and Prospects in China', in R. Hood and S. Deva (eds) *Confronting Capital Punishment in Asia: Human Rights, Politics and Public Opinion* (Oxford, Oxford University Press 2013), pp. 107-122; Michelle Miao, 'Capital Punishment in China: A populist instrument of social governance' (2013) *Theoretical Criminology*, 17(2).
[106] Willian Berry, 'Practicing Proportionality' (2012) 64 Florida Law Review 687-719.
[107] (1980) *2 SCC 684.*
[108] Ibid par. 224.
[109] Ibid par. 312.
[110] [2009] INSC 1056. See also Rajesh Kumar v State of NCT of Delhi [2011] *ALL SCR 2670*.
[111] *Trimmingham v the Queen* (2005) Criminal Appeal No 32 of 2004, EECA (Saint Vincent and the Grenadines).
[112] [2009] UKPC 25 (Saint Vincent and the Grenadines).

76. A high degree of subjective judicial judgment is involved in the imposition of any death sentence, and concerns have been raised about the consistency with which the 'rarest of the rare' test has been applied in practice. Empirical research by Professor Surya Deva, examining judicial practice between 2000 and 2011, found some variation and error in its application, creating a random selection of the most unfortunate defendants among many similar cases. This clearly undermines the legitimacy of the 'rarest of the rare' formula,[113] leaving Deva to conclude that it had 'outlived its utility' and that, given the Court's failure to exercise its discretion in a consistent and non-arbitrary way, India should abolish the death penalty.[114]
77. In a 2017 report, an Indian non-governmental organisation, Project 39A, published the results of an opinion study which surveyed 60 former judges of the Supreme Court of India regarding the death penalty and its role in the Indian criminal justice system.[115]
78. With regard to the 'rarest of the rare' test, the report found that judicial understandings of the doctrine commonly emphasised the brutality of the offence with some judges not considering whether life imprisonment was 'unquestionably foreclosed' in deciding on punishments. Divergent views were also expressed as to the weight and scope to be given to individuals' mitigating circumstances in the process of determining the sentence. Such propensity for variation in judicial approaches to sentencing creates a significant risk of arbitrariness. The outcome of an individual's case, at the trial and/or appeal stages, and thereby their risk of receiving the ultimate penalty, could rest partially or entirely on the assignment of the judge(s) to their case.
79. Despite judicial pronouncements about the test, case outcomes clearly are still varied and many would appear to be based solely on the nature of the offence.[116] As the authors of the Project 39A report concluded, '… judges tasked with sentencing are supposed to be presented with a far more comprehensive and nuanced task, which goes far beyond merely determining whether the crime before them is rare.'[117] Many judges interviewed for this report did not understand this.
80. While the report found significant acknowledgment among the majority of judges interviewed as to the potential for wrongful convictions in the Indian criminal justice system, there was only minimal acceptance of the possibility of error in capital cases as constituting a reason for the abolition of the death penalty.[118]
81. Other Asian jurisdictions that have followed a similar path in trying to restrict capital punishment to the most heinous offences, such as Bangladesh and Japan, have also failed to establish a consistent and fair interpretation of sentencing policy,[119] leading

[113] Surya Deva, 'Death Penalty in the 'Rarest of Rare' Cases: A Critique of Judicial Choice-making', in Hood and Deva (eds) *Confronting Capital Punishment in Asia: Human Rights, Politics, and Public Opinion* (Oxford, Oxford University Press 2013) 238-286 at 256. See also Bikram Jeet Batra, *Lethal Lottery: The Death Penalty in India: A Study of Supreme Court Judgments in Death Penalty Cases, 1950-2006 (*New Delhi, Amnesty International and People's Union for Civil Liberties 2008) 44.

[114] Surya Deva, 'Death Penalty in the 'Rarest of Rare' Cases: A Critique of Judicial Choice-making', in Hood and Deva (eds) *Confronting Capital Punishment in Asia: Human Rights, Politics, and Public Opinion* (Oxford, Oxford University Press 2013) 238-286 at 256.

[115] Project 39A, *Matters of Judgment: A judges' opinion study on the death penalty and the criminal justice system* (November 2017) <https://issuu.com/p39a/docs/combined231117>.

[116] For examples from Indian case law see: Roger Hood and Carolyn Hoyle, *The Death Penalty: A Worldwide Perspective* (5th edn, OUP 2015) 351-352.

[117] Project 39A (n 98) 53.

[118] ibid 15.

[119] Roger Hood and Carolyn Hoyle, *The Death Penalty: A Worldwide Perspective* (5th edn, OUP 2015) chapter 8; David T. Johnson, 'Progress and Problems in Japanese Capital Punishment' in R. Hood and S. Deva (eds) *Confronting Capital Punishment in Asia* (2013) 168-184 at 175-182.

to the same conclusions that 'nothing about the nation's capital jurisprudence can explain who gets sentenced to death or hanged when hundreds of equally or more culpable offenders escape the death penalty altogether.'[120]

The legal context

82. As well as the risk of arbitrariness arising from reliance on the subjective judgments of the judge(s) sitting in capital cases, the fate of individuals who may face death sentences can also depend significantly on the 'shifting sands' of the jurisprudential contexts in which they find themselves. Recent decades have seen continual impact of jurisprudence governing the use of the death penalty, including commutations of death sentences across the Caribbean when prisoners have been on death row for more than five years, following the 1994 decision of the Privy Council in *Pratt and Morgan v Attorney General for Jamaica.*[121] The Privy Council held that for an individual to remain awaiting execution for a period of more than five years would constitute cruel and unusual punishment.[122] This decision prompted the commutation of the sentences of hundreds of individuals in the Caribbean region.[123]
83. I understand that only one or two of the 37 people on death row in Taiwan have been there for less than five years. The vast majority have been there for more than 11 years, with just under half having been there for more than 20 years. In the Caribbean and Uganda, almost all of Taiwan's death sentenced prisoners would have their sentences commuted to life.
84. Other developments in the jurisprudential landscape over the past 30 years have meant that the precise fate of an individual who may be at risk of facing a death sentence could be altogether different depending on the status quo in their jurisdiction at the time, such as whether mandatory sentencing was retained, the period of time they had been awaiting execution and the point at which their appeal occurred in relation to changes in judicial opinion and doctrine. Such inconsistencies across similar jurisdictions create unacceptable levels of arbitrariness.

The political context

85. Whether an execution is carried out following a death sentence is also dependent on the political context in that jurisdiction, not least, on the presence or absence of a moratorium (formal or informal) on executions. For example, all countries in the English-speaking Caribbean have now passed the 10-year time period required to be classified as abolitionist *de facto* by the United Nations.[124]
86. The last execution in Taiwan was in 2020. Should this temporary moratorium, similar to that between 2006 and 2010, continue for another six years, it too would be considered abolitionist *de facto*.

[120] David T Johnson and Frankin E Zimring, *The Next Frontier: National Development, Political Change, and the Death Penalty in Asia* (New York, Oxford University Press 2009) 429-32.
[121] [1993] UKPC 1, [1994] 2 AC 1.
[122] Bulkan (n 49) 115-6.
[123] Douglas Mendes, 'Saving lives by luck and chance: Savings Law Clauses and the persistence of arbitrariness' (Proceedings of the Death Penalty Conference, Barbados, 3-5 June 2006) 3.
[124] The Death Penalty Project, 'Submission to the Inter-American Commission on Human Rights Thematic Hearing on the Situation of the Death Penalty in the English-speaking Countries of the Caribbean' (12 November 2019) 2.

87. The United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns,[125] has stated that where executions are resumed after having been suspended for an extended period, they may be rendered arbitrary in the absence of objective reasons for their resumption.[126]
88. The Special Rapporteur noted that there is particular risk of arbitrariness where, for example, the timing and selection of prisoners to be executed after resumption is decided 'at random' and/or where the resumption of executions is motivated by causes unrelated to the individual offender or their offence, such as by external political factors.[127]
89. Resumptions of executions after extended periods of their suspension in this manner have occurred in certain jurisdictions in recent years, such as in Jordan and Pakistan, with the threat of resumptions in Sri Lanka.[128] Such resumptions are often due to political imperatives, as was seen in 2023 in Myanmar, when political executions ended a forty-year moratorium.[129]
90. In March 2010, Taiwan's former Minister of Justice resigned from his office after refusing to sign execution orders for 44 death sentenced prisoners. Just under two months later, the Ministry of Justice broke its four-year moratorium and executed four of the persons on death row without providing due process of law.[130]
91. Across the African continent, there is considerable evidence that the death penalty is imposed or executed as an instrument of political power, with governments using it to enforce their policies and demonstrate their authority.[131] For example, the laws and practices related to the death penalty in Nigeria and the Democratic Republic of Congo, where there is evidence of unfairness and arbitrariness, illustrate the extent to which retentionist countries retain the death penalty for political reasons rather than in pursuit of justice.[132]
92. Similarly, across Asia, politics have driven retention and the administration of the death penalty. Michelle Miao has described capital punishment as functioning as a tool for political struggles in China since the Maoist revolution, with considerable evidence that today it serves as a populist mechanism to strengthen the resilience of the authoritarian party-state and enhance its political legitimacy.[133]

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[125] This reference concerns a report published during the time of Professor Heyn's mandate as Special Rapporteur, between August 2010 and July 2016.

[126] United Nations General Assembly, 'Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, on the protection of the right to life' (2014) UN Doc A/69/265 <https://undocs.org/A/69/265>, paras. 102-104.

[127] ibid.

[128] Amnesty International, 'The impact of the resumption of the use of the death penalty on human rights' (July 2019) ACT 50/0241/2019 < https://www.amnesty.org/download/Documents/ACT5002412019ENGLISH.PDF>.

[129] Amnesty International, *Myanmar: First executions in decades mark atrocious escalation in state repression* (July 2022) https://www.amnesty.org/en/latest/news/2022/07/myanmar-first-executions-in-decades-mark-atrocious-escalation-in-state-repression/

[130] Vincent Y. Chao, 'Legality of Capital Punishment Upheld', *Taipei Times* (May 29, 2010); Chang Wen-Chen, *Case Dismissed: Distancing Taiwan from the international human rights community*, Judicial Reform Foundation (Sept. 2010).

[131] Dirk Van Zyl Smit, 'The Death Penalty in Africa' (2004) *4 African Human Rights Law Journal 1*, 15.

[132] Aime Muyoboke Karimunda, *The Death Penalty in Africa: The Path Towards Abolition* (Routledge 2016)

[133] Michelle Miao, 'Capital Punishment in China: A populist instrument of social governance' (2013) *Theoretical Criminology*, 17(2).

93. Even in the U.S., political considerations influenced the resumption of executions in the federal system, where the latter months of the administration led by President Trump saw a spate of executions in 2020, after a long hiatus.[134]
94. Clearly, the fate of individuals who have been sentenced to death can also rest on the wider political context and changes in political factors at particular points in time, factors which are unrelated either to the individual or to the circumstances of their case.

CONCLUSIONS

95. This report has set out a variety of areas in which arbitrariness can and does arise in the use of the death penalty, a problem which remains present in discretionary sentencing regimes as in mandatory regimes. The persistence of this issue has prompted respected bodies to advise against retention of the death penalty even on the basis of a discretionary sentencing regime.
96. The ICCPR and the UN Economic and Social Council's *Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty*[135] prohibit the arbitrary deprivation of life where countries do not abide by the standards that guarantee a fair trial, the presumption of innocence and a fair opportunity for defendants to answer the charges brought against them before a duly constituted court. In 2009, Taiwan took the progressive step of incorporating the ICCPR as a matter of domestic law, voluntarily agreeing to conform to its human rights standards and objectives, including the ultimate abolition of the death penalty. Hence, the right to life in Taiwan cannot be diminished arbitrarily. If Taiwan cannot guarantee that defendants will be safe from unfair and arbitrary trial and appellate processes, from wrongful convictions, and from wrongful executions, the death penalty would be unconstitutional.
97. In this regard, Taiwan is no different from her neighbours in East Asia, nor from other jurisdictions across Asia, Africa, the Middle East and the Americas. Notwithstanding improvements in due process protections around the world, each of the UN Secretary-General's Quinquennial reports on the death penalty show that in retentionist states these safeguards are often breached and, in consequence, innocent people, as well as those who, within the laws of the country, do not 'deserve' the death penalty, are sentenced to death and executed.[136]
98. A thorough examination of Taiwan's legal obligations under the ICCPR, published in 2014, found that, notwithstanding the implementation of two international Covenants in Taiwan since 2009, which have improved the protection of the right to life and the right to a fair trial for capital defendants, Taiwan's system of capital punishment remains seriously flawed, as is every other system in the world.[137]
99. The evidence shows that at present, Taiwan does <u>not</u> have a justice system that sentences to death in only the most serious cases, where the evidence is robust and

[134] Michael Tarm and Michael Kunzelman, *Trump administration carries out 13th and final execution*, AP News (16 Jan. 2021) https://apnews.com/general-news-28e44cc5c026dc16472751bbde0ead50 (Noting that Trump carried out 13 executions following a 17-year hiatus, more than any president in over 120 years).

[135] UN Economic and Social Council, 'Resolution 1984/50: Safeguards guaranteeing protection of the rights of those facing the death penalty' (1984) UN Doc E/RES/1984/50, endorsed by the UN General Assembly in 'Resolution 39/118: Human rights in the administration of justice' (1984) UN Doc A/RES/39/118, adopted without a vote in December 1984 (updated in 1989).

[136] Reports available at: United Nations, 'Reports: Death penalty' (2023) <https://www.ohchr.org/en/death-penalty/reports-human-rights-council#>.

[137] 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* (2014) 2, 18-23.

has been tested effectively at each and every stage of the criminal process, and that does not violate human rights or condemn the innocent or the undeserving.

100. The people of Taiwan are not fundamentally opposed to abolition. A 2021 report, based on interviews with 38 Taiwanese legislators found that the majority (61%) supported abolition of the death penalty.[138] Indeed, only 6 of 38 legislators said that they may oppose an Act of Parliament to abolish the death penalty, and none said they would strongly and vigorously oppose abolition.[139] An earlier public opinion survey found that almost half of a representative sample of Taiwanese citizens would support abolition of capital punishment if it were to be replaced with life imprisonment, and 71% would support abolition if it was replaced with a life sentence without parole and compensation for victims or their families generated through work by the defendant.[140]

101. Reviewing the problems associated with the use of the discretionary death penalty in India, the Law Commission of India, in a 2015 report, concluded that the country's discretionary regime was untenable due to its inherent arbitrariness, and that the death penalty should be abolished for all ordinary crimes as '[t]here exists no principled method to remove such arbitrariness from capital sentencing.'[141]

102. A similar conclusion was reached by the American Law Institute in 2009. Reviewing problems with efforts to regulate the death penalty and concerns arising from its administration, the authors recommended that 'the preconditions for an adequately administered regime of capital punishment do not currently exist and cannot reasonably be expected to be achieved,'[142] prompting the Institute to withdraw the section on the death penalty from its Model Penal Code later that year.[143]

103. More recently, in December 2020, nearly a hundred current and former elected prosecutors, Attorneys General, and law enforcement leaders in the U.S. published a joint statement in response to the application of the federal death penalty that stated: 'Case after case has revealed that our nation's long experiment with the death penalty has failed. The process is broken, implicates systemic racism and constitutional concerns, …. If ever there were a time to revisit this practice, that time is now…. It is unequally and arbitrarily applied, ineffective at improving public safety, and a waste of taxpayer resources; and its use presents the perilous risk of executing

[138] Carolyn Hoyle and Shiow-duan Hawang, *Legislators' Opinions on the Death Penalty in Taiwan* (London: The Death Penalty Project, 2021).
[139] Ibid.
[140] Chiu Hei-Yuan, *For or against abolition of the death penalty: Evidence from Taiwan,* (London: The Death Penalty Project, 2019), edited by Roger Hood.
[141] Law Commission of India, 'Report No. 262 – The Death Penalty' (August 2015) <2022081670.pdf (s3waas.gov.in)> 214.
[142] Council of the American Law Institute, 'Report of the Council to the Membership of the American Law Institute on the Matter pf the Death Penalty' (April 2009) <https://www.ali.org/media/filer_public/3f/ae/3fae71f1-0b2b-4591-ae5c-5870ce5975c6/capital_punishment_web.pdf> 49.
[143] American Law Institute, 'Model Penal Code' <https://www.ali.org/publications/show/model-penal-code/>.

an innocent person.'[144] The current U.S. President, through the Department of Justice, placed a moratorium on federal executions.[145]

104. Existing research suggests that despite the variety of attempts to enact processes and safeguards around the use of the discretionary imposition of the death penalty across many different jurisdictions, some of which have been set out in this report, arbitrariness nonetheless persists.

105. In 1972, the U.S. Supreme Court invalidated existing capital punishment regimes in *Furman v. Georgia* in part due to the evidence that 'it is inflicted arbitrarily'.[146] Other countries have followed this logic in rejecting the death penalty. In 1995, the South African Constitutional Court in *Makwanyane,* in ruling the death penalty to be unconstitutional, similarly recognised the 'inherent risk of arbitrariness … which makes it impossible to determine and predict which accused person guilty of a capital offence will escape the death penalty and which will not.'[147] Since then, social science has provided further evidence to support this position.

106. At present, it appears that it would be highly unlikely that any system could be designed which would entirely guarantee the absence of arbitrariness from every stage of the criminal justice system in the use of the death penalty.

Professor Carolyn Hoyle, M.A., MSc., DPhil (Oxon).
Director, Death Penalty Research Unit,
University of Oxford, England
11 March 2024

[144] Joint Statement by Criminal Justice and Law Enforcement Leaders in Opposition to Application of the Federal Death Penalty (December 2020) <https://fairandjustprosecution.org/wp-content/uploads/2020/12/FJP-Federal-Death-Penalty-Joint-Statement.pdf>

[145] Press Release, Attorney General Merrick B. Garland Imposes a Moratorium on Federal Executions (July 1, 2021) <https://www.justice.gov/opa/pr/attorney-general-merrick-b-garland-imposes-moratorium-federal-executions-orders-review>.

[146] *Furman v. Georgia* 408 US 238 (1972).

[147] *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3.

Appendix A.

Curriculum Vitae: Professor Carolyn Hoyle

CURRICULUM VITAE

PROFESSOR CAROLYN HOYLE

Professor of Criminology and Director of the Death Penalty Research Unit, University of Oxford
CAROLYN.HOYLE@CRIM.OX.AC.UK

EMPLOYMENT HISTORY

- **2011 – present**

Professor of Criminology, Fellow of Green Templeton College, University of Oxford

- **2012 – 2017**

Director of the Centre for Criminology, Oxford

- **2006 – 2011**

Reader in Criminology, Fellow of Green Templeton College, Oxford

- **2000 – 2006**

University Lecturer in Criminology, Fellow of Green College, Oxford

- **1998 – 2000**

Research Fellow, Centre for Criminology, University of Oxford, Fellow of Wolfson College

- **1997-1998**

Research Officer, Law Department, University of Bristol

- **1996-1997**

Research Officer, Centre for Criminology, University of Oxford

PROFESSIONAL PROFILE

Carolyn Hoyle has been researching and teaching on the death penalty worldwide for 20 years. She is the co-author of *The Death Penalty: A Worldwide Perspective*, now in its fifth edition, published by Oxford University Press. Her research explores the rationales for retention, not least deterrence and public opinion, and discrimination and arbitrariness in the administration of the death penalty. Her work focuses primarily on Asia and on Commonwealth countries across Africa and the Caribbean.

ACADEMIC QUALIFICATIONS

- **D.Phil. Sociology**

Department of Sociology, University of Oxford, 1996, ESRC studentship
Thesis: 'Responding to Domestic Violence: The roles of police, prosecutors and victims'

- **MSc & MA Sociology**

Department of Sociology, University of Oxford, 1991, ESRC studentship

SELECTED FUNDING AWARDS OVER £10K (PAST DECADE ONLY)

Oxford Policy Engagement Network Funding, 'Abolitionist in practice: Developing a new framework for policymakers in countries which do not execute', £49,311.87, (2023-2025)

University of Oxford Internet Engagement Fund, 'Death Penalty lawyers in the Global South', £4,843.80 (2023)

UKRI ODA Fund, 'Mapping the Political Economy of Drugs and the Death Penalty', £45,811.70, (2022-23)

ESRC, 'Mapping the Political Economy of Drugs and the Death Penalty in Southeast Asia', £913,637.09 (2022-25)

John Fell Fund, 'Mapping Death Row for Drug Offences in the Middle East: Gender, citizenship and justice', £54,211.51 (2022-23)

University of Oxford Internet Engagement Fund, 'Increasing engagement with foreign nationals facing the death penalty', £4997.76 (2022)

ESRC IAA, 'Assisting civil society to support foreign nationals sentenced to death in Asia and the Middle East', £9,841. (2022)

Oxford University Strategic Priorities Fund, 'Engaging with policymakers and civil society to challenge penal policy on the death penalty in Indonesia and Zimbabwe', £26,000 (2021)

University of Oxford Engagement Fellowship, 'Engaging with civil society to map and support foreign nationals on death row', £18,948.10 (2021)

Fell Fund, 'Drugs, the Death Penalty and Deterrence in Indonesia: A Pilot Study', £7,472 (2021-22)

ESRC IAA, 'Assisting civil society in efforts to support foreign nationals sentenced to death in Asia and the Middle East', £25,000 (2020-21)

British Academy, 'The Plight of Foreign Nationals on Death Row in Malaysia', £10,000 (2018)

ESRC IAA, 'Advancing the Impact of Victim Participation at the International Criminal Court: Developing Avenues for Collaboration', £48,067 (2018)

ESRC IAA Stage 4, 'Advancing the Impact of Victim Participation at the International Criminal Court: Bridging the Gap Between Research and Practice', £10,000 (2020)

Leverhulme Trust, 'Last Resorts: Decisions and Discretion at the Criminal Cases Review Commission', £110,338 2013-2015)

SELECTED IMPACT & ENGAGEMENT

REF 2021: Impact Case Study: 'Strengthening accountability at the Criminal Cases Review Commission'

REF 2014: Impact Case Study 'Reforming and Restricting the Use of the death penalty in China'

Panellist: UN Human Rights Council's biennial high-level panel on the question of the death penalty (2021)

Expert witness submissions to Constitutional Court, Guyana in a challenge to the death penalty (2021)

Expert witness to Government review of the mandatory death penalty for drugs in Malaysia (2019)

SELECTED RECENT & RELEVANT PUBLICATIONS:

- **Books:**

C. Hoyle & M. Sato (2019) *Reasons to Doubt: Wrongful Convictions and the Criminal Cases Review Commission,* Oxford University Press.

R. Hood & C. Hoyle (2015) *The Death Penalty: A Worldwide Perspective,* 5th edn., Oxford University Press (Chinese & Spanish translations).

C. Cunneen & C. Hoyle (2010) *Debating Restorative Justice*, Hart Publishing.

R. Hood & C. Hoyle (2008) *The Death Penalty: A Worldwide Perspective*, 4th edn., Oxford University Press (Chinese & Persian translations).

C. Hoyle (1998) *Negotiating Domestic Violence: Police, Criminal Justice and Victims*, Oxford University Press (paperback edn. June 2000).

- **Edited Books:**

M. Bosworth, C. Hoyle & L. Zedner (2016) *Changing Contours of Criminal Justice,* Oxford University Press.

M. Bosworth & C. Hoyle (2011) *What is Criminology?*, Oxford University Press.

C. Hoyle (2009) *Restorative Justice* (Critical Concepts series), Routledge.

C. Hoyle & R. Young (2002) *New Visions of Crime Victims*, Oxford: Hart Publishing.

- **Articles in Refereed Journals:**

C. Hoyle & J. Hutton (2024) 'National Sovereignty Versus Universal Human Rights: Drugs and the Mandatory Death Penalty in Singapore', *Amicus Journal*, Issue 45, pp. 37-47.

L. Harry, C. Hoyle & J. Hutton (2023) 'Migratory dependency and the death penalty: Foreign nationals facing capital punishment in the Gulf', *Punishment and Society*, online at https://doi.org/10.1177/14624745231186001

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C. Hoyle (2019) 'Forensic Science and Expert Testimony in Wrongful Convictions: A study of decision-making at the Criminal Cases Review Commission' *British Journal of Criminology* 59(4), 919-937.

C. Hoyle & L. Tilt (2018) 'The Benefits of Social Capital for the Wrongfully Convicted: Considering the promise of a resettlement model', *The Howard Journal of Crime and Justice,* 57, 4, 495-517.

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C. Hoyle & N. Palmer (2014) 'Family justice centres: A model for empowerment?' 20 *International Review of Victimology* 1.

C. Hoyle & L. Ullrich (2014) 'New Court, New Justice? The Evolution of Justice for Victims at Domestic Courts and the International Criminal Court' *Journal of International Criminal Justice.*

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C. Hoyle & R. Young (2003) 'Restorative Justice, Victims and the Police' pp 680-706 in T. Newburn (ed) *Handbook of Policing,* Cullompton: Willan.

C. Hoyle (2002) 'Securing Restorative Justice for the Non-Participating Victims' in C. Hoyle & R. Young (eds) *New Visions of Crime Victims*. Oxford: Hart Publishing.

C. Hoyle & R. Young (2002) 'Restorative Justice: Assessing the Prospects and Pitfalls' in M. McConville and G. Wilson (eds.) *The Handbook of the Criminal Justice Process,* Oxford: Oxford University Press.

C. Hoyle (2000) 'Being 'a nosy bloody cow': ethical and methodological issues in researching domestic violence' in *Doing Research on Crime and Justice*, R. King & E. Wincup (eds.) Oxford University Press.

- **Reports:**

Bottoms, A. and Hoyle, C. Biography of Roger Hood for the British Academy at https://www.thebritishacademy.ac.uk/publishing/memoirs/21/hood-roger-1936-2020/

Hoyle, C and Rizzelli, L. (2023) Living with a Death Sentence in Kenya: Prisoners' Experiences of Crime, Punishment and Death Row, London: The Death Penalty Project

Hoyle, C. (2022) *Dealing with Punishment: Risks and Rewards in Indonesia's Illicit Drug Trade*, London: The Death Penalty Project

Hoyle, C. and Harry, L. (2022) *The Death Penalty in Kenya: A Punishment that has Died Out in Practice, Part Two: Overwhelming support for abolition among opinion leaders*, London: The Death Penalty Project

Hoyle, C. (2022) *The Death Penalty in Kenya: A Punishment that has Died Out in Practice, Part One: A public ready to accept abolition*, London: The Death Penalty Project

Hoyle C. and Hawang, S (2021) *Legislators' Opinions on the Death Penalty in Taiwan*, London: The Death Penalty Project

Hoyle, C. (2021a) *Investigating Attitudes to the Death Penalty in Indonesia: Part 1, Opinion Formers: An Appetite for Change*, London: The Death Penalty Project

Hoyle, C (2021b) *Investigating Attitudes to the Death Penalty in Indonesia: Part 2 - Public Opinion: No Barrier to Abolition*, London: The Death Penalty Project

C. Hoyle (2019) Time to Abolish the Death Penalty in Zimbabwe: Exploring the Views of its Opinion Leaders Death Penalty Project

C. Hoyle (2019) The Feasibility of Conducting Research on Attitudes Towards the Death Penalty in Indonesia, Death Penalty Project

C. Hoyle (2019) Taiwan: Unsafe Convictions in capital cases in Taiwan Death Penalty Project

J. Viebach, L. Ullrich, M. Gawronski & C Hoyle (2016) Innovative Media for Change: Opportunities and Challenges of Media Collaboration in Transitional Justice, Centre for Criminology, University of Oxford

C. Hoyle, N-E. Speechley & R. Burnett (2016) *The Impact of Being Wrongly Accused of Abuse in Occupations of Trust: Victims' Voices*, Centre for Criminology, University of Oxford

A. Wilcox, R. Young & C. Hoyle (2004) *An Evaluation of the Impact of Restorative Cautioning: Findings from a Reconviction Study Home Office Research Findings* 255 London: Home Office.

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C. Hoyle, R. Young & Hill, R. (2002) *Proceed with Caution: An Evaluation of the Thames Valley Police Initiative in Restorative Cautioning*, York: Joseph Rowntree Foundation, May.

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- **Selected media engagement on the death penalty:**

S. Lehrfreund and C. Hoyle (2023) It's time for Ghana to enshrine its respect for the right to life – by abolishing the death penalty, *The Conversation*, 17 July 2023 at https://theconversation.com/its-time-for-ghana-to-enshrine-its-respect-for-the-right-to-life-by-abolishing-the-death-penalty-209740

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資格

1. 筆者為英國牛津大學法學院犯罪學教授，兼任犯罪學中心死刑研究室主任。學術研究涵蓋犯罪學各個面向，兼具實證與理論，對於死刑領域頗有研究。近 10 年特別關注亞洲相關議題，並參與台灣死刑政策的討論與研究。
2. 筆者以死刑為題的研究經同儕審查並於期刊發表，同時撰寫相關報告書。另外，與羅吉爾・胡德（Roger Hood）教授合著《死刑：全球視角》（*The Death Penalty: A Worldwide Perspective*）一書（2008 年第 4 版、2015 年第 5 版，牛津大學出版社）。印度最高法院於「庫瑪訴國家首都領土德里代政府案 [2011] INSC 1002」（*Kumar v State through Govt. of NCT of Delhi*）上訴複審曾引用該書第 4 版內容（2011 年 9 月 28 日）[1]。
3. 筆者履歷請見本報告附件。
4. 筆者受「死刑專案」研究計畫之託，參酌台灣實務與程序，對照其他司法管轄地區的相關證據，綜合評析死刑之恣意性，撰擬為專家報告。筆者瞭解國家人權委員會會將本報告納入法庭之友意見書，並提交憲法法庭。筆者亦瞭解此次委任的首要職責是為法院服務，應秉公提供專業領域的證據資訊。

5. 回應議題

6. 筆者撰寫之專家報告參考各國證據資料，特別聚焦與台灣相關的內容，針對死刑本身的恣意性進行分析。同時指出，幾乎不可能設計出零恣意執行死刑的刑事司法制度。

7. 意見

台灣死刑概述

8. 綜觀這 30 年，在法律上或實質上廢除死刑的國家急遽增加。1988 年為 52 國，2023 年底則增至 124 國。此外，2022 年執行死刑的只有 20 個國家，不過，以全球數字來看，其中中國、伊朗、沙烏地阿拉伯等國的占比特別高。[2]
9. 如今，歐洲與中亞幾乎完全廢死，而撒哈拉以南的非洲地區也鮮少使用死刑（近年只有波札那、索馬利亞、南蘇丹、蘇丹會執行）。加勒比地區仍有少數實行案例，而整個美洲只有美國的部分州政府司法單位會執行。隨著美國愈來愈多州加入廢死行列，年執行數也從 1999 年的顛峰 98 件，降至 2023 年的 24 件。[3]
10. 國際廢死運動始於歐洲，現已獲得諸多政治體系、宗教團體、文化社群的支

[1] 請見第 100 段至第 104 段。最高法院於「帝巴雷訴比哈爾邦政府案 [2013] INSC 901」（*Deepak Rai v State of Bihar*）再度引用本案所引內容（2013 年 9 月 19 日）。

[2] Amnesty International, *Death Sentences and Executions 2022* (2023)。

[3] Death Penalty Information Center, 'The Death Penalty in 2023: Year End Report' (2023) <https://deathpenaltyinfo.org/facts-and-research/dpic-reports/dpic-year-end-reports/the-death-penalty-in-2023-year-end-report>。

持，亞太地區共有 21 國支持廢死。另一方面，中華人民共和國、阿富汗、北韓、越南的死刑年執行量達數千件；新加坡與孟加拉則偶爾執行。[4]

11. 近年來台灣已很少使用死刑。自 2016 年起，只有部分年度有過 1 次執行，其餘年度皆是 0 件。這段期間只有兩位死刑犯伏法，代表目前仍有 37 位死刑犯，其中包含一名女性，不過台灣已四年沒有執行死刑。然而，台灣的執行數字並非一直都這麼低。1950 年代「白色恐怖」時期的執行率相當高，而且自 1980 年代中至 2000 年代初，這個數字一直非常高，在亞洲僅次於新加坡[5]（1988 年至 1992 年、1990 年代末的執行量突增）。[6]
12. 2000 年後死刑執行量開始減少（從 1999 年的 24 件，降至 2003 年的 7 件，此後年執行量都在六件以下），因為相關修法逐步限縮能判處死刑的犯罪行為，包含修正《刑事訴訟法》，以及於 2006 年廢除唯一死刑。數字下降的趨勢反映出政治轉向重視人權的理念，也顯示台灣希望能與過去的威權統治切割。因此，2006 年至 2009 年間並無執行死刑，算是非正式暫停死刑。另外，2007 年初法務部宣布將推動專案，舉辦研究研討會和公聽會，鼓勵全國辯論死刑政策。[7]
13. 2009 年，台灣將《公民與政治權利國際公約》（International Covenant on Civil and Political Rights，ICCPR，下稱《公政公約》）國內法化，進一步朝廢死政策推進，顯示政府對於遵守國際人權原則與準則的決心，其中包含《公政公約》第 6 條第 6 款不得「延緩或阻止死刑之廢除」。[8]
14. 2010 年，台灣的廢死運動進展遇到波折。代表 40 名死刑犯針對程序提出之釋憲聲請案遭憲法法庭（註：時大法官會議）駁回不受理。台灣廢除死刑推動聯盟（下稱「廢死聯盟」）認為此決議論證薄弱，並且讓台灣離國際人權組織越來越遠。[9]
15. 2010 年死刑執行重啟，每年皆有數名死囚被送上刑場。鄭捷遭處決不久之後，蔡英文總統上台，蔡政府表明以廢死為目標的立場。[10] 於是 2016 年至今，法務部鮮少簽核死刑令，但往後每次執行都令國際社會擔憂台灣是否背離《公政公約》的精神。[11]
16. 2018 年，李宏基伏法。[12] 儘管法務部說明執行的考量點包含國內並無廢死共識，不過，國外人權團體都表示遺憾，擔心此舉會削弱外交上的努力，難以深化與他國的關係。如同當時施凱爾爵士（Keir Starmer）與雷紹爾律師（Saul Lehrfreund）於《台北時報》的投書所言：「我們擔心，因為恢復執行死刑台灣

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[4] 2022 年，緬甸軍政府進行四件執行，為 40 年來首次執行，審判的過程不公正、不公開且顯然存在恣意量刑的疑慮：Amnesty International, 'Myanmar: First executions in decades mark atrocious escalation in state repression', July 25, 2022 at <https://www.amnesty.org/en/latest/news/2022/07/myanmar-first-executions-in-decades-mark-atrocious-escalation-in-state-repression/>。

[5] Amnesty International, *Singapore: The death penalty: A hidden toll of executions*, 2004, ASA 36/001/2004。

[6] 犯罪率增加、發生多起民眾高度關注的案件、社會氛圍存有貪腐疑慮，都與執行率上升相關：Johnson D. and Zimring F., *The next frontier: National development, political change, and the death penalty in Asia* (Oxford University Press, 2009) ch6。

[7] The Death Penalty Project, *'For or Against Abolition of the Death Penalty: Evidence from Taiwan'*, Chiu Hei- Yuan (2019, Roger Hood ed.), <https://www.deathpenaltyproject.org/wp-content/uploads/2019/03/Taiwan-Public-Opinion-FINAL-ENG.pdf> 10。

[8] 關於台灣《公政公約》遵守狀況，審查細節請見：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'*, 2014。

[9] Wen-chen C. and Chuan-fen C., *My country kills: Constitutional challenges to the death penalty in Taiwan*, Taiwan Alliance to End the Death Penalty, 2011。

[10] Starmer K. and Lehrfreund S., 'Time to abolish the death penalty', *Taipei Times*, 5 October, 2016。

[11] Lehrfreund S., 'The death penalty: End it, do not mend it', *Taipei Times*, 5 July 2014。

[12] Amnesty International, Taiwan: First execution under President Tsai Ing-wen a crushing setback to abolition hopes (2018) <https://www.amnesty.org/en/latest/news/2018/08/taiwan-dp/>。

已往後倒退一大步，危及其國際聲望」[13]。2020 年 4 月，翁仁賢遭槍決伏法，這也是近期台灣最後一次執行死刑。[14]

17. 「國家人權行動計畫（2022-2024）」為台灣首次針對人權保障的全面性政策，計畫重申廢死目標。政府成立「逐步廢除死刑研究推動小組」，展現廢死承諾，提醒檢察官應考量《公政公約》第 6 條，審慎求刑，並研訂死刑替代方案。[15]
18. 受法律保護為普世人權，國家必須履行其國際義務，包括不得恣意剝奪公民生命。《公政公約》第六條第一項規定：「人人皆有天賦之生存權。此種權利應受法律保障。任何人之生命不得無理剝奪。」人權事務委員會（負責監督締約國執行《公政公約》的國際機構）在《第 36 號一般性意見》指出，「恣意性」這一概念必須採用更廣泛的解釋，使其包括不適當、不正義、缺乏可預測性和缺乏正當法律程序，以及合理性、必要性和比例原則等要素。[16]
19. 由於台灣已將《公政公約》國內法化，[17] 必須尊重其義務，代表如果死刑在執行上恣意、帶有歧視或反覆無常，則不得保留。因此，如有證據顯示死刑並非在調查、審判和上訴過程的每一個階段都公正、公平，並且對被告提供足夠的正當法律程序保護，則代表死刑違反台灣的國內法。
20. 以下報告將證明，所有繼續實施和執行死刑的刑事司法系統，包括台灣在內，皆*無可避免*具備恣意性這項特徵。事實上，根據可靠的研究證據，我得出的結論是，幾乎不可能設計出完全保證沒有或排除恣意性風險的*任何*制度。

唯一死刑和相對死刑制度中的恣意性

21. 在過去幾十年中，關於死刑使用的國際標準越來越傾向於反對以唯一死刑的方式實施。[18] 對唯一死刑的拒絕日益增長，主要是因為這種刑罰的恣意性，否定國內法庭決定特定罪行和特定罪犯是否應處以死刑的裁量權。[19] 簡而言之，「限制裁量權不符合公平觀念，且違背人性。」[20]
22. 這樣的轉變反映在國際和地區人權機構的決定中，尤其可見於聯合國人權事務委員會（CCPR），[21] 也可以看到在世界各地普通法的判例裡，法院已裁定實施唯一死刑構成對生命的恣意剝奪。[22] 在亞洲，印度是首先在一些死刑案件中引入裁量權的國家，最早始於 1860 年。[23] 印度最高法院於 1983 年裁定唯一死刑

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[13] Starmer K. and Lehrfreund S., 'The risk to Taiwan from executions', *Taipei Times*, 2 October 2018。

[14] FIDH, 'Second execution under President Tsai condemned' (2020)
<https://www.fidh.org/en/region/asia/taiwan/second-execution-under-president-tsai-condemned>。

[15] Executive Yuan, National Human Rights Action Plan 2022-2024. 115-119.

[16] Human Rights Committee, General Comment No. 36 on Article 6: Right to Life, UN Doc. CCPR/C/GC/36 [3 September 2019], par. 12.

[17] Act to Implement the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, art. I (promulgated Apr. 22, 2009), Laws & Regulations Database of the Republic of China, MINISTRY OF JUSTICE http://mojlaw.moj.gov.tw/EngLawContent.aspx?id=3. See also The Judicial Yuan Reviews Regulations in Response to the Promulgations of the Covenants; It also Promotes Legislation on Speedy and Fair Trials, Jud. Yuan (Nov. 5, 2009) <http://jirs.judicial.gov.tw/ GNNWS/engcontent.asp?id=36952&Muchlnfo=l>

[18] Saul Lehrfreund, 'Undoing the British colonial legacy: the judicial reform of the death penalty' in C Steiker and J M Steiker (eds) *Comparative Capital Punishment* (Edward Elgar 2019) 292.

[19] See also, UN Human Rights Committee, General Comment No. 36 on Article 6: Right to Life, UN Doc. CCPR/C/GC/36 [3 September 2019], para. 37.

[20] P. Jabbar, 'Imposing a 'mandatory' death penalty: a practice out of sync with evolving standards', in C.S Steiker and J.M. Steiker (eds.), *Comparative Capital Punishment* (Elgar, 2019) 138-159

[21] e.g. *Thompson v St Vincent and The Grenadines*, Communication No. 806/1998, CCPR/C/70/D/806/1998 (2000); *Kennedy v Trinidad and Tobago*, Communication No. 845/1998, CCPR/C/74/D/845/1998 (2002).

[22] Andrew Novak, 'The Role of Legal Advocates in Transnational Judicial Dialogue: The Abolition of the Mandatory Death Penalty and the Evolution of International Law' (2017) 25 *Cardozo J of Intl and Comparative L* 179, 204.

[23] 根據 1860 年的《印度刑法典》，謀殺罪可判處死刑，但允許行使裁量權。1973 年，印度通過《刑事訴訟

違憲，並認定司法裁量權是確保罰則符合比例原則的重要保障，此後印度便無唯一死刑。[24] 之後，孟加拉引用印度、加勒比聯邦和部分非洲地區法理學，廢除唯一死刑。[25]

23. 在1990年代，台灣多達50多項罪行為唯一死刑。[26] 儘管在2006年[27] 廢除了唯一死刑，終結了強制量刑相關特定形式的恣意性，但僅此並不能確保司法系統的恣意性完全消失。在法官享有裁量權的量刑制度下，刑事司法程序的每個階段都存在恣意性風險，尤其在裁定哪些罪行應判處死刑，及哪些個人「值得一死」時，更是涉及主觀要素。
24. 這樣的恣意性曾導致美國最高法院在1972年弗曼訴喬治亞州案（Furman v. Georgia）[28] 中暫時廢除死刑。史都華大法官 (Justice Steward) 認為，對「隨意的一小撮」被告恣意實行死刑，是一個「任性且怪異」的過程，就像被閃電擊中一樣。法院裁定，這種恣意性不符合美國憲法禁止殘酷和非尋常懲罰（cruel and unusual punishments）的規定。正如布倫南大法官 (Justice Brennan) 所言：「當死刑在法律上可用的案件中，只在極少數的情況下施行時，幾乎不可避免地代表死刑是隨意施行的，基本上就跟樂透沒兩樣。」[29]
25. 印度的裁量制度也被描述為一種「致命樂透」[30]。印度最高法院在巴查恩辛格案（Bachan Singh）[31] 及後續判決中制定的量刑指引，試圖將死刑侷限在「少數中的少數 (rarest of the rare)」的案件。下文將詳細說明，雖然這減少了在印度犯下謀殺罪的被告被處以死刑的比例，但這項原則的適用並沒有遵循清楚的模式，明顯有不一致的情況，死刑的判處往往取決於法官的個人偏好，並非依據有共識且完整的量刑原則。
26. 印度最高法院也多次對死刑案件中，裁量判決的恣意性表達關切，認為即使在有裁量權的制度下，「少數中的少數」案例這項門檻也被主觀、不一致地應用。[32]
27. 在 2015 年關於死刑的報告中，印度法律委員會同樣指出，不同的法院，包括最高法院的大法官，在事實和情況相似的案件中做出截然相反的判決，明顯缺乏一致性。[33]呼應美國最高法院在弗曼訴喬治亞州案中表達的觀點，印度法律委員會表示，由於在印度，普通罪行的死刑被「任意和怪異地施加」，且「沒有原則性方法可以消除這種恣意性」，因此應該廢除死刑。
28. 在今天的美國，這種致命樂透依然存在：0.18% 的殺人案罪犯最終遭執行。[34]雖然與法律相關的因素，如罪行的嚴重性或犯罪者的罪責，會部分決定是否執行死刑，但政治因素和犯罪者及被害人的個人情況，也會對刑事司法程序和結果

法》，要求在判處死刑時必須給出特別理由；詳見 Jabbar 案（註 18）第 140 頁。

[24] 在 *Mithu* 一案中，法院裁定《刑法典》第 303 條違憲，該條文規定特定的謀殺罪行應判處死刑。詳見：1983 年 Mithu 訴旁遮普邦案， 2 SCR 690, 692。

[25] *Bangladesh Legal Aid and Services Trust v Bangladesh (Shukur Ali)* (2010) 30 BLD (HCD) 194; *Bangladesh Legal Aid and Services Trust v The State* [2015] (Appellate Division, Supreme Court of Bangladesh, 5 May 2015).

[26] 王兆鵬 (Jaw-Perng Wang)，'The Current State of Capital Punishments in Taiwan' (2011) 6(1) *NTU L. Rev* 143, 170.

[27] 張文貞 (Wen-Chen Chang)，'Case dismissed: Distancing Taiwan from the international human rights community', in *My Country Kills: Constitutional Challenges to the Death Penalty in Taiwan* (2011) 47, 63.

[28] *Furman v Georgia*, 408 U.S. 238 (1972).

[29] *Furman*, 408 U.S. at 293 (J. Brennan, concurring).

[30] Bikram Jeet Batra, *Lethal Lottery: The Death Penalty in India: A Study of Supreme Court Judgments in Death Penalty Cases, 1950-2006 (*New Delhi, Amnesty International and People's Union for Civil Liberties 2008).

[31] *Bachan Singh v State of Punjab* (1980) SCR(1) 145.

[32] See Bikram Jeet Batra, *Lethal Lottery: The Death Penalty in India: A Study of Supreme Court Judgments in Death Penalty Cases, 1950-2006 (*New Delhi, Amnesty International and People's Union for Civil Liberties 2008).

[33] The Law Commission of India, 'The Death Penalty' Report No. 262, August 2015.

[34] F.R. Baumgartner, M. Davidson, K.R. Johnson, A. Krishnamurthy and C.P. Wilson, Deadly Justice: A Statistical Portrait of the Death Penalty (Oxford University Press, 2018) 348.

產生重大影響。種族和性別顯然與檢察官和法官的決策密切相關，但根據數據顯示，還存在地理和時間上的恣意性，這在其他國家也極有可能出現。雖然美國在正當程序上最接近國際標準的要求，但全面檢視實證證據就會發現，死刑在美國的實施恣意執行，[35]如同所有維持死刑的國家。[36]

29. 台灣自廢除唯一死刑以來，被判處死刑的被告不多。據我所知，在 21 世紀的頭十年，犯下可處以死刑罪行的被告中，僅 8% 遭判處死刑。這些案件和其他判處終身監禁的案件，在法律上的相關要件，極有可能非常相似。因此，研究人員針對維持死刑國家的刑事司法系統中，影響決策者的*非法律相關*特徵進行探討。以下報告內容將討論這種恣意性的不同要素。

被告的個人情況

30. 美國的研究一再顯示，就算具備「嚴格正當法律程序 (super due process)」保障，審前程序仍無法消除恣意性。
31. 實證研究一致發現，死刑判決存在差異，主要是基於「受害者種族」效應。[37]一項早期但嚴謹的實證研究發現，在美國喬治亞州 2400 多起謀殺案中，控制了與犯罪和犯罪者特徵相關的 230 個變數後，受害者的種族是決定被告是否判處死刑的強力預測因子，被告的種族也有影響。事實上，被控謀殺白人的被告被判處死刑的可能性，是被控謀殺黑人的四倍多；而被控謀殺白人的黑人被告，比任何其他類型的被告更有可能被判處死刑。[38] 這項研究的說服力和真實性在 McCleskey v. Kemp 一案中被美國最高法院所接受，不過大法官並不認為該證據支持 McCleskey 的個案。[39]
32. 針對美國不同時期有關死刑起訴和量刑的研究進行統合分析，可得到確定性證據，顯示殺害白人比殺害黑人更有可能面臨死刑起訴，死刑判決率也較高。[40]即使控制了加重因子，[41] 也有證據顯示，死刑定讞案件在刑事過程各階段，種族歧視和恣意性都仍持續且普遍影響。[42]
33. 在美國，種族並不是死刑判決中，唯一與法律不相關的特徵。事實上，「患有嚴重精神疾病、沒有家庭、無力自聘律師辯護、或者在各種方面最脆弱的人，皆較有可能被處以死刑。」[43]
34. 亞洲及全球各地的研究也顯示，「那些被判死並執行的人，往往是在所有犯下可能被判死犯罪的人中最無權力的人」。[44]
35. 雖然在印度和其他地方，有證據顯示種族歧視會影響量刑，但階級和種姓也會

[35] 同前註，340-5。
[36] Roger Hood and Carolyn Hoyle, *The Death Penalty: A Worldwide Perspective* (5th edn, OUP 2015) ch. 7.
[37] Roger Hood and Carolyn Hoyle, *The Death Penalty: A Worldwide Perspective* (5th edn, OUP 2015) 375.
[38] David Baldus, Charles Pulaski and George Woodworth, 'Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience' (1983) 74 *Journal of Criminal Law and Criminology* 3 661-753. [39] 481 U.S. 279 (1987).
[39] 481 U.S. 279 (1987).
[40] Frank R. Baumgartner, '#BlackLivesDon'tMatter: Race-of-victim Effects in US Executions, 1976-2013' (2015) 3 *Politics, Groups and Identities* 209, 212.
[41] Michael Radelet and Glenn Pierce, 'Race and death sentencing in North Carolina, 1980–2007' (2011) 89 *North Carolina Law Review* 2119; Sheri Lynn Johnson, John H. Blume, Theodore Eisenberg, Valerie P. Hans and Martin T. Wells, 'The Delaware Death Penalty: An Empirical Study' (2012) 97 *Iowa Law Review* 1925; Glenn Pierce and Michael Radelet, 'Death Sentencing in East Baton Rouge Parish 1990-2008' (2011) 71 *Louisiana Law Review* 647.
[42] Death Penalty Information Center, *Enduring Injustice: The Persistence of Racial Discrimination in the U.S. Death Penalty* (2020); Steven Shatz, Glenn Pierce and Michael Radelet, 'Race, Ethnicity, and the Death Penalty in San Diego County: The Predictable Consequences of Excessive Discretion', *Columbia Human Rights Law Review* 51, pp. 1070-1098.
[43] F.R. Baumgartner, M. Davidson, K.R. Johnson, A. Krishnamurthy and C.P. Wilson, *Deadly Justice: A Statistical Portrait of the Death Penalty* (Oxford University Press, 2018) 340-5: 349.
[44] Saul Lehrfreund and Roger Hood, 'The inevitability of arbitrariness: Another aspect of victimisation in capital punishment laws' in OHCHR, *Death Penalty and the Victims* (UN 2016) <https://www.ohchr.org/EN/newyork/Documents/Death-Penalty-and-the-Victims-WEB.PDF> 150-151.

影響。[45]此外，在亞洲和中東多個司法管轄區，公民身分也與判死甚至執行的決定相關，外國人在因可能判死犯罪被捕時，並未獲得與公民相同的權利，也未獲得 1963 年《維也納領事關係公約》（Vienna Convention on Consular Relations）所保障的保護。[46]

36. 雖然南非在 Makwanyane 案中廢除死刑，但並沒有聚焦種族與死刑判決之間的關聯性；法院廢死的原因是死刑對基本人權造成無可回復的侵犯。不過，法官確實聽取了證據，接受四項可能導致死刑判決的交叉變數：貧困、種族、性別和公益辯護律師。[47]
37. 其他地區對死刑犯的研究顯示，他們不一定是最十惡不赦的罪犯，但通常是身處最不利處境的人，在一些案例裡更是最脆弱的族群。如印度和孟加拉的研究顯示，他們往往是經濟弱勢、來自社會底層、且教育程度低。[48]他們的經歷使他們容易暴露於犯罪之下，且無法得到刑事司法系統足夠的保護，這使他們很可能被判處死刑，同時也很可能缺乏足夠的資源來應對刑事司法程序。
38. 針對肯亞大多數死刑犯進行的訪談顯示，被判死的絕大多數人社會經濟地位低下：超過十分之一的死刑犯從未接受過正式教育，超過三分之二的人只完成初等教育，其中近一半的人僅完成了部分的初等教育。[49]由於相對缺乏教育，他們多半比較貧困，且從事低階、不穩定的工作，犯罪時財務狀況不佳（超過一半的人因暴力搶劫而被定罪）。[50]
39. 根據統計數據，台灣死刑犯的情況可能類似；大多數人的教育程度僅限於小學或國中程度，因此在最終導致判刑的刑事司法程序期間，可能也同樣脆弱。[51]

調查與審判階段的正當法律程序

40. 在死刑案件中，刑事司法程序的任一階段都可能存在恣意性風險。這在維持唯一死刑的國家尤其令人擔憂，比如千里達及托巴哥，在這些國家，刑事司法系統偵破殺人案件的能力有限，代表謀殺案最終定罪的可能性非常低，而定罪後面臨死刑更是「既少數又恣意的命運」。[52]
41. 廢除唯一死刑後，普通法司法管轄區引入量刑指引，努力確保死刑起訴和量刑

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[45] National Law University Delhi, Project 39A, *Death Penalty India Report* (2016) at <https://www.project39a.com/dpir>; Roger Hood and Florence Seemungal, *A Rare and Arbitrary Fate: Conviction for Murder, the Mandatory Death Penalty and the Reality of Homicide in Trinidad and Tobago* (London: The Death Penalty Project 2006).

[46] Carolyn Hoyle 'Capital Punishment at the intersections of discrimination and disadvantage: the plight of foreign nationals', in C Steiker and J M Steiker (eds) *Comparative Capital Punishment* (Edward Elgar 2019); L. Harry, C. Hoyle & J. Hutton (2023) 'Migratory dependency and the death penalty: Foreign nationals facing capital punishment in the Gulf', *Punishment and Society*; C. Hoyle, J. Hutton & L. Harry (2023) 'A Disproportionate Risk of Being Executed: Why Pakistani Migrants Are Vulnerable to Capital Punishment in Saudi Arabia', *British Journal of Criminology;* D. Cullen (2021) 'Foreign nationals facing the death penalty: the role of consular assistance', *DPRU Blog* at <https://blogs.law.ox.ac.uk/research-and-subject-groups/death- penalty-research-unit/blog/2021/11/foreign-nationals-facing-death>.

[47] S v Makwanyane and Another 1995 (3) SA 391 (CC), paras 48-49 per President Chaskalson.

[48] National Law University of Delhi, *Death Penalty India Report* (2016), available at <https://www.project39a.com/dpir>; Dept. Law, University of Dhaka, *Living Under Sentence of Death: A Study on the Profiles, Experiences and Perspectives of Death Row Prisoners in Bangladesh* (London: The Death Penalty Project, 2022) <deathpenaltyproject.org/knowledge/living-under-sentence-of-death>.

[49] Carolyn Hoyle and Lucrezia Rizzelli, *Living with a Death Sentence in Kenya: Prisoners' Experiences of Crime, Punishment and Death Row*, (London: The Death Penalty Project, 2006).

[50] 同前註。

[51] Taiwan Alliance to End the Death Penalty: Dignity. Justice. International Symposium on the Right to Life - Taiwan Death Penalty Prison Interview Project, TAEDP (20 Nov. 2023) https://deathpenaltyproject.org/taiwan- alliance-to-end-the-death-penalty-dignity-justice-international-symposium-on-the-right-to-life-taiwan-death- penalty-prison-interview-project/

[52] Roger Hood and Florence Seemungal, *A Rare and Arbitrary Fate: Conviction for Murder, the Mandatory Death Penalty and the Reality of Homicide in Trinidad and Tobago* (London: The Death Penalty Project, 2006), 23.

作法一致。特別是檢方如意圖求處死刑，應提前通知，並告知辯方理據。[53] 然而，決定的主觀性造成恣意性，尤其是在仍有高比例殺人案未偵破，且大多數定罪在上訴後會被推翻的情況下，例如加勒比地區。[54] 審前恣意性的一大關鍵變因在於警方調查的力度、品質和強度，對於一案件是否最終判死扮演重要角色。例如，在巴哈馬，2005 年至 2009 年間共有 333 起殺人案，其中僅十起以謀殺定罪。[55]

42. 公平審判的國際標準保證所有因刑事起訴而被捕或關押者，自刑事調查開始到被剝奪自由，都享有獲得稱職且有效的法律辯護的權利。這讓被告能保護自己的權利並準備辯護，也是防範酷刑和其他不當對待，以及防止強迫認罪或其他自證其罪之陳述的重要保障。[56]舉例來說，孟加拉和印度的數據暴露司法系統腐敗、無能、濫用正當程序，且從逮捕、定罪到量刑階段，被告遭受恣意且不一致的待遇。[57]
43. 聯合國人權事務委員會明確表示，違反《公政公約》第十四條規定的公平審判保障，在判死的案件中，將導致判決具恣意性，因此構成違反生命權。[58] 在許多情況下，此種保障在實務上並未獲得保證，[59] 即使維持相同標準，冤錯案的風險仍相當顯著。[60]
44. 違反包括強迫認罪、缺乏有效法律代理、過度和無正當理由的延遲、刑事訴訟程序普遍缺乏公平性、或審判或上訴法院缺乏獨立性或公正性。另外包括未及時告知遭押外國人根據《維也納領事關係公約》（Vienna Convention on Consular Relations，1963 年），對方享有通知領事和協助的權利。[61]
45. 近年來，報告顯示許多國家存在死刑實施肇因於恣意逮捕、法律代理不足、缺乏正當程序和公平審判保障，包括巴林、伊拉克、沙烏地阿拉伯、葉門、中國、新加坡和緬甸。[62]
46. 台灣《刑事訴訟法》禁止酷刑或不當對待。根據刑法第 156 條規定，出於強暴、脅迫、利誘、詐欺、疲勞訊問、違法羈押或其他不正之方法獲得之自白，不得作為法院證據。儘管如此，在台灣仍有因酷刑逼供而遭判死的案例。[63]
47. 所有維持死刑國家的證據顯示，法律保障與實質保護間有落差，特別是法律代理的缺乏或有效性這塊，貧困被告僅能獲得法律扶助系統提供的最低限度支持，[64]往往只能依賴公益律師或極資淺律師協助準備辯護。在台灣，準備為死

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[53] Joe Middleton and Amanda Clift-Matthews with Edward Fitzgerald QC, *Sentencing in Capital Cases* (London: The Death Penalty Project 2018).
[54] Arif Bulkan, 'The death penalty in the Commonwealth Caribbean: Justice out of reach?' in OHCHR, *Moving away from the death penalty: Arguments, trends and perspectives* (UN 2014): 136. <https://www.refworld.org/docid/54a684144.html> 149.
[55] Amnesty International, Death Penalty in the English-speaking Caribbean (2012) <https://www.amnesty.org/download/Documents/20000/amr050012012en.pdf> 27.
[56] Principle 1 of the UN Basic Principles on the Role of Lawyers, adopted by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.
[57] Carolyn Hoyle and Saul Lehrfreund, 'Contradictions in Judicial Support for Capital Punishment in India and Bangladesh: Utilitarian Rationales'(2019) *Asian Journal of Criminology*.
[58] UN Human Rights Committee, General comment No. 36, para. 41; and General comment No. 32 (2007), para. 59.
[59] Saul Lehrfreund, 'Wrongful convictions and miscarriages of justice in death penalty trials in the Caribbean, Africa and Asia' in OHCHR, *Moving away from the death penalty: Arguments, trends and perspectives* (UN 2014) <https://www.refworld.org/docid/54a684144.html> 48.
[60] 同前註，65。
[61] Human Rights Committee, General Comment No. 36, paras. 42-43.
[62] United Nations General Assembly, Question of the death penalty, A/HRC/51/7 (2022) paras 39, 40, 41.
[63] 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* (2014) 27.
[64] Bulkan (n 49) 133; Saul Lehrfreund, 'Wrongful convictions and miscarriages of justice in death penalty trials in the Caribbean, Africa and Asia' in OHCHR, *Moving away from the death penalty: Arguments, trends and perspectives* (UN 2014) <https://www.refworld.org/docid/54a684144.html> 53.

刑案件被告提供法律協助律師的不足，是公平審前和審判程序的重大障礙。[65]

48. 在南韓和巴基斯坦部分地區，死刑案件無強制規範須向上級法院提起上訴，而在北韓則根本無上訴可能，因此如同其他地方，很可能出現冤錯案。[66]
49. 日本的死刑制度並不像美國採取「嚴格正當程序 (super due process)」（美國採用此程序，意圖保障死刑制度免受恣意性影響，雖然仍並未解決問題）。[67] 而在亞洲其他維持死刑的國家中，死刑犯在被捕或準備審判或上訴時，很少或根本沒有機會接觸律師。在某些情況下，律師還會遭到恐嚇，並被排除在法律訴訟之外。[68]
50. 2023 年 7 月 4 日，馬來西亞廢除唯一死刑，並針對犯罪實施量刑裁量，並包含死刑。[69] 此後，可判死被告便可能面臨高院判處以下兩種刑罰：死刑、或 30 至 40 年有期徒刑和鞭刑的替代懲罰；或如果於上訴法院或聯邦法院提起通常上訴，將現有死刑減刑。[70]
51. 國際特赦組織 2024 年 2 月發布的報告顯示，重新審議這些案件的前六個月內，馬來西亞高院判處或維持死刑的數量大幅減少。不過，這些案件也引發疑慮，即馬來西亞酌情判死和修法後的替代懲罰，仍有系統性缺陷且違反國際人權法和標準。約 28%的被告在高院或上訴時，起訴罪名改為較輕罪名或獲得無罪釋放，代表這些被告在一審時便不應遭判死。[71]案件獲得重新審議、原先遭判死的 50 名被告中，幾乎一半 (40%) 之前無律師代理，儘管馬來西亞各地皆有法律扶助計畫，協助社經地位較低的被告。[72]
52. 雖然台灣已將《公政公約》國內法化，但專家發現台灣的執行不符合其國際法義務，違反被告生命權。[73] 例如，《公政公約》第六條第四項保障請求特赦或大赦之權，代表台灣有嚴格義務，應提供有效措施，在所有案件中適當考慮特赦。[74] 不過，目前尚未訂定特赦或減刑考量明確程序規則，更不用說審查和決定此類申請的標準了。《赦免法》賦予大赦或特赦決定完全酌情，甚至無回覆申請之必要。整個程序缺乏自然公正和程序公正等基本原則，而《赦免法》也因不符合《公政公約》第六條第四項而遭批評。[75] 此外，在赦免程序尚未確定的情況下也不應執行死刑，台灣卻曾發生過如此情況。[76] 由此可見並未遵守《公政公約》第六條第四項對死刑犯請求赦免權利的保障。
53. 鑑於這些證據，針對台灣立法委員的一項研究發現：包括只有不到四分之一的立委認為刑事司法系統通常提供死刑案件被告充分和公平的程序保障，幾乎一半的立委認為警方永遠不能或很少能被信任，以及很大比例的受訪立委對檢察官和法院缺乏信任，就不令人意外了。[77]

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[65] 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* (2014) 35.
[66] Anti-Death Penalty Asia Network, *When Justice Fails,* 31.
[67] David T. Johnson, 'Progress and Problems in Japanese Capital Punishment' in R. Hood and S. Deva (eds) *Confronting Capital Punishment in Asia* (2013) 168-184 at 175-182.
[68] Anti-Death Penalty Asia Network, *When Justice Fails,* 31.
[69] Abolition of Mandatory Death Penalty Act 2023 (Act 846).
[70] 同前註。
[71] Amnesty International ACT 50/7750/2024 Public Statement: 'Malaysia: First six months of sentencing discretion underscore urgent need for indefinite extension of moratorium on executions', 26 February 2024.
[72] 同前註。
[73] 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* (2014) 5.
[74] 同前註，頁 20；另請見《公政公約》第六條第四項。
[75] 同前註，頁21-22。
[76] 同前註，頁22。
[77] Carolyn Hoyle and Shiow-duan Hawang, *Legislators' Opinions on the Death Penalty in Taiwan* (London: The Death Penalty Project 2021) 8-9.

錯誤的有罪判決

54. 美國發展出的死刑法理學承認「死亡不一樣」，因此值得「嚴格正當程序」。從決定起訴一路到上訴權，以及大赦或赦免機會，死刑被告的經歷會與面臨無期徒刑或其他較輕刑責的被告不同。但儘管有這些加強保障，這個世界上最先進的維持死刑民主國家仍無法預防無辜的人，以及罪不至死的人遭判處死刑和執行。[78]
55. 如果「嚴格正當程序」都未能消除美國的恣意性和錯誤判決，那麼其他沒有給予「嚴格正當程序」的國家，自然也無法消除死刑施行中的程序缺陷，特別是在財政和法律資源不足的情況下。
56. 由於死亡在日本並不被視為「不一樣」，因此針對死刑提供的保障和公平審判保障和其他非死刑案件並無不同，不符合普世同意的標準，針對死刑提供特殊保障和公平審判保障。[79] 檢察官一直到審判倒數第二天之前，[80] 都無義務表示意圖求處死刑，剝奪被告準備充分辯護的機會。這代表日本律師公會無法像美國律師公會，在審判準備和期間提供支持。此外，不同於美國，在日本，審判過程並非二階段 (bifurcated)，導致無法向法院提供充分減刑證據。另外也並無要求法官和「國民裁判員」（2009 年引入）必須判決一致：死刑判決只需九名法官中五名（包括一名職業法官）贊成即可。[81]
57. 鑑於缺乏透明度且未能確保武器平等，日本的定罪率異常高（高於 99%）這件事也就不令人意外了。[82] 因此，不可能有足夠信心認為日本的死刑犯中並無無辜者或不應判死者。缺乏自動上訴審查，且檢察官可以對死刑以下的判決提起上訴，都使得情況更糟。[83] 正如 David Johnson 教授所描述：「如果說美國死刑法失敗是因為未能實現其許多承諾，日本法律的失敗便是因為拒絕做出承諾」。[84]
58. 不意外的是，世界上其中一起最惡名昭彰的錯誤判決就發生在日本。2014 年 3 月，遭單獨監禁 47 年的袴田岩 (Iwao Hakamada) 從死囚牢房獲釋，之前被控謀殺兩名兒童及其父母。袴田岩當時經過 20 天審訊，無律師在場，並遭酷刑逼供。幾十年後，新發現的 DNA 證據和其他證據顯示檢察官當時偽造對其不利的證據；已年邁體弱袴田岩終於獲釋，卻沒有獲得任何道歉或官方承認責任。[85]
59. 「死刑專案」的一份報告說明日本另外四名遭單獨監禁 28 至 33 年、最後無罪

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[78] Anna VanCleave, *The Illusion of Heightened Standards in Capital Cases*, Ill. L. Rev. (2023) 1289, 1332. For a critique of the way that evidentiary rules in the United States fail in preventing wrongful convictions, see generally Jeffrey Bellin, The Evidence Rules That Convict the Innocent, 106 CORNELL L. REV. 305, 306 (2021).

[79] International Federation for Human Rights, *The Death Penalty in Japan: The Law of Silence* (2008), available from <https://www2.ohchr.org/english/bodies/hrc/docs/ngos/FIDHJapan94.pdf>.

[80] 明顯違反《公政公約》第 14 條第三項 a 款。

[81] Saul Lehrfreund, 'The Impact and Importance of International Human Rights Standards: Asia in World Perspective' in R. Hood and S. Deva (eds) *Confronting Capital Punishment in Asia: Human Rights, Politics and Public Opinion* (Oxford, Oxford University Press 2013) 23-45 at 34-35. 由日本死刑廢除推進議員聯盟領導人起草的新法案（2011年起草的「慎重死刑法案 (Be Cautious about Capital Punishment Bill)」）要求所有法官和非專業法官都需同意死刑才能通過，但法案目前仍停留在委員會階段。See David Johnson, 'Progress and Problems in Japanese Capital Punishment' in Hood and Deva (eds) 168-184 at 172-173.

[82] Hiroko Tabuchi, 'Soul-Searching as Japan Ends a Man's Decades on Death Row' *New York Times* March 27, 2014.

[83] For a thorough review of the failings of the Japanese criminal justice process to achieve anything near reasonable due process protections for defendants, see David T. Johnson, 'Progress and Problems in Japanese Capital Punishment' in R. Hood and S. Deva (eds) *Confronting Capital Punishment in Asia* (2013) 168-184 at 175-180.

[84] David T. Johnson, 'Progress and Problems in Japanese Capital Punishment' in R. Hood and S. Deva (eds) *Confronting Capital Punishment in Asia* (2013) 168-184 at 182.

[85] The Death Penalty Project, *The inevitability of error: The administration of justice in death penalty cases* (2014) at <https://deathpenaltyproject.org/knowledge/the-inevitability-of-error-the-administration-of-justice-in-death-penalty-cases/> 9-11.

釋放的案例。如同袴田岩，以及世界各地許多其他遭錯誤判決的人，門田 (Menda)、齋田川 (Saitagawa)、松山 (Matsuyama) 和島田 (Shimada) 都是在經過漫長而殘酷審訊並產生虛偽自白後遭判決定罪。[86]

60. 中國幾件較惡名昭彰的錯誤判決，則是因為被告在審前遭受了酷刑的對待。1995 年，聶樹斌遭錯誤執行，罪名為強姦和謀殺一名當地婦女，而另一名男子後來坦承犯罪。同樣地，佘祥林和滕興山因謀殺妻子遭定罪，幾年後兩名婦女再次出現，證明兩人無辜，但對滕興山來說為時已晚，他已遭執行。趙作海受到酷刑，被迫就謀殺一位農民同胞的罪名認罪。他的死刑被減刑為 29 年有期徒刑，但在服刑 11 年後，其「受害者」卻安然無恙地回到了村子。不幸的是，趙作海妻子已離開他，另嫁他人，並放棄兩名小孩，由他人收養。他表示，他在獄中遭受嚴厲毆打後，九度承認了「犯罪」。中國法制目前雖然提供不僅一次的上訴機會，但仍有疑慮認為最高人民法院的審查程序不符合《公政公約》第 14 條的最低限度要求，而且一直到最近，上訴人才能在該階段獲得律師辯護。[87]
61. 許多人權組織和媒體都有提到世界各地許多其他司法管轄區判死後獲釋的案例，包括貝里斯、馬拉威、馬來西亞、巴基斯坦、巴布亞紐幾內亞、菲律賓、千里達及托巴哥和美國。[88] 在所有案例中，法院都認為定罪有疑慮，而且在許多案例中，甚至有明確證據顯示受刑人實際上無辜，並未犯下遭判刑罪行。2010 年，聯合國表示：「無可爭議地，仍然有無辜者遭判死。」[89] 所有證據都顯示此中情況仍在繼續，而且在台灣也是如此。
62. 2011 年，台灣總統馬英九大動作地對江國慶的母親道歉。江國慶是一名軍人，遭控強姦和謀殺一名五歲女孩，之後於 1997 年遭錯誤執行。在另一名男子認罪後，總統赦免江國慶，並向其母親提供賠償。[90] 還有其他最終獲得無罪平反的死囚，因其審理程序依賴這些死囚遭刑求逼供後提出的虛假自白所致的有罪死刑判決，不只讓台灣政府必須賠償這些遭冤罪錯判的人士，也促使倡議者呼籲廢除死刑。[91] 雖然如此，在這些事件之後，仍有 30 多人遭執行。如下文所述，有證據顯示部分可能遭錯判。
63. 詳細分析 2006 年至 2015 年間台灣 62 起死刑判決的法律程序發現，62 起判決中有十起存在嚴重缺陷，缺乏重大罪證支持檢方的有罪主張。其中 32 起判決中，法院未能證實有預謀，顯示這些案件並非「最嚴重」罪行，而近一半（28）案件主張有犯罪意圖，但缺乏相關證據支持。而在若干案例中，則是使用情感性語言來支持此類主張。[92]
64. 此證據顯示台灣的死刑制度存在嚴重缺陷，並確實存在無辜者遭判死和執行風險，清楚指出改善程序保障的重要性，才能讓台灣符合必要的國際人權規範和標準，保障面臨死刑的人。雖然改善可能可以降低錯判可能性，但是來自其他

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[86] 同前註，8。

[87] Saul Lehrfreund, 'Wrongful Convictions and Miscarriages of Justice in Death Penalty Trials in the Caribbean, Africa and Asia', in OHCHR, *Moving away from the death penalty: Arguments, trends and perspectives* (UN 2014) <https://www.refworld.org/docid/54a684144.html> 61.

[88] Roger Hood and Carolyn Hoyle, *The Death Penalty: A Worldwide Perspective* (5th edn, OUP 2015) 118; Amnesty International, *Death Sentences and Executions in 2012* (2013) <https://www.amnesty.org/download/Documents/8000/act500012013en.pdf>.

[89] UN Secretary-General, 'Capital punishment and implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty' (2009) UN Doc E/2010/10 <https://undocs.org/en/E/2010/10>, para 140.

[90] 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* (2014) 27-28.

[91] *See, e.g.,* Jason Pan, High Court Acquits Death Row Convict, Taipei Times (Oct. 27, 2017) <https://www.taipeitimes.com/News/front/archives/2017/10/27/2003681122>

[92] Carolyn Hoyle, *Unsafe convictions in capital cases in Taiwan: A report based on the research and findings of Chang Chuan-Fen* (London: Death Penalty Project, 2019).

維持死刑的已開發民主國家的證據顯示，完美的司法制度不存在，而錯判永遠不會完全消失。

65. 台灣和所有進行過精密民意研究的國家一樣，錯判的疑慮大幅降低民眾和「社會精英」或「意見領袖」對死刑的支持。2014 年發布的一項嚴謹民意調查，收集了 2039 名台灣人的代表性樣本；結果顯示近四分之三的受訪者認為錯判可能發生，而三分之二的人認為有些無辜者被判死。此外，或許不令人意外地，事實上只有少數（32%）台灣民眾強烈反對廢死。如提到 1997 年在台灣被執行的江國慶冤案，並請受訪者考慮廢死議題時，強烈反對廢死的比例更會降至僅 6%。[93]如同其他地方，台灣民眾支持死刑並非根深蒂固，而是取決於其施行是否公平和可靠。如有證據顯示並非公平且可靠，代表無辜或不應被判死者可能被判死，死刑支持率便會大幅減少。
66. 根據 2021 年一份訪談 38 位台灣立法委員的報告發現，僅一小部分人（11%）認為誤判很少發生，大多數受訪者認為誤判經常發生。[94]事實上，如同其他地區針對意見領袖所進行的類似研究，報告發現立委對刑事司法系統判決和保障無辜者信任度較低。不意外地，大多數支持廢死的受訪者都提到擔心執行無辜者為一大主要理由。[95]

精神醫學和心理學證據

67. 缺乏公平審判保障，並因此導致恣意性風險另一重大疑慮在於精神醫學和心理醫學證據之提供：死刑案件中是否有尋求、提供和適當考慮這些證據。儘管被告精神狀態相關證據至關重要，但在許多維持死刑的司法管轄區，此類證據往往不被採納，往往是因為獲取極其困難。[96]
68. 在 2011 年洛克哈特訴女王案 (*Lockhart v The Queen*) 中，[97] 英國樞密院決定，每個可能判死案件都應提供精神醫學報告，並應在必要時提供臨床心理學家報告。然而，由於部分司法管轄區缺乏合格專家，以及專家評估的成本，讓此類證據的提供變得複雜。[98]
69. 儘管已有法律原則上禁止，[99] 但據悉在不同司法管轄區仍有在犯罪當下和/或在判刑或執行時患有嚴重精神障礙者遭判死並執行，包括日本和新加坡。[100]近年來區域內發生若干案例也顯示此類事件仍可能持續發生。此外，一項針對印度死刑犯的深入研究發現，11% 的死刑犯曾被診斷患有智力障礙，但在審判期間並未針對這點進行評估。[101]
70. 雖然具備法律保障措施，保障有心理健康問題者不被判死，但這些案例凸顯實

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[93] 瞿海源 (Chiu Hei-Yuan)，*For or against abolition of the death penalty: Evidence from Taiwan* (London: The Death Penalty Project, 2019), edited by Roger Hood.
[94] Carolyn Hoyle and Shiow-duan Hawang, *Legislators' Opinions on the Death Penalty in Taiwan* (London: The Death Penalty Project, 2021) 26.
[95] 同前註，26-27。
[96] Nigel Eastman, Sanya Krljes, Richard Latham, Marc Lyall, *Casebook of Forensic Psychiatric Practice in Capital Cases* (London: The Death Penalty Project, 2018) <https://www.deathpenaltyproject.org/knowledge/casebook-of-forensic-psychiatric-practice-in-capital- cases/>.
[97] [2011] UKPC 33 (Bahamas), paras. 11-13.
[98] Joe Middleton, Amanda Clift-Matthews and Edward Fitzgerald, *Sentencing in Capital Cases* (The Death Penalty Project, 2018) <https://www.deathpenaltyproject.org/wp-content/uploads/2018/10/Sentencing-in- Capital-Cases-2018.pdf > 58.
[99] Human Rights Committee, General comment No. 36, para. 49. See also Economic and Social Council resolutions 1984/50 and 1989/64.
[100] United Nations General Assembly, *Question of the death penalty*, A/HRC/51/7, 2022, para 56. See also, Saul Lehrfreund, 'Wrongful convictions and miscarriages of justice in death penalty trials in the Caribbean, Africa and Asia' in OHCHR, *Moving away from the death penalty: Arguments, trends and perspectives* (UN 2014) <https://www.refworld.org/docid/54a684144.html> 55.
[101] Project 39A , *Deathworthy: A Mental Health Perspective of the Death Penalty* (2021) at <https://www.project39a.com/deathworthy-a-mental-health-perspective-of-the-death-penalty>.

務上執行的恣意性，特別在一些司法管轄區，並沒有經費為遭控死刑犯罪者提供心理健康評估。[102]

71. 台灣《刑法》第十九條規定，行為時因精神障礙或其他心智缺陷，致不能辨識其行為違法或欠缺依其辨識而行為之能力者，不罰。不過，證據卻顯示，有精神障礙和/或智力障礙者遭判死刑。在刑事審判中，此類被告經常被塑造為想要欺騙法院，換取較輕判決。精神醫學和/或心理學鑑定也非規定一定要提供法院，而且就算鑑定也往往不夠充分。顯然，刑事被告的精神狀況評估在台灣仍是一大嚴峻議題，也因此造成被告權利侵害。[103]

司法機構在酌情量刑的角色

72. 儘管許多維持死刑的國家針對死刑制度進行相當大的改革，但迄今為止，沒有一個制度可以免於恣意性。[104] 從中國 [105] 到美國 [106]，量刑和司法審查程序仍存在恣意性。
73. 在酌處死刑量刑採用「少數中的少數」方法的背景下（這種方法也越來越常用以取代過去的唯一死刑制度），充分考量精神醫學和心理學證據在死刑案件中特別重要。這項基準旨在將死刑判決限制在例外情況下。
74. 如上所述，「少數中的少數」原則最初是在印度最高法院於 1980 年 Bachan Singh 訴旁遮普邦一案中確立。[107] 法院認為，只有將死刑的施加侷限於最嚴重案件的情況下，死刑才符合憲法，但極端殘酷犯罪不應必然導致死刑。量刑框架要求法官平衡加重和減輕刑責因子，並給予後者「自由且廣泛的解釋」。[108] 減輕因子包括國家有義務呈現被告無教化可能。[109]上述原則若能依照法院所原始預想的那樣適用，那麼在印度將只有在極少數無期徒刑替代方案都遭確定排除的情況下，才有可能使用死刑。
75. 印度最高法院重申「少數中的少數」基準，釐清其在 2009 年 Santosh Bariyar 訴馬哈拉施特拉邦案中的應用。[110] 法院於此案中強調基準第二層次概念的重要性：必須始終考慮犯罪人的情況及教化前景。法院指出，下級法院不一定會將基準的兩個層次視為個別要素進行審查，而在許多情況下僅考慮罪行的嚴重性。此一判決明確顯示，判處死刑需要檢方證明無更生 (rehabilitation)可能性。這項限制性基準隨後被東加勒比上訴法院 [111] 和英國樞密院於 2009 年 Trimmingham 訴女王案中採用為框架。[112]
76. 任何死刑判決都包含高度主觀的司法判斷，也因此引發實務上應用「少數中的少數」基準是否具備一致性的疑慮。 Surya Deva 教授檢視 2000 年至 2011 年間的司法實務，進行實證研究，發現其應用存在若干變型和錯誤，因此在許多類似案件中，最不幸的被告會因為隨機因素遭到死刑判決。這顯然破壞「少數中

[102] The Death Penalty Project, 'UK judges uphold death sentence of Trinidad prisoner despite him "more likely than not" having serious mental illness' (2018) at <https://www.deathpenaltyproject.org/uk-judges-uphold- death-sentence-of-trinidad-prisoner-despite-him-more-likely-than-not-having-serious-mental-illness/>.
[103] The Death Penalty Project, *The Death Penalty in Taiwan: A report on Taiwan's legal obligations under the International Covenant on Civil and Policitcal Rights* (2014) 18.
[104] Hood and Hoyle (n 33) ch. 8.
[105] Liu Renwen, 'Recent Reforms and Prospects in China', in R. Hood and S. Deva (eds) *Confronting Capital Punishment in Asia: Human Rights, Politics and Public Opinion* (Oxford, Oxford University Press 2013), pp. 107- 122; Michelle Miao, 'Capital Punishment in China: A populist instrument of social governance' (2013) *Theoretical Criminology*, 17(2).
[106] Willian Berry, 'Practicing Proportionality' (2012) 64 Florida Law Review 687-719.
[107] (1980) *2 SCC 684.*
[108] 同前註，par. 224。
[109] 同前註，par. 312。
[110] [2009] INSC 1056. See also Rajesh Kumar v State of NCT of Delhi [2011] *ALL SCR 2670.*
[111] *Trimmingham v the Queen* (2005) Criminal Appeal No 32 of 2004, EECA (Saint Vincent and the Grenadines).
[112] [2009] UKPC 25 (Saint Vincent and the Grenadines).

的少數」公式的正當性，[113] Deva 教授因此認為，該測試已「失去效用」，並且鑑於法院未能以一致和非恣意的方式行使其裁量權，印度應廢除死刑。[114]

77. 印度非政府組織 Project 39A 在 2017 年的一份報告中公布一項意見研究結果，研究針對印度最高法院 60 名前法官進行調查，欲探究死刑及其在印度刑事司法系統中扮演的角色。[115]
78. 關於「少數中的少數」基準，報告發現司法界對這項原則的理解通常強調罪行的殘酷性，部分法官在決定懲罰時沒有考慮是否「毫無疑問排除」無期徒刑 。針對量刑過程中對個人減刑情節的考量程度和範圍，也呈現出不同意見。司法量刑方法的不同造成相當的恣意性風險。個別案件在審判和/或上訴階段的結果，以及遭判極刑的風險，可能部分或完全取決於是哪位法官分配到該案件。
79. 儘管司法已針對裁量基準作出公示聲明，案件結果顯然仍然各不相同，而且許多結果似乎僅基於犯罪性質而定。[116] 正如 Project 39A 報告作者所總結：「…負責量刑的法官理應進行更全面性且精細的任務，絕不只是判定該犯罪是否為少數。」[117]而報告中所訪問的許多法官，並不理解這一點。
80. 雖然報告發現，大多數受訪法官都承認印度刑事司法系統可能存在誤判，但只有極少人願意接受「死刑案件中可能出現誤判」可以構成廢除死刑的理由。[118]
81. 亞洲其他採取類似途徑的司法管轄區，也就是試著將死刑限制在最罪大惡極的罪行上，如孟加拉和日本，也未能針對量刑政策建立起一致且公正的解釋，[119] 這也導出同樣的結論：「當有人被判死而同時有數百名罪責相同或更重的犯罪者逃死時，國家的死刑法理學完全無法解釋誰會被判死或絞死。」[120]

法律背景

82. 除了因依賴審理死刑案件法官的主觀判斷，從而產生恣意性風險之外，可能面臨死刑的人，其命運也可能很大程度仰賴他們身處哪個法律體系背景。近幾十年來，死刑使用的法理論述持續發揮影響，包括在 1994 年樞密院在 Pratt and Morgan 訴牙買加檢察總長案 (*Pratt and Morgan v Attorney General for Jamaica*) [121] 的決定後，加勒比地區針對待死五年以上的受刑人進行減刑。在 1994 年的這項決定中，樞密院認為，一個人等待執行五年以上，已經構成殘酷且不尋常的懲罰。[122]這項決定也促使加勒比地區將數百名受刑人減刑。[123]

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[113] urya Deva, 'Death Penalty in the 'Rarest of Rare' Cases: A Critique of Judicial Choice-making', in Hood and Deva (eds) *Confronting Capital Punishment in Asia: Human Rights, Politics, and Public Opinion* (Oxford, Oxford University Press 2013) 238-286 at 256. See also Bikram Jeet Batra, *Lethal Lottery: The Death Penalty in India: A Study of Supreme Court Judgments in Death Penalty Cases, 1950-2006 (*New Delhi, Amnesty International and People's Union for Civil Liberties 2008) 44.

[114] Surya Deva, 'Death Penalty in the 'Rarest of Rare' Cases: A Critique of Judicial Choice-making', in Hood and Deva (eds) *Confronting Capital Punishment in Asia: Human Rights, Politics, and Public Opinion* (Oxford, Oxford University Press 2013) 238-286 at 256.

[115] Project 39A, *Matters of Judgment: A judges' opinion study on the death penalty and the criminal justice system* (November 2017) <https://issuu.com/p39a/docs/combined231117>.

[116] 有關印度判例法範例，請參閱：Roger Hood and Carolyn Hoyle, *The Death Penalty: A Worldwide Perspective* (5th edn, OUP 2015) 351-352.

[117] Project 39A (n 98) 53.

[118] 同前註，15。

[119] Roger Hood and Carolyn Hoyle, *The Death Penalty: A Worldwide Perspective* (5th edn, OUP 2015) chapter 8; David T. Johnson, 'Progress and Problems in Japanese Capital Punishment' in R. Hood and S. Deva (eds) *Confronting Capital Punishment in Asia* (2013) 168-184 at 175-182.

[120] David T Johnson and Frankin E Zimring, *The Next Frontier: National Development, Political Change, and the Death Penalty in Asia* (New York, Oxford University Press 2009) 429-32.

[121] [1993] UKPC 1, [1994] 2 AC 1.

[122] Bulkan (n 49) 115-6.

[123] Douglas Mendes, 'Saving lives by luck and chance: Savings Law Clauses and the persistence of arbitrariness' (Proceedings of the Death Penalty Conference, Barbados, 3-5 June 2006) 3.

83. 據我瞭解，台灣 37 名死刑犯中，只有一至兩人入獄不到五年。絕大多數人在已入獄逾 11 年，幾乎一半的人甚至已待了超過 20 年。如果在加勒比地區和烏干達，台灣幾乎所有死刑犯都會被減刑為無期徒刑。
84. 綜觀過去 30 年來法理學領域的其他發展，根據不同時間司法轄區的狀況，如是否維持確定刑判決、等待執行時間，以及上訴期間司法意見和原則是否有所變化，可能面臨死刑風險的個人，其具體命運可能因此完全不同。類似司法管轄區之間的不一致性所造成的恣意性之程度難以接受。

政治背景

85. 死刑判決後是否執行，也取決於一司法管轄區的政治背景，特別是（正式或非正式）暫停執行是否存在。例如，加勒比地區英語國家的所有國家現均已通過聯合國規定的十年期限，成為事實上廢除死刑的國家。[124]
86. 台灣最後一次執行死刑是 2020 年。如果這次暫停執行（類似於 2006 年至 2010 年期間）再持續六年，也將被視為*事實上*廢除死刑。
87. 聯合國有關法外處決、即決處決或任意處決問題特別報告員 Christof Heyns[125] 指出，如果在長期暫停執行後重新執行，則在缺乏恢復執行的客觀理由下，可能會被認定為恣意。[126]
88. 特別報告員指出：特別存在的恣意性風險在於，例如在恢復執行後，執行死刑之時機和死囚之選擇是「隨機」決定，和/或恢復執行死刑的動機與個別犯罪者或其罪行無關，而是基於其他因素，諸如外部政治因素。[127]
89. 近年來，在某些司法管轄區，例如約旦和巴基斯坦，便是以如此方式，在長期暫停執行死刑後又恢復執行；而斯里蘭卡也威脅要恢復執行。[128]這類的恢復執行往往出於政治需要，例如在 2023 年，緬甸的政治處決終結了長達四十年的暫停執行。[129]
90. 2010 年 3 月，台灣前法務部長因拒絕簽署 44 名死刑犯的執行令而辭職。不到兩個月後，法務部打破為期四年暫停執行，在沒有正當法律程序的情況下處決四名死刑犯。[130]
91. 在非洲大陸，有大量證據顯示判處或執行死刑被用來當作政治權力工具，各國政府利用死刑來貫徹政策並展示權威。[131] 例如，奈及利亞和剛果民主共和國的死刑相關法律和做法可見不公平性和恣意性，說明維持死刑的國家之所以維持死刑，很大程度是出於政治原因，而非為了追求正義。[132]
92. 同樣地，在亞洲，政治也驅動著死刑的維持和施行。苗苗 (Michelle Miao) 將死刑描述為自毛澤東革命以來中國政治鬥爭的工具，大量證據顯示，至今死刑已

[124] The Death Penalty Project, 'Submission to the Inter-American Commission on Human Rights Thematic Hearing on the Situation of the Death Penalty in the English-speaking Countries of the Caribbean' (12 November 2019) 2.
[125] 這裡指的是 Heyns 教授擔任特別報告員期間（2010 年 8 月至 2016 年 7 月）發表的一份報告。
[126] United Nations General Assembly, 'Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, on the protection of the right to life' (2014) UN Doc A/69/265 <https://undocs.org/A/69/265>, paras. 102-104.
[127] 同前註。
[128] Amnesty International, 'The impact of the resumption of the use of the death penalty on human rights' (July 2019) ACT 50/0241/2019 < https://www.amnesty.org/download/Documents/ACT5002412019ENGLISH.PDF>.
[129] Amnesty International, *Myanmar: First executions in decades mark atrocious escalation in state repression* (July 2022) https://www.amnesty.org/en/latest/news/2022/07/myanmar-first-executions-in-decades-mark- atrocious-escalation-in-state-repression/
[130] Vincent Y. Chao, 'Legality of Capital Punishment Upheld', *Taipei Times* (May 29, 2010); Chang Wen-Chen, *Case Dismissed: Distancing Taiwan from the international human rights community*, Judicial Reform Foundation (Sept. 2010).
[131] Dirk Van Zyl Smit, 'The Death Penalty in Africa' (2004) *4 African Human Rights Law Journal 1*, 15.
[132] Aime Muyoboke Karimunda, *The Death Penalty in Africa: The Path Towards Abolition* (Routledge 2016)

成為一種民粹主義機制，用來強化威權黨國韌性及其政治合法性。[133]

93. 即使在美國，政治考量也影響聯邦系統執行的恢復；在川普政權的最後幾個月，可見長期暫停執行後又於 2020 年大量執行死刑。[134]
94. 顯然，對於遭判死的個人，其命運也可能取決於整體政治背景和特定時間點政治因素的變化，而這些因素與個人或案件情況無關。

結論

95. 本報告列出使用死刑可能且確實出現恣意性的多種不同領域，並且說明這樣的問題不管是在酌情判死制度還是唯一死刑制度中都存在。也因為前述的問題持續存在，也促使相關機構一再指出：即便是在以裁量科處死刑制度為基礎的國度，依然不應該保留死刑制度。
96. 《公政公約》和聯合國經濟及社會理事會《保護面臨死刑者權利的保障措施》[135]禁止國家在未遵守保證公平審判、無罪推定及被告有公平機會能在依法完整組成的法院進行答辯對其指控等標準的情況下，任意剝奪生命。2009 年，台灣邁出了進步的一步，將《公政公約》國內法化，自願同意遵守其人權標準和目標，包括最終廢除死刑。因此，在台灣，生命權的基本保障不能被恣意削減。如果台灣無法擔保被告免受不公平和恣意的審判和上訴程序，免受錯誤定罪和執行之風險，則死刑違憲。
97. 在這方面，台灣與其東亞鄰國及亞洲、非洲、中東和美洲的其他司法管轄區並無不同。雖然世界各地的正當程序保障有所改善，但聯合國秘書長的每一份死刑五年報告都顯示，維持死刑的國家常違反前述這些保障措施，因而造成無辜者及在該國法律下不「應該」判死的人，遭判處死刑並執行。[136]
98. 2014 年發布、針對台灣《公政公約》法律義務的澈底審查發現，雖然台灣於 2009 年開始施行兩公約，改善對生命權和公平審判權的保障。台灣的死刑制度，如同世界上所有其他死刑制度，仍存在嚴重缺陷。[137]
99. 證據顯示，台灣目前的司法系統並非僅將證據確鑿、且在刑事訴訟每階段都經過有效檢驗的最嚴重案例判處死刑，同時也無法擔保無侵犯人權或者沒有將無辜者或不應判死者判死。
100. 台灣民眾並非澈底反對廢死。2021 年一份報告針對 38 名台灣立法委員進行訪談，發現大多數受訪者（61%）支持廢死。[138] 事實上，38 名立委中僅六人表示他們可能會反對廢除死刑的國會法案，並且沒有人表示會強烈反對廢除死刑。[139] 再之前的一項民調顯示，如果以無期徒刑取代死刑，近一半的台灣民眾代表性樣本會支持廢死，如果由無期徒刑不得假釋取代、且將被告工作收入賠償受

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[133] Michelle Miao, 'Capital Punishment in China: A populist instrument of social governance' (2013) *Theoretical Criminology*, 17(2).

[134] Michael Tarm and Michael Kunzelman, *Trump administration carries out 13th and final execution*, AP News (16 Jan. 2021) https://apnews.com/general-news-28e44cc5c026dc16472751bbde0ead50（註：川普中斷了17年的暫停執行，並進行13起執行，比120多年來任何一位總統都多）。

[135] UN Economic and Social Council, 'Resolution 1984/50: Safeguards guaranteeing protection of the rights of those facing the death penalty' (1984) UN Doc E/RES/1984/50, endorsed by the UN General Assembly in 'Resolution 39/118: Human rights in the administration of justice' (1984) UN Doc A/RES/39/118, adopted without a vote in December 1984 (updated in 1989).

[136] 報告請見：United Nations, 'Reports: Death penalty' (2023) <https://www.ohchr.org/en/death- penalty/reports-human-rights-council#>.

[137] 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* (2014) 2, 18-23.

[138] Carolyn Hoyle and Shiow-duan Hawang, *Legislators' Opinions on the Death Penalty in Taiwan* (London: The Death Penalty Project, 2021).

[139] 同前註。

害者及家屬，則有 71% 的人會支持廢除死刑。[140]

101. 印度法律委員會於 2015 年一份報告中，審查印度相對死刑相關問題，並得出結論：印度相對死刑制度因其固有的恣意性而欠缺立足點，因此應針對所有普通犯罪廢除死刑，因為「不存在任何原則性的方法，可消除死刑判決中的此種恣意性。」[141]
102. 美國法律協會 (American Law Institute) 於 2009 年也得出類似結論。檢視死刑規範措施中存在的問題，以及死刑施行引發的疑慮後，作者建議：「目前不存在適當施行死刑制度的先決條件，且無法合理期望能實現這些條件。」[142] 進而讓協會於同年將死刑段落自其《模範刑法典》 (Model Penal Code) 中移除。[143]
103. 更近期，2020 年 12 月，美國近百名現任和前任檢察官、檢察總長和執法領導人針對聯邦死刑應用發表聯合聲明，聲明中指出：「一個又一個案件已揭露出我國長期的死刑實驗失敗了。這個程序失靈，涉及系統性種族主義和憲法疑慮……重新審視這種做法時機就是現在……其實施不平等、恣意，無助於改善公共安全，而且浪費納稅人資源；並且存在處決無辜者的危險。」[144] 現任美國總統透過司法部暫停聯邦執行。[145]
104. 現有研究顯示，儘管許多不同司法管轄區針對酌情判處死刑制定各種程序和保障措施，其中部分已於本報告中列出，但恣意性依然存在。
105. 1972 年，美國最高法院在弗曼訴喬治亞州案中宣布現行死刑制度無效，部分原因是有證據顯示「死刑的施加乃恣意」。[146]其他國家也依照同樣邏輯拒絕死刑。1995 年，南非憲法法院在 Makwanyane 案中裁定死刑違憲時，同樣承認「固有的恣意性風險…造成不可能確定和預測哪些犯下可能判死罪刑的被告將逃死、哪些不能。」[147]此後，社會科學也提供進一步證據支持此立場。
106. 目前看來，要設計出能完全保證刑事司法系統各階段在使用死刑時不存在恣意性的制度，極不可能。

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2024 年 3 月 11

[140] Chiu Hei-Yuan, *For or against abolition of the death penalty: Evidence from Taiwan,* (London: The Death Penalty Project, 2019), edited by Roger Hood.
[141] Law Commission of India, 'Report No. 262 – The Death Penalty' (August 2015) <2022081670.pdf (s3waas.gov.in)> 214.
[142] Council of the American Law Institute, 'Report of the Council to the Membership of the American Law Institute on the Matter pf the Death Penalty' (April 2009)
[143] American Law Institute, 'Model Penal Code' <https://www.ali.org/publications/show/model-penal-code/>.
[144] Joint Statement by Criminal Justice and Law Enforcement Leaders in Opposition to Application of the Federal Death Penalty (December 2020) <https://fairandjustprosecution.org/wp- content/uploads/2020/12/FJP-Federal-Death-Penalty-Joint-Statement.pdf>
[145] Press Release, Attorney General Merrick B. Garland Imposes a Moratorium on Federal Executions (July 1, 2021) <https://www.justice.gov/opa/pr/attorney-general-merrick-b-garland-imposes-moratorium-federal- executions-orders-review>.
[146] 弗曼訴喬治亞州 (*Furman v. Georgia*) 408 US 238 (1972).
[147] *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3.

EXPERT REPORT OF JEFFREY FAGAN, PH.D.

DETERRENT EFFECTS OF THE DEATH PENALTY

I. Overview

A. Qualifications

1. I am the Isidor and Seville Sulzbacher Professor of Law at Columbia Law School and a Professor in the Department of Epidemiology at the Mailman School of Public Health at Columbia University. My curriculum vitae is attached in Appendix A.
2. I am an elected Fellow of the American Society of Criminology. I am a former member and past Vice Chair of the Committee on Law and Justice of the National Research Council. I was a former member of the National Consortium on Violence Research at Carnegie Mellon University. I was a founding member of the MacArthur Research Network on Adolescent Development and Juvenile Justice. I am past Chair of the National Policy Committee of the American Society of Criminology. I served as Executive Council (elected) to the American Society of Criminology. I served on peer review panels for the National Institute of Justice, National Institute of Mental Health and the National Science Foundation. I have served on Scientific Review Committees of the National Research Council.
3. My research has been published in the leading journals in criminal law, sociology and criminology, including the *Journal of Empirical Legal Studies*, the *Columbia Law Review*, the Cornell Law Review, the *University of Chicago Law Review*, the *Journal of Quantitative Criminology*, the Journal of Criminal Law & Criminology, the *Fordham Urban Law Journal*, *Criminology*, *Criminology & Public Policy*, the *American Sociological Review*, the *Lancet*, and *PLOS One*. I have published over 100 articles in peer reviewed journals, and numerous chapters in edited volumes.
4. I am past editor of the *Journal of Research in Crime and Delinquency.* I currently serve on the editorial board of the *Journal of Criminal Law and Criminology,* and have served on the editorial boards of numerous professional and academic journals in criminology including *Crime & Justice*, the *Journal of Quantitative Criminology* and *Criminology.* My research has been supported by the National Institute of Justice, the National Institute of Mental Health, the National Institute on Drug Abuse, the National Science Foundation, the Office of Juvenile Justice and Delinquency Prevention, the Centers for Disease Control, the Rockefeller Foundation, the John D. and Catherine T. MacArthur Foundation, the Annie E. Casey Foundation, the Russell Sage Foundation, the Robert Wood Johnson, the Open Society Foundations, and the Russell Sage Foundation.

B. Issues and Questions Addressed

1. In this Expert Report, I provide evidence from empirical research to address two principal claims regarding the efficacy of the death penalty as a deterrent. Specifically, I provide analysis of the impact on homicide levels of a moratorium in death sentences and executions, and the impact of the abolition of the death penalty on homicide levels.

2. I have been instructed by The Death Penalty Project to provide a report detailing whether there is any credible evidence that the death penalty has any greater deterrent effect than other serious punishments.

3. I understand that my report will be provided to the Constitutional Court of Taiwan as part of an amicus curiae brief to be submitted by the National Human Rights Commission of Taiwan. I also understand that my overriding duty is to the court and to provide impartial evidence in my field of expertise.

4. To address these issues, I provide analysis of the theory and research on the following questions:

    a. What is the theory of general deterrence?
    b. What are the components and processes in general deterrence?
    c. What is the theory of specific deterrence?
    d. What are the elements and processes of specific deterrence?
    e. Is there evidence from comparative research in the United States and other countries that there are deterrent effects of the death penalty on homicide levels?
    f. Is there a *consensus* in empirical research on the effectiveness of general and specific deterrent effects of the death penalty on homicides?
    g. Is there evidence in Taiwan of the impact a moratorium on death sentences and executions on rates of homicide?

C. Summary of Opinions

1. The death penalty is ineffective as a measure to prevent crime. Murder rates rise and fall independently of the imposition of death sentences or the conduct of executions.
2. Empirical evidence shows that capital punishment is carried out in an arbitrary and capricious manner and is infected by invidious racial and ethnic bias.
3. The deterrent effects of criminal sanctions are specific to the risks of detection of crime and the arrest of suspected offenders, not to the severity of punishments.
4. There is no empirical evidence that the death penalty deters murders or manslaughters compared to the next most severe sentence of life without parole.
5. Empirical studies have shown that there is no *marginal* deterrent effect on the murder rate when death sentences are imposed compared to sentences of term life or life without parole.
6. There is no evidence that the imposition of a moratorium on executions or the abolition of the death penalty causes an increase in the murder rate.
7. There is no evidence that the imposition of a moratorium on executions or the abolition of the death penalty causes an increase in non-homicide violent crimes.

II. RESPONSES

A. *What is the theory of general deterrence?*

1. Deterrence theory in its classical form states that crime is less likely when the threat of punishment is greater.[1] Economists added expected gain to the classic view of deterrence, viewing crime as a choice between costs and benefits.[2]

2. The core ambition of deterrence is to make threats credible: certain, swift and costly. In the case of capital punishment, retentionist states wish to signal to those contemplating murder, or any other offense eligible for execution, that there are substantial risks of having the state end their lives should they commit the crime and be sentenced to death. The premise is a would-be offender, knowing about the threat of execution, would forego the act because the costs – in this case, death – are unacceptably high and well in excess of

[1] Andy B. Anderson, Anthony R. Harris and JoAnn Miller, "Models of Deterrence Theory," 12 *Social Science Research* 236 (1983).

[2] Gary S. Becker, "Crime and Punishment: An Economic Approach," 76 *Journal of Political Economy* 169 (1968). Isaac Ehrlich, "Participation in Illegimate Activities: A Theoretical and Empirical Investigation," 81 *Journal of Political Economy* 521(1973). Isaac Ehrlich, "The Deterrent Effect of Capital Punishment: A Question of Life and Death," 65 *American Economic Review* 397 (1975).

any presumed marginal benefits from the crime itself. It assumes a rational actor whose risk-reward calculus would lead to the avoidance of a capital crime, and one whose perceptions of risk are well-calibrated to likelihood of execution. It also assumes that risks are substantial and observable.[3]

3. A "rational offender" will decide whether or not to commit a crime by weighing the benefit of not committing a crime with the benefit of committing the crime without being caught and the benefit of committing a crime that results in being caught and punished.[4]

4. "In such a formulation, the individual chooses to commit a crime if and only if the following condition holds: … [the] crime is worthwhile so long as its expected utility exceeds the utility from abstention." [5]

5. Becker concludes that: "(1) the supply of offenses will fall as the probability of apprehension rises, (2) the supply of offenses will fall as the severity of the criminal sanction increases and (3) the supply of offenses will fall as the opportunity cost of crime rises."[6]

6. Robinson and Darley show that deterrence requires knowledge by a would-be offender of the law that prohibits an act (legal knowledge), and that the offender understands the risks of detection and the risks of punishment. Their formulation also requires that an actor be rational in weighing the benefits of crime compared to the costs of punishment and the risks of detection (rational choice), and that the perceived benefits outweigh the costs (perceived net benefit hurdle).[7]

7. While Robinson and Darley are generally optimistic about the prospects of deterrence for most crimes, they find that there is no deterrent effect for murder. And with respect to felony murder, they report that while a felony-murder rule may inhibit non-fatal robberies, the presence of a felony murder statute will tend to increase the incidence of fatal robbery-murders.[8]

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[3] Roger Hood and Carolyn Hoyle, THE DEATH PENALTY: A WORLDWIDE PERSPECTIVE (Oxford, UK: Oxford University Press, 2015). Countries like Japan argue that popular support for capital punishment, including cultural beliefs in its deterrent value, is reciprocally tied to the legitimacy of the government itself. See, for example, Mai Sato, THE DEATH PENALTY IN JAPAN: WILL THE PUBLIC TOLERATE ABOLITION? (Weisbaden, GDR: Springer Publishing, 2014).

[4] Gary S. Becker, "Crime and Punishment: An Economic Approach," supra n. 2.

[5] Aaron Chalfin, and Justin McCrary, "Criminal Deterrence: A Review of the Literature," 1 *Journal of Economic Literature 1* (2014).

[6] *Id*. at 7.

[7] Robinson, Paul and Darley, John M. "Does the Law Deter? A Behavioral Science Investigation," 24 *Oxford Journal of Legal Studies* 173-205 (2004).

[8] *Id*. at 203.

B. *What is the theory of specific deterrence?*

1. Where general deterrence refers to the effect of criminal punishment on potential offenders, specific deterrence refers to the effects of criminal punishment on those who have committed crimes and received punishment. The goal of specific deterrence is to persuade persons through the actual experience of punishment to desist from further criminal behavior.[9]
2. Offenders are thought to be deterred from further crime if the punishment they receive is swift (celerity), certain (highly likely) and severe (lengthy periods of confinement and attenuated liberty.[10] In a capital punishment regime, specific deterrence is assured since the offender is killed by the state.

C. *What are the elements and processes of specific deterrence?*

1. Specific deterrence requires that the offender perceive sanction threats in response to her or his criminal activity.
2. Sanction threat perceptions include both the risk or certainty (threat) of punishment and the consequences of that punishment. These perceptions and evaluations of threat and severity are modified in response to an offender's punishment experiences relative to his criminal activity. Specifically, an offender's involvement in criminal activity will depend on the consequences that may or may not follow from this criminal activity. The model is premised on the idea of "belief updating." That is, rather than being static, sanction threat perceptions continuously evolve in response to ongoing experiences of the actor.[11]
3. These propositions leave open several practical and empirical questions. How would we know about murders or other death-eligible crimes that are contemplated but abandoned because of the threat of death? How many averted murders are there, and what is the threshold to assume that there is a deterrent effect? If we avert one murder, is that sufficient to claim deterrence? Are executions the reason for the abandonment of a capital crime? What about other punishment threats, like death in prison through an irreversible life sentence? What ratio of executions to capital crimes would present evidence of "deterrence"? How many executions are needed to signal a credible deterrent threat?

[9] Johannes Andenaes, PUNISHMENT AND DETERRENCE (Ann Arbor, MI, USA: University of Michigan Press, 1974).

[10] Marchese di Beccaria, Cesare, AN ESSAY ON CRIMES AND PUNISHMENTS (Philip H. Nicklin, 1819).

[11] Greg Pogarsky et al., "Modeling Change in Perceptions about Sanction Threats," 20 *Journal of Quantitative Criminology* 343 (2004); McCrary, Justin, and Lee, David S, "The Deterrence Effect of Prison: Dynamic Theory and Evidence," *Berkeley Program in Law & Economics, Working Paper Series* (2009).

D. *The Evidence: Deterrence, Executions and Murder Across Nations*

1. Five decades of research have shown that whether the offense is a murder, a drug offense, or an act of terrorism, the scientific evidence supporting the belief in deterrence is unreliable, and in many instances, simply wrong.[12] This conclusion is based on the convergence of evidence from studies over decades, conducted under a wide range of scientific strategies.

2. Experiments are the "gold standard" of scientific evidence.[13] There are no experiments on execution, nor can there be, for obvious moral and ethical reasons.[14] However, there are several studies that closely approximate experiments.[15] For example, some studies have examined the effects of moratoria in places that have suspended capital punishments. Other studies compare places that practice capital punishment with carefully matched places that have abolished or suspended executions and found no differences in murder rates, regardless of the number of executions in the retentionist places. Still other studies compare similarly situated states or nation-states that practice capital punishment with those that do not.

3. From 1972-76, there was a moratorium on executions in the U.S. One of the reasons for the moratorium was growing doubts during the pre-moratorium decade about the deterrent effects of capital punishment on murder.[16] Executions resumed following publication of research claiming that the death penalty did in fact deter homicides. The claims were quite strong: each execution deterred as many as eight future homicides. But that evidence was strongly contested, and a 1978 panel of the National Academy of Sciences found little evidence that claims of deterrence were accurate.[17]

4. Comparative research based on statistical evidence of changes in homicide rates before and after abolition of capital punishment across 13 European nations reached much the same conclusion.[18] A recent meta-analysis of 700 deterrence studies, including 52 death

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[12] National Research Council, Deterrence and the Death Penalty (D. Nagin and J.V. Pepper, eds.) (2012). See, also, John J. Donohue, "Empirical Analysis and The Fate of Capital Punishment," 11 *Duke J. Const. L. & Pub. Pol'y* 51(2016).

[13] National Research Council, *id*. at 31 (stating that "[e]xperiments are a widely accepted way of scientifically testing for causal effects: there is general agreement that the findings are reflective of causal effects").

[14] *Id.*

[15] *Id.* at 32.

[16] *Furman v Georgia*, 408 U.S. 238, 315 (1972) (Marshall, Concurring). The *Furman* court also expressed concerns about arbitrariness and capriciousness in charging and sentencing, leading the court to characterize capital punishment as practiced in the U.S. from 1960-72 as a "fatal lottery." The *Furman* court also expressed concerns about racial bias, concluding that the death penalty in the U.S. was "imposed by a majority of 'we' on a minority of 'they'" (Douglas, J., concurring).

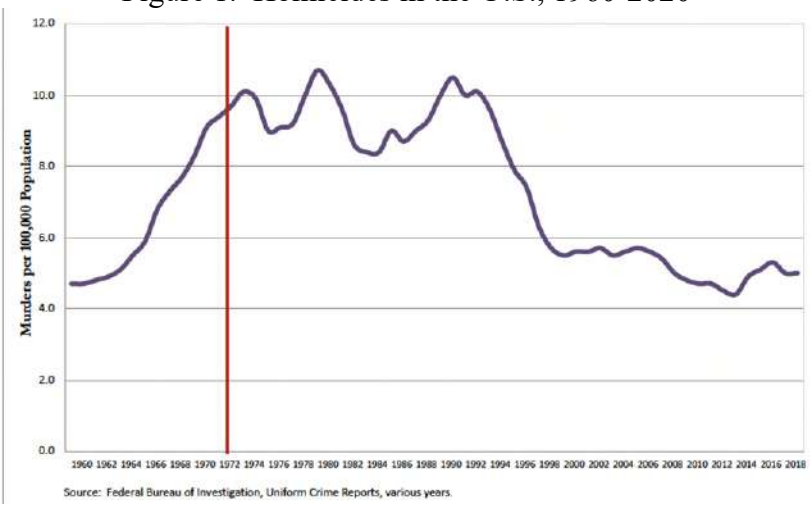
[17] National Research Council, Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates. Panel on Research on Deterrent and Incapacitative Effects (1978) (concluding "available studies provide no useful evidence on the deterrent effect of capital punishment" (9) and "that the death penalty [as practiced in the United States] can ever be subjected to the kind of statistical analysis that would validly establish the presence or absence of a deterrent effect" (62)).

[18] Dane Archer, Rosemary Gartner, Marc Beittel, "Homicide and the Death Penalty: A Cross-National Test of a Deterrence Hypothesis," 74 *Journal of Criminal Law & Criminology* 991, 1013 (1983) (comparing evidence from 13 countries and city substudies to conclude that "there is no overwhelming evidence for deterrence, and the contrary conclusions of existing research suggest that such evidence for deterrence will not be forthcoming").

penalty studies, suggests that deterrent effects can be achieved for minor crimes and disorder offenses, but there were no deterrent effects on homicides for any punishment, including executions and lengthy prison sentences.[19] Of the death penalty studies, 90% were conducted in the U.S., and 34% were published after 1995.[20]

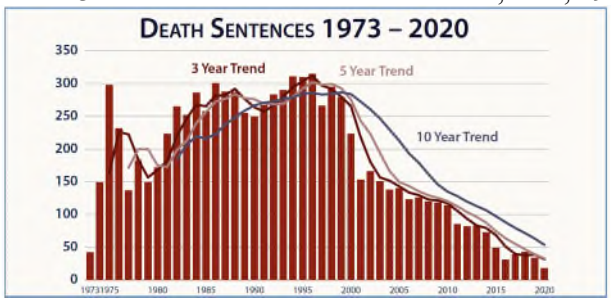
5. Despite the absence of experimental evidence, national trends in the U.S. confirm the absence of plausible evidence of deterrent effect of executions. In the U.S., murders have been declining since 1993 across the U.S. in retentionist, moratorium, and abolition states.

Figure 1. Homicides in the U.S., 1960-2020



6. Figures 2 and 3 show that since 1999, death sentences and executions have all been declining at the same time and at the same pace for nearly 15 years. Death sentences, in part a reflection of that peak in the mid-1990s, reached a peak rate in 1998, and have declined since. Executions reached a peak in 1999, and also have been declining since.

Figures 2 and 3. Death Sentences and Executions, U.S., 1977-2020



[19] Dieter Dolling, Horst Entorf, Dieter Hermann, and Thomas Rupp, "Is Deterrence Effective? Results of a Meta-Analysis of Punishment," 15 *European Journal of Crime Policy Research* 201 (2009).

[20] *Id*. at 219.

7. The murder rate nationally and in both retentionist and abolitionist states was unaffected by these changes in execution or death sentence risk, indicating a secular decline.[21] And recent abolition events in a group of U.S. states[22] allow for comparisons of murder rates before and after execution. Over approximately five years in New Jersey, Illinois and New Mexico, there appears to be no evidence of an increase in murders following the abolition of capital punishment. In fact, homicides in Chicago, the major city in Illinois, reached a 50 year low in 2014, long after the last execution in the late 1990s. Several other states have enacted moratoria on executions: Oregon, Pennsylvania, and California. In total, 10 states either have enacted formal moratoria or have carried out no executions for the past decade.[23]

8. Two recent studies examined the deterrent effects of the death penalty using novel methods that simulate an experiment by creating synthetic states that match executing states. The first study compared murder rates in seven states that had abolished capital punishment since 2000 with a matched sample of 29 states that had retained it.[24] The analysis finds no evidence that the presence of a capital punishment statute in a state is sufficient to deter murders. The second study used a similar design to compare homicide rates in four states that had declared a moratorium on executions with states that had continued to carry out executions for the period between 1979 and 2019.[25] Similar to the Parker study, this study showed that moratoriums on capital punishment resulted in nonsignificant homicide reductions in all four states. Both studies conclude that their results are inconsistent with a deterrence hypothesis: there was no evidence of a deterrent effect attributable to death penalty statutes or executions.

9. Evidence from other countries shows similar secular trends. Following the abolition of capital punishment in Eastern Europe in the early 1990s, homicide rates have been

[21] Donohue, supra n. 12.

[22] New Jersey, New Mexico, Illinois, Connecticut, New York, Maryland. See, Death Penalty Information Center, at http://www.deathpenaltyinfo.org/recent-legislative-activity. Several other states recently abolished capital punishment: Delaware, Washington, Colorado, and New Hampshire.

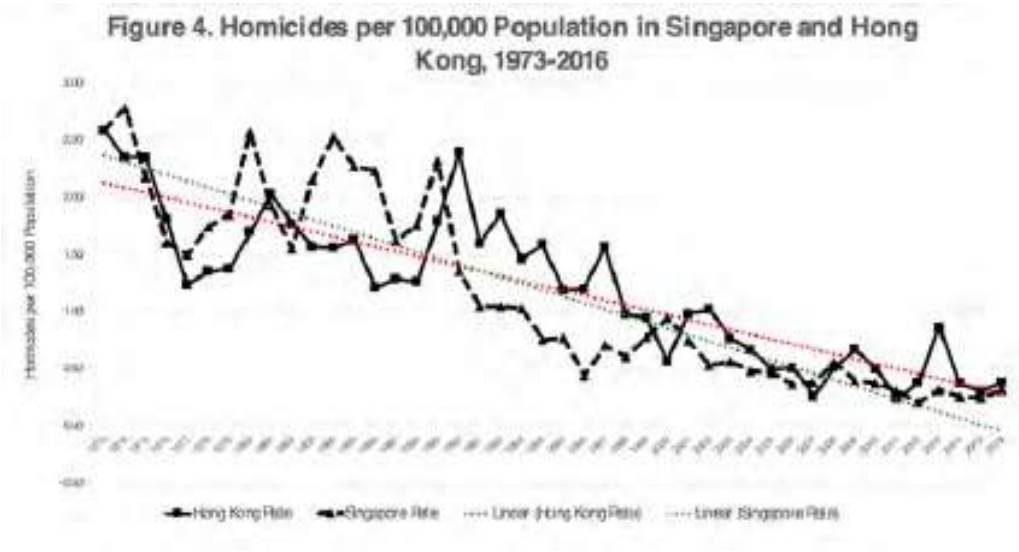
[23] https://deathpenaltyinfo.org/news/dpic-2019-year-end-report-death-penalty-erodes-further-as-new-hampshire-abolishes-and-california-imposes-moratorium

[24] Brett Parker, "Death Penalty Statutes and Murder Rates: Evidence from Synthetic Controls." Journal of Empirical Legal Studies (2021). https://doi.org/10.1111/jels.12291

[25] Stephen N. Oliphant, Estimating the effect of death penalty moratoriums on homicide rates using the synthetic control method, 21 Criminology & Public Policy 915 (2022).

declining.[26] A study of executions and violent crime in Japan showed that neither the death sentence rate nor the execution rate has a statistically significant effect on the homicide and robbery-homicide rates, whereas the life sentence rate has a significant negative effect on the robbery-homicide rate.[27]

10. A study comparing murder rates in Singapore, where executions for murder are common and persistent over time, with Hong Kong, where executions were banned since the 1970s, showed no difference in the murder rates over nearly three decades since the cessation of executions in Hong Kong.[28] Figure 4, updating the Hong Kong-Singapore comparison through 2016, shows that the long term trends in the two city-states, one with frequent executions and the other with none since the 1960s, continue to have nearly identical homicide rates and nearly identical long-term trajectories of declining homicide rates.



11. Studies in Trinidad and Tobago by Greenberg and Agozino also showed no change in homicide rates despite increases in executions.[29] The most comprehensive study showed that executions had no deterrent effect on murder over a 50 year period from 1960-2010, once the murder rate is adjusted for imprisonment and socio-economic factors. Figures 5 and 6 below, show that murders were not responsive to changes either in the prison population or in the rate of death sentences.

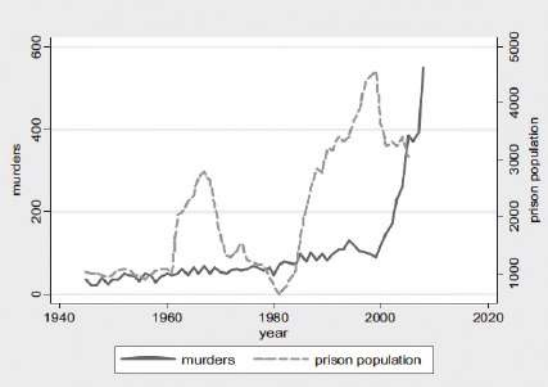
[26] U.N. Office of Drugs and Crime, 2011 Global Study on Homicide: Trends, Contexts and Data (Vienna, Austria, 2011). Homicides declined by 61% from 2000-2008 in Czech Republic, Poland, Moldova, Hungary and Romania. U.N. Report at 33.

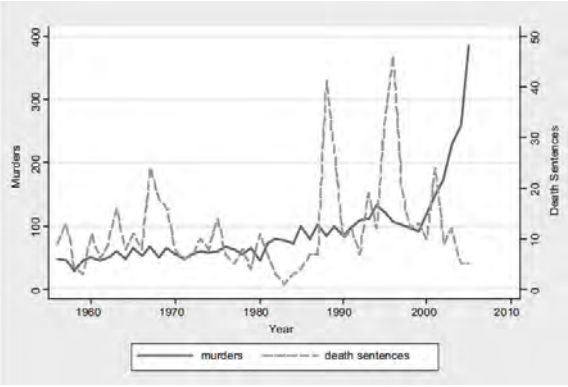
[27] Daisuke Mori, "Deterrent Effect of Capital Punishment in Japan: An Analysis Using Nonstationary Time-Series Data." 28 *Supreme Court Economic Review* 6 1 (2020).

[28] Franklin E. Zimring, Jeffrey Fagan, and David T. Johnson, "Executions, Deterrence, and Homicide: A Tale of Two Cities," 7 *Journal of Empirical Legal Studies* 1-29 (2010).

[29] David Greenberg and Biko Agozino, "Executions, Imprisonment, and Crime in Trinidad and Tobago," 52 *British Journal of Criminology* 113 (2012).

Figures 5 and 6. Murders, Death Sentences and Prison Populations, Trinidad and Tobago, 1960-2010



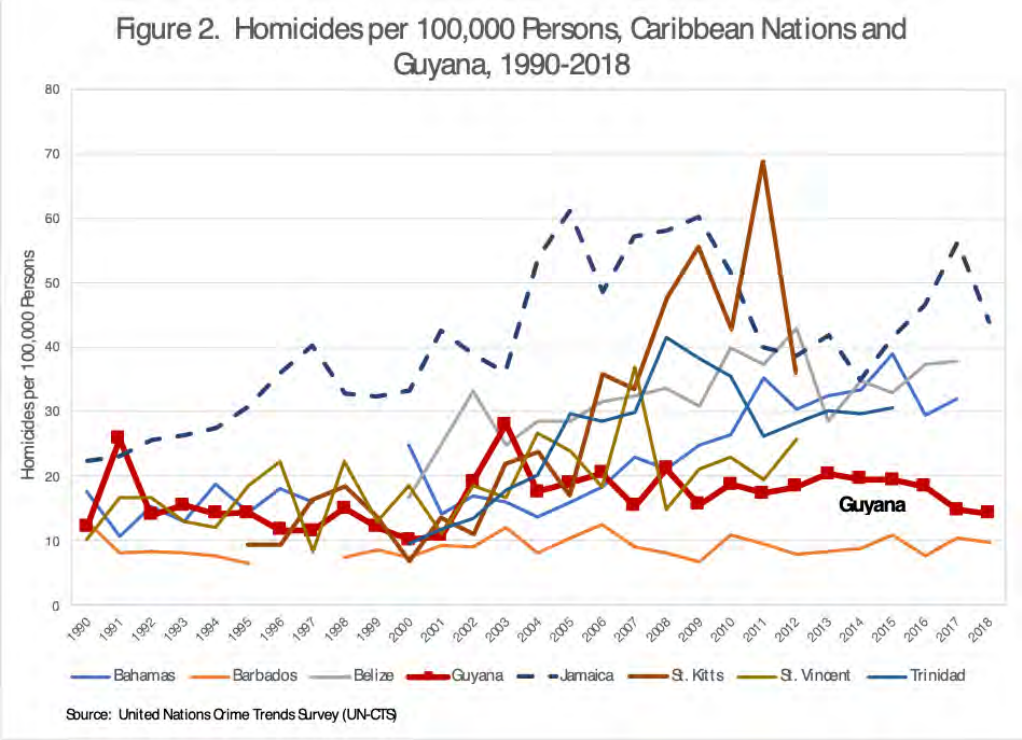


12. The authors conclude that "[o]ver a span of 50 years, during which these sanctions were being deployed in degrees that varied substantially, neither imprisonment nor death sentences nor executions had any significant relationship to homicides. In the years immediately following an appeals court's determination limiting executions, the murder rate fell." Executions in Trinidad and Tobago may have had a perverse effect on murders. Following the spate of executions in 1999,[30] Figure 6 shows that murders increased beginning the next year and continued for over a decade.[31]

[30] Greenberg and Agozino, id. See, also, Larry Roberts, Trinidad Executes Four in Nine Days, World Socialist Web Site, http://www.wsws.org/en/articles/1999/06/cari-j17.html.
[31] https://deathpenaltyworldwide.org/database/

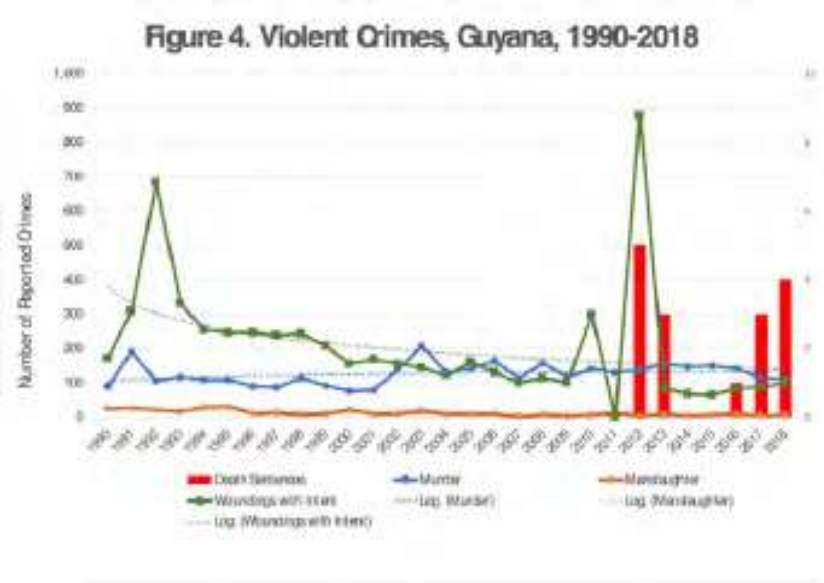
E: *Evidence from Guyana of the impact a moratorium on death sentences and executions on rates of homicide shows no deterrent effects of death sentences.*

1. Data from several sources were compiled to address this question, including data on murders and other crimes and death sentences and executions, from 1990-2018. In addition, data were compiled for neighboring countries in South America and the Caribbean to compare trends over time with Guyana. Data are collected from national authorities through the annual United Nations Crime Trends Survey (UN-CTS).[32]



2. Figure 2 compares homicide rates per 100,000 population with seven other Caribbean nations. Over the past decade, starting in 2008, Guyana's homicide rate is substantially lower than all but one of these other nations, including many retentionist nations. Jamaica, a retentionist state, has the highest homicide rates over nearly the entire period. St. Kitts and Nevis has had a sharp increase in homicides from 2005-2012, the last year of their participation in the UNDOC annual survey. Among these seven other Caribbean nations in Figure 2, only Barbados has a lower rate over the 18-year period.

[32] https://www.unodc.org/unodc/en/data-and-analysis/United-Nations-Surveys-on-Crime-Trends-and-the-Operations-of-Criminal-Justice-Systems.html (last visited January 28, 2021). Additional data are sourced by UNDOC from the most reliable sources available. All data are sent to UN Member States for review and validation.



3. Figure 4 shows that for murders,[33] the line is stable over time and consistent with a multi-year period preceding the imposition of death sentences starting in 2012. There is a slight negative trend for woundings and for manslaughters. But similar to the murder trend, there is no change in the trend for the 10 years preceding the imposition of death sentences in 2012 to the years after when death sentences were imposed.

4. These data strongly suggest that there is no evidence that the imposition of a moratorium in Guyana on executions or the abolition of the death penalty causes an increase in homicides. The trends in murders and other crimes seem to be unaffected by prior moratoriums, or by the resumption of death sentences in 2012.

[33] Since these data are obtained from the Guyanan Police Force, the term 'murder' is adopted consistent with the police vocabulary.

F. *Evidence from Taiwan*

1. The death penalty in Taiwan is usually only imposed in murder cases.[34] For murder, it is discretionary. Although the death penalty remains authorized by statute for other offenses, it is very rarely imposed in those cases. For murder, the death penalty has been discretionary since 2006.[35]

2. In practice, the Supreme Court has not upheld a death sentence for offenses other than murder since 2002. The last non-murder death sentence that was upheld by the Supreme Court was for drug trafficking.[36] While the District Courts and the High Court have imposed death sentences on 14 defendants for crimes *other than murder* between 2002-2015, the Supreme Court later reduced all these sentences to lesser penalties. The current population of 37 persons on death row in Taiwan have been convicted of murder.

3. Table 1 shows data on homicides, homicide arrests, death sentences and executions for the two decades from 2002 to 2022. The table also includes *rates* for homicides, death sentences, and executions.

4. Both rates and counts are shown for homicides, homicide arrests (offenders), death sentences, and executions. The rates are standardized to the population, shown as events per 100,000 persons. Since some years had zero events (death sentences, executions), the data were adjusted to show .99 events in that year to allow for computation of the population rate, or the rate per death sentence or execution.[37] Using .99 in fact creates a generous estimate of these sanctions, by including a parameter less than one but greater than zero.

[34] Carolyn Hoyle, *Unsafe convictions in capital cases in Taiwan: A report based on the research and findings of Chang Chuan-Fen* (2019) The Death Penalty Project. 8-9. See also 放棄死刑走向文明 (2015). Taipei Bar Association. p525-531

[35] Jaw-Perng Wang, "The current state of capital punishments in Taiwan", *6(1) National Taiwan University Law Review 143* (2011) 147

[36] Carolyn Hoyle, *Unsafe convictions in capital cases in Taiwan: A report based on the research and findings of Chang Chuan-Fen* (2019) The Death Penalty Project. 8-9

[37] The adjustment was necessary to avoid diving by zero for years when there were either no death sentence or executions.

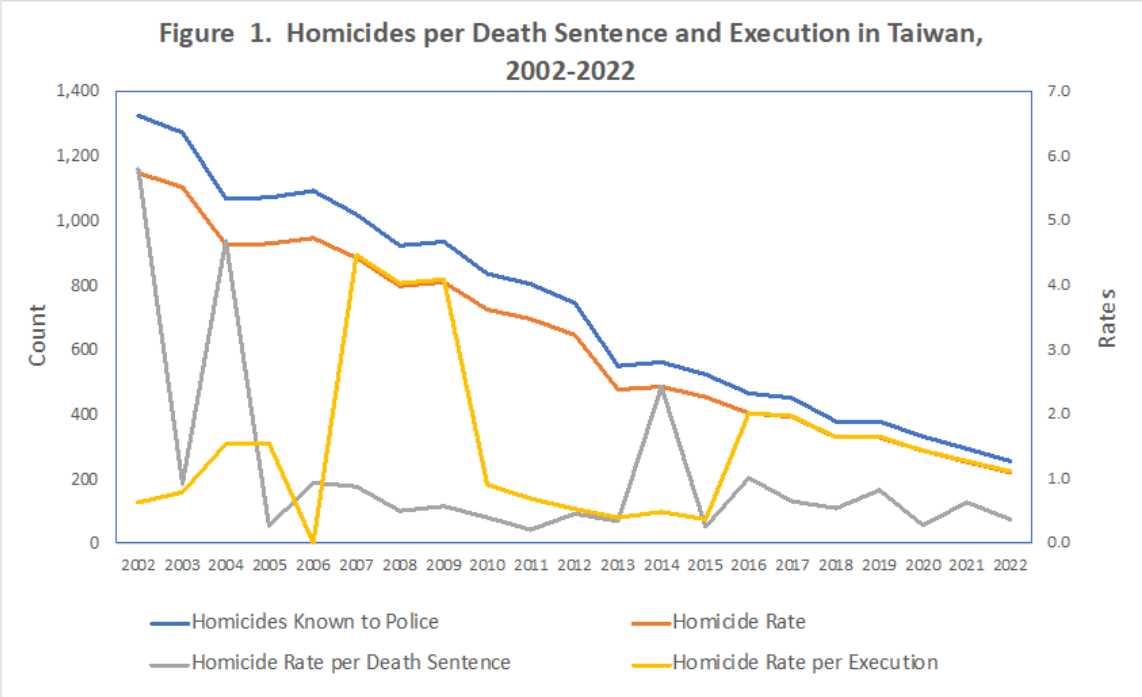


Table 1. Homicide, Homicide Rates and Death Sentences, Taiwan, 2002-2022

Year	Homicide Rates (Offenses Known to the Police)	Homicides per 100,000 Persons(a)	Homicide Offenders	Homicide Offenders per 100,000 Persons(a)	Death Sentences (b)	Executions (c	Homicide Rate per Death Sentence	Homicide Rate per Execution
2002	1,326	5.7	1,998	8.7	0.99	9	5.8	0.6
2003	1,273	5.5	2,000	8.7	6	7	0.9	0.8
2004	1,070	4.6	1,695	7.3	0.99	3	4.7	1.5
2005	1,071	4.6	1,620	7.0	17	3	0.3	1.5
2006	1,093	4.7	1,921	8.3	5	0.99	0.9	0.0
2007	1,020	4.4	1,682	7.3	5	0.99	0.9	4.5
2008	922	4.0	1,501	6.5	8	0.99	0.5	4.0
2009	935	4.1	1,580	6.8	7	0.99	0.6	4.1
2010	836	3.6	1,531	6.6	9	4	0.4	0.9
2011	804	3.5	1,573	6.8	16	5	0.2	0.7
2012	744	3.2	1,593	6.9	7	6	0.5	0.5
2013	551	2.4	951	4.1	7	6	0.3	0.4
2014	561	2.4	1,043	4.5	1	5	2.4	0.5
2015	522	2.3	897	3.9	9	6	0.3	0.4
2016	465	2.0	844	3.7	2	1	1.0	2.0
2017	451	2.0	842	3.6	3	0.99	0.7	2.0
2018	379	1.6	849	3.7	3	1	0.5	1.6
2019	378	1.6	806	3.5	2	0.99	0.8	1.7
2020	332	1.4	632	2.7	5	1	0.3	1.4
2021	292	1.3	561	2.4	2	0.99	0.6	1.3
2022	254	1.1	424	1.8	3	0.99	0.4	1.1

a. Taiwan population ranged from 2000-2020 was 22,194,731 in 2000 to 23,821,464 in 2022, an average of 23,081,544 The annual homicde rate and rate of homicide offenders per 10 million perrsons is based on that average.
b. Years with no death sentences are set to .99. This provides a conservative estimate of the rate per death senence.
c. Years with no death sentences are set to .99. This provides a conservative estimate of the rate per death senence.
Sources
Death Sentences and Executions:Amnesty International Annual Report, various years
Violent Crime, Various Years
Population: Worldometer (www.Worldometers.info)

5. Table 1 and Figure 1 each show that both the number and rate of homicides declined steadily from 2002 to 2022, even while the number of executions and death sentences fluctuated but generally declined overall. There was no sensitivity in homicides to fluctuations in penalty risk. Even after a sharp spike in death sentences in 2011, the general long-term trend in homicide decline persisted over time. Deterrence theory suggests that the number and rate of homicides would have increased over this period as death penalty sanction declined. But this not observed in these data. There appears to be no deterrent effect of a reduction in death penalty sanctions over the period of two decades.

6. Table 1 includes all homicides: murders and non-intentional or negligent homicides. To test for the stability of these patterns for murder cases only, the same analysis was completed for murders for the years 2018-2023. Table 2 shows the results.

7. As in Table 1, there are steep declines in murders, murder rates, murder arrests, and murder arrest rates per 100,000 persons over this five-year period. These declines occurred even as death sentences for murder rose and fell from year to year. The declines also were steep and sustained despite the near absence of executions during this time. As with homicides, there appears to be no deterrent effect of a reduction in death penalty sanctions on either murder rates or murder arrests over this five-year period.[38]

Table 2. Murder, Murder Rates, Death Sentences and Executions, Taiwan, 2018-2022

Year	Murders (Known to the Police)	Murders per 100,000 Persons(a)	Murder Offenders	Murder Offenders per 100,000 Persons(a)	Death Sentences (b)	Executions (c)	Murder Rate per Death Sentence	Murder Rate per Execution
2018	301	1.3	760	3.3	3	1	0.4	1.3
2019	283	1.2	695	3.0	2	0.99	0.6	1.2
2020	218	0.9	489	2.1	5	1	0.2	0.9
2021	197	0.9	498	2.2	2	0.99	0.4	0.9
2022	163	0.7	304	1.3	3	0.99	0.2	0.7

a. Taiwan population ranged from 2000-2020 was 22,194,731 in 2000 to 23,821,464 in 2022, an average of 23,081,544. The annual homicde rate and rate of homicide offenders per 10 million perrsons is based on that average.

b. Years with no death sentences are set to .99. This provides a conservative estimate of the rate per death senence.

c. Years with no death sentences are set to .99. This provides a conservative estimate of the rate per death senence.

Sources:

Death Sentences and Executions:Amnesty International Annual Report, various years

Murder and Murder Arrests: National Police Agency of Taiwan, Ministry of Interior, Republic of Taiwan Statistical Yearbook, Table 2 - Violent Crime, Various Years

Population: Source: Worldometer (www.Worldometers.info)

[38] Data for 2023 show that these declines continued for a sixth year. These data were omitted from the table due to the absence of death penalty sanction information for 2023.

8. In addition to examining murder rates for the most recent five years, I examined robbery rates for the same period. One question in the deterrence literature is whether other violent crimes will increase as a substitute for murders as the execution rate varies over time.[39] Alternately, robbery rates and robbery-related killings (i.e., robbery-murders or felony murders) may increase as the threat of execution declines over time. To assess these hypotheses, the analyses in Table 2 were repeated using data on robberies obtained from the National Police Agency of Taiwan.[40] The results of this analysis are shown in Table 3.

9. Table 3 shows that both the number of robberies and the number of robbery offenders steadily declined over the period from 2018-2022. During this period, the numbers of death sentences and executions were essentially constant, with little year to year variation. In addition, the robbery rates and robbery arrest rates also declined continuously in the five-year period. The results show that as with murder, robbery was invariant in the context of declining death penalty sanctions.

Table 3. Robberies, Robbery Offenders, Death Sentences and Executions, Taiwan, 2018-2022

Year	Robberies (Known to the Police)	Robberies per 100,000 Persons(a)	Robbery Offenders	Robbery Offenders per 100,000 Persons(a)	Death Sentences (b)	Executions (c)	Robbery Rate per Death Sentence	Robbery Rate per Execution
2018	197	0.9	362	1.6	3	1	0.3	0.9
2019	187	0.8	325	1.4	2	0.99	0.4	0.8
2020	151	0.7	341	1.5	5	1	0.1	0.7
2021	150	0.6	294	1.3	2	0.99	0.3	0.7
2022	129	0.6	231	1.0	3	0.99	0.2	0.6

a. Taiwan population ranged from 2000-2020 was 22,194,731 in 2000 to 23,821,464 in 2022, an average of 23,081,544. The annual homicde rate and rate of homicide offenders per 10 million perrsons is based on that average.

b. Years with no death sentences are set to .99. This provides a conservative estimate of the rate per death senence.

c. Years with no death sentences are set to .99. This provides a conservative estimate of the rate per death senence.

Sources:

Death Sentences and Executions:Amnesty International Annual Report, various years

Robberies and Robbery Arrests: National Police Agency, Ministry of the Interior, Republic of Taiwan, Statistical Tables Yearbook, Table 2 - Violent Crime, Various Years

Population: Source: Worldometer (www.Worldometers.info)

10. As with homicides generally and murders, there appears to be no deterrent effect of a reduction in death penalty sanctions on either robbery offenses, robbery arrests, or robbery rates over this five-year period.[41]

[39] See, Becker, supra n. 8

[40] National Police Agency, Ministry of Interior, Republic of Taiwan, Statistical Tables Yearbook, Table 2 – Violent Crime, Various Years

[41] Data for 2023 show that these declines continued for a sixth year. These data were omitted from the table due to the absence of death penalty sanction information for 2023.

G. Conclusion

1. These statistics and analyses strongly suggest that there is no evidence that death sentences or executions are associated with increases in the homicide, murder or robbery rates in Taiwan. The trends in three categories of violent crime are unaffected by declines over time in the imposition of death sentences or executions. Accordingly, there appears to be no evidence of the deterrent effects of death penalty sanctions generally.

Signed:

Jeffrey Fagan, Ph.D.

Dated 7 March 2024

APPENDIX A.

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CURRICULUM VITAE

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PROFESSIONAL EXPERIENCE:

2011 – present:	Isidor and Seville Sulzbacher Professor of Law, Columbia Law School
2021 – present:	Faculty Associate, Columbia Data Science Institute
2018 (Fall):	Florence Rogatz Visiting Professor of Law, Yale Law School
2013 (Spring):	Florence Rogatz Visiting Professor of Law, Yale Law School
2001-2011:	Professor, Columbia Law School
2010-11:	Fellow, Straus Institute for the Advanced Study of Law and Justice, New York University School of Law
2010-present:	Senior Research Scholar, Yale Law School
2009-10	Florence Rogatz Visiting Professor of Law, Yale Law School
2004-2015:	Director, Center for Crime, Community and Law, Columbia Law School
2001-2006	Director, Doctor of Juridical Science in Law (JSD) Program, Columbia Law School
2008 – present:	Faculty Fellow, Columbia Population Research Center
1999-present	Faculty Fellow, Institute for Social and Economic Research and Policy, Columbia University
1998-2001:	Visiting Professor, Columbia Law School
1996-present:	Professor, Department of Epidemiology, Mailman School of Public Health, Columbia University
1995-2002:	Founding Director, Center for Violence Research and Prevention, Mailman School of Public Health, Columbia University
1989-1996:	Associate Professor to Professor, School of Criminal Justice, Rutgers-The State University of New Jersey
1988-1989:	Associate Professor, Doctoral Program in Criminal Justice, City University of New York Graduate Center; Associate Director for Research, Criminal Justice Center, John Jay College of Criminal Justice, City University of New York
1986-1988:	Senior Research Fellow, New York City Criminal Justice Agency.
1977-1986:	Director, Center for Law and Social Policy, URSA Institute, San Francisco.
1975-1976:	Research Director, Northern California Service League, San Francisco, California.
1974-1975:	Associate Research Analyst, Office of Criminal Justice Planning, Oakland, California.
1970-1974:	Director, College of Urban Studies, State University of New York at Buffalo.
1969-1971:	Teaching Assistant and Research Associate, Department of Psychology, State University of New York at Buffalo

EDUCATION:

PhD, 1975, Policy Science, Department of Civil Engineering, State University of New York at Buffalo. Dissertation: "A Predictive Model of Success in Criminal Justice Employment Programs."
MS, 1971, Human Factors Engineering, Department of Industrial Engineering, State University of New York at Buffalo.
BE, 1968, Industrial Engineering, New York University.

AWARDS AND HONORS:

Advisory Board, Presidential Scholars in Society and Neuroscience, Columbia University, 2021-present
Power of One Racial Justice Award, Center for Race, Crime and Justice, John Jay College, May 2016
Lillie and Nathan Ackerman Lecture in Equality and Justice, Baruch College, November 2013
Fellow, American Society of Criminology, elected April 2002
Fellow, Davenport College, Yale University
Darrow K. Soll Memorial Criminal Law and Justice Lecture, *Indignities of Order Maintenance*, Rogers College of Law, University of Arizona, March 2013.
Lecturer, Hoffinger Colloquium, *Profiling and Consent: The Trouble with Police Consent Decrees*, New York University School of Law, April 2011
National Associate, National Research Council and Institute of Medicine, 2011 – present
Member, Committee on Law & Justice, National Research Council, 2002-2008
Senior Justice Fellow, Open Society Institute, 2005-6
Health Policy Scholar, Robert Wood Johnson Foundation, 2002-2004
Book Award, "Best Book on Adolescence and Social Policy" for *Changing Borders of Juvenile Justice* (with F. Zimring), Society for Research on Adolescence, 2002
Public Interest Achievement Award, Public Interest Law Foundation of Columbia University, Spring 2001
Bruce Smith Senior Award, Academy for Criminal Justice Sciences, March 2000.
Lecturer, Fortunoff Colloquium, *Social Contagion of Violence.* New York University School of Law, April 1999
Fellow, Earl Warren Legal Institute, School of Law, University of California-Berkeley, 1999-present
University Faculty Merit Award, Rutgers University, 1990-94
Lecturer in Colloquium on Race, Ethnicity and Poverty Workshop, Center for the Study of Urban Inequality, University of Chicago, June 1992
University Research Council Grantee, Rutgers University, 1989-90
Lecturer, Fortunoff Colloquium, *Preventive Detention and the Validity of Judicial Predictions of Dangerousness.* New York University School of Law, October, 1988
Delegate, Criminal Justice and Criminology Delegation to the People's Republic of China, Eisenhower Foundation, l985
NDEA Title IV Fellowship, Department of Industrial Engineering, State University of New York at Buffalo, June 1968-June 1971

PUBLICATIONS:

Books:

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Rudman, C., J.A. Fagan, E. Hartstone, and M. Moore. "Violent youth in adult court: Process and punishment." *22 Crime and Delinquency* 75-96 (1986).

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"Doubling Down on Pot: Marijuana, Race and the New Disorder in New York City Street Policing" (with A. Geller), Presented at the Fifth Conference on Empirical Legal Studies, Los Angeles CA, November 2009

"Crime, Conflict and the Racialization of Criminal Law," Presented at the Annual Meeting of the European Society of Criminology, Ljubljana, Slovenia, September 2009

"Street Stops and Broken Windows Revisited: The Demography and Logic of Proactive Policing in a Safe and Changing City," (with A. Geller, G. Davies and V. West). Presented at the Annual Meeting of the Association for Public Policy and Management, Los Angeles, November 2008. Also presented at the Annual Meeting of the American Society of Criminology, St. Louis, November 2008.

"Desistance and Legitimacy: Effect Heterogeneity in a Field Experiment on High Risk Groups," (with A. Papachristos, D. Wallace, and T. Meares), presented at the Annual Meeting of the American Society of Criminology, St. Louis, November, 2008.

"Legitimacy, Compliance and Cooperation: Procedural Justice and Citizen Ties to the Law" (with T. Tyler). Presented at the Second Conference on Empirical Legal Studies, Cornell Law School, October 2008.

"Measuring A Fair Cross-Section of Jury Composition: A Case Study of the Southern District of New York," (with A. Gelman, D.E. Epstein, and J. Ellias). Presented at the Annual Meeting of the Midwest Political Science Association, Chicago, April 4, 2008

"Race, Legality and Quality of Life Enforcement in New York City, 2006," John Jay College of Criminal Justice, New York, February 28, 2008

"Be Careful What You Wish For: The Comparative Impacts of Juvenile and Criminal Court Sanctions on Adolescent Felony Offenders," Presented at Annual Conference on Empirical Legal Studies, New York, November 19, 2007

"The Common Thread: Crime, Law and Urban Violence in Paris and the U.S.," Presented at the Conference on "Poverty, Inequality, and Race: Forty Years after the Kerner Commission

Report and Twenty Years after the Scarman Commission Report," University of Paris IX (Sorbonne), July 2007

"Race, Political Economy, and the Supply of Capital-Eligible Cases," Presented at the Annual Meeting of the American Society of Criminology, Atlanta GA, November 2007.

"The Political Economy of the Crime Decline in New York City," Presented at the Annual Meeting of the American Society of Criminology, Atlanta GA, November 2007. Also presented at the Annual Meeting of the American Association for the Advancement of Science, San Francisco, February 2007 (with G. Davies). Also presented at the Symposium on the Crime Decline, University of Pennsylvania, Department of Criminology, March 31, 2006.

"Crime and Neighborhood Change." Presented at the National Research Council, Committee on Law and Justice, Washington DC, April 2007.

"Immigration and Crime," Presented at the Annual Meeting of the American Society of Criminology, Los Angeles, November 2006 (w. Garth Davies).

"Rational Choice and Developmental Contributions to Legal Socialization," Presented at the Conference on Empirical Studies in Law, Austin, Texas, October 2006; also presented at the Annual Meeting of the American Society of Criminology, Toronto, November 2005 (with A. Piquero) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=914189.

"The Diffusion of Homicides from Illegal Gun Markets: A Test of Social Contagion Theories of Violence, Presented at the Annual Meeting of the American Society of Criminology, Toronto, Ontario, November 14, 2005 (with G. Davies).

"Attention Felons: Evaluating Project Safe Neighborhoods in Chicago" (November 2005). U Chicago Law & Economics, Olin Working Paper No. 269 http://ssrn.com/abstract=860685, presented at the Annual Meeting of the American Society of Criminology, Toronto, November 2005 (with A. Papachristos and T.L. Meares)

"Legitimacy And Cooperation: Why Do People Help The Police Fight Crime In Their Communities?" Presented at the Annual Meeting of the American Society of Criminology, Toronto, November 2005 (with T. Tyler), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=887737

"Science, Ideology and the Death Penalty: The Illusion of Deterrence." The Walter Reckless Lecture, delivered at the Moritz School of Law and the Criminal Justice Research Center, The Ohio State University, Columbus, OH, April 2005.

"Crime Currents and the Co-Production of Security in New York City." Presented at the *Colloquium on the Urban Age*, London School of Economics, February 2005.

"The Effects of Drug Enforcement on the Rise and Fall of Violence in New York City, 1985-2000," Presented at the *Workshop on Behavioral and Economic Research* National Institute on Drug Abuse, Bethesda MD, October 2004 (with G. Davies).

"Police, Order Maintenance and Legitimacy," Presented at the Conference on *Dilemmas of Contemporary Criminal Justice: Policing in Central and Eastern Europe*, University of Maribor, Ljubljana, Slovenia, September 2004 (with Tom R. Tyler)

"The Bustle of Horses on a Ship: Drug Control in Public Housing," Presented at Workshop on Crime in Public Housing, National Consortium on Violence Research, John F. Kennedy School of Government, Harvard University, April 2004.

"Neighborhood Patterns of Violence among Latinos," Presented at Workshop on *Beyond Racial Dichotomies of Violence: Immigrants, Race and Ethnicity*, UCLA Center for Population Studies, Los Angeles, November 2003 (with G. Davies).

"Neighborhood Effects on Violence Against Women: A Panel Study," Presented at the Annual Meeting of the American Society of Criminology, Denver, November 2003 (with G. Davies).

"Reciprocal Effects of Crime and Incarceration in New York City Neighborhoods," Presented at the Russell Sage Foundation, New York, December 2002 (with V. West and J. Holland).

"The Effects of Drug Enforcement on the Rise and Fall of Homicides in New York City, 1985-1996," Presented at the Annual Meeting of the American Society of Criminology, Chicago, November 2002 (with G. Davies).

"Age-Specific Sanctions for Juvenile Offenders: Crime Control and the Exclusion of Adolescent from the Juvenile Court," Presented at the Symposium for the 10th Anniversary of the Netherlands Institute for the Study of Crime and Law Enforcement, Leiden, The Netherlands, September 2002.

"New Measures for Assessing Perceptions of Legitimacy and Deterrence among Juvenile Offenders," Presented at the Annual Meeting of the American Society of Criminology, Chicago, November 2002 (with A. Piquero).

"Community, Courts, and Legitimacy," Fordham University Law School Symposium on Problem-Solving Courts, New York, February 2002 (with V. Malkin).

"Specific Deterrent Effects of Jurisdictional Transfer of Adolescent Felony Offenders," American Society of Criminology, Atlanta, November 2001 (with A. Kupchik).

"Assessing the Theoretical and Empirical Status of 'Broken Windows' Policing," Faculty of Law, University of Cambridge, Cambridge UK, October 2001.

"Social Contagion of Youth Violence," Grand Rounds Lecture, Johns Hopkins University School of Medicine, Baltimore MD, March 2001.

"Street Stops and Broken Windows: Terry, Race and Disorder in New York City," Presented at the Annual Meeting of the American Society of Criminology, San Francisco, CA , November 2000.

"Social and Legal Consequences of Judicial Waiver of Adolescents: Human Rights Implications," Presented at the Annual Meeting of the American Association for the Advancement of Science, Washington DC, February 2000.

"Crime in Poor Places: Examining the Neighborhood Context of New York City's Public Housing Projects," Presented at the Research Institute on Neighborhood Effects on Low-Income Families, Joint Center for Poverty Research, The University of Chicago, September 1999 (with Tamara Dumanovsky and J. Philip Thompson).

"Social Contagion of Violence,"Presented at the Fortunoff Colloquium, New York University School of Law, April 1999. Previous versions presented at the Winter Roundtable, Teachers College, Columbia University, February 1998, and the International Roundtable on Urban Security, Foundation Jean Jares, Paris, April 1998.

"This is Gonna' Hurt Me More than It'll Hurt You: Consequences of the Criminalization of Youth Crime." Presented at the Workshop on the Juvenile Justice System, National Research Council Panel on Juvenile Crime, Washington DC, January 1999.

"Use, Misuse and Nonuse of Social Science in Law: Case Studies from Criminal Law." Presented at the Annual Meeting of the American Association of Law Schools, New Orleans, January 1999.

"Consequences of Waiver: Recidivism and Adolescent Development." Presented at the Symposium on The Juvenile Justice Counter-Reformation: Children and Adolescents as Adult Criminals, Quinnipiac College School of Law, Hamden CT, September 17-18, 1998.

"Drugs and Youth Violence: The Tripartite Framework Revisited." Presented at the Annual Meeting of the American Society of Criminology, San Diego, November 1997.

"The Criminalization of Delinquency and the Politics of Juvenile Justice." Presented at the Annual Meeting of the National Conference of State Legislatures, Philadelphia PA, August 1997.

"Crack in Context: Myths And Realities From America's Latest Drug Epidemic." Presented at the NIJ/NIDA Conference on *The Crack Decade*: *Research Perspectives and Lessons Learned.* Baltimore MD: June 1997.

"Alcohol and Violent Events." Presented at the Annual Meeting of the American Society of Criminology, Chicago, November 1996 (with D.L. Wilkinson).

"Crime and Public Housing: Conceptual and Research Issues." Presented at the Joint Conference on Research in Public Housing, National Institute of Justice and Department of Housing and Urban Development, Washington DC, July 1997.

"The Functions of Adolescent Violence." Presented at the Bi-National Forum on Youth Violence, The French American Foundation, United Nations, New York, October 1996.

"Mirror Images of Violence: The Historical Socialization of Willie Bosket." Author-Meets-Critic Panel on *All God's Children*, by Fox Butterfield. Presented at the Annual Meeting of the American Society of Criminology, Boston, November 1995.

"Crime and Work." Presented at the Annual Meeting of the American Society of Criminology, Boston, November 1995.

"Drugs and Violence: Lessons from Three Epidemics." Presented at a joint session of the Annual Meetings of the American Sociological Association and the Society for the Study of Social Problems, Washington DC, August 1995.

"Social and Legal Control of Spouse Assault: Ironies in the Effectiveness of Punishment for Wife Beating." Presented at the Conference on Research and Evaluation, National Institute of Justice, Washington DC, July 1995.

"Cocaine and Federal Sentencing Policy." Testimony before the Subcommittee on Crime, Committee on the Judiciary, U.S. House of Representatives, Washington DC, June 29, 1995.

"Gangs, Youth, Drugs, and Violence." Presented to the Drugs-Violence Task Force of the U.S. Sentencing Commission, Washington DC, May 1995.

"Community Risk Factors in Workplace Violence." Presented at the Symposium on Violence in the Workplace, New York Academy of Medicine, New York, March 1995.

"Situational Contexts of Gun Use among Young Males." Presented at the Annual Meeting of the American Association for the Advancement of Science, Atlanta, February 1995, and at the Annual Meeting of the American Society of Criminology, Miami, November 1994.

"The Social Control of Violence among Intimates: Neighborhood Influences on the Deterrent Effects of Arrest for Spouse Assault" (with J. Garner & C. Maxwell). Presented at the Annual Meeting of the American Society of Criminology, Miami, November 1994.

"Crime, Drugs and Neighborhood Change: the Effects of Deindustrialization on Social Control in Inner Cities." Presented at the Annual Meeting of the American Association for the Advancement of Science, San Francisco, February 1994.

"The Social Context of Deterrence." Plenary paper presented at the Annual Meeting of the American Society of Criminology, Phoenix, October 1993.

"Doubling Up: Careers in Legal and Illegal Work." Presented at the Annual Meeting of the American Society of Criminology, Phoenix, October 1993.

"Promises and Lies: The False Criminology of "Islands in the Street." Presented at the Annual Meeting of the American Sociological Association, Miami, August 1993.

"Deindustrialization and the Emergence of Youth Gangs in American Cities." Colloquium at the Institute of Politics, University of Pittsburgh, April 1993.

"Women and Drugs Revisited: Female Participation in the Crack Economy." Colloquium at the Research Institute on the Addictions, State of New York, March 1993.

"Neighborhood Effects on Gangs and Ganging: Ethnicity, Political Economy and Urban Change." Presented at the Annual Meeting of the American Society of Criminology, New Orleans, November 1992.

"Enterprise and Ethnicity: Cultural and Economic Influence on Social Networks of Chinese Youth Gangs" (with K. Chin). Presented at the Annual Meeting of the American Society of Criminology, New Orleans, November 1992.

"The Specific Deterrent Effects of Criminal Sanctions for Drug and Non-Drug Offenders." Presented at the Annual Meeting of the Law & Society Association, Philadelphia, May 1992.

"The Changing Contexts of Drug-Violence Relationships for Adolescents and Adults." Presented at the Annual Meeting of the American Academy for the Advancement of Science, Washington DC, February 1991.

"Youth Gangs as Social Networks." Presented at the Annual Meeting of the American Society of Criminology, Baltimore MD, November 1990.

"Context and Contingency in Drug-Related Violence." Presented at the Annual Meeting of the American Psychological Association, Boston MA, August 1990.

"The Dragon Breathes Fire: Chinese Organized Crime in New York City" (R. Kelly, K. Chin, and J. Fagan). Presented to the Political Sociology Faculty of the University of Florence,

Firenze, Italy, May 1990.

"The Political Economy of Drug Use and Drug Dealing among Urban Gangs (J. Fagan and A. Hamid). Presented at the Annual Meeting of the American Society of Criminology, Reno NV, November 1989.

"The Comparative Impacts of Juvenile and Criminal Court Sanctions for Adolescent Felony Offenders" (J. Fagan and M. Schiff). Presented at the Annual Meeting of the American Society of Criminology, Reno NV, November 1989.

"Symbolic and Substantive Effects of Waiver Legislation in New Jersey" (M. Schiff and J. Fagan). Presented at the Annual Meeting of the Law and Society Association, Vail CO, June, 1988.

"The Predictive Validity of Judicial Determinations of Dangerousness: Preventive Detention of Juvenile Offenders in the Schall v. Martin Case" (J. Fagan and M. Guggenheim). Presented at the Annual Meeting of the American Society of Criminology, Montreal, Quebec, November, 1987; and, at the Fortunoff Colloquium Series, New York Unversity School of Law, November, 1988.

"The Comparative Effects of Legal and Social Sanctions in the Recurrence of Wife Abuse" (J. Fagan and S. Wexler). Presented at the Third National Conference on Family Violence Research, University of New Hampshire, Durham, NH, July, 1987

"The Stability of Delinquency Correlates in Eight High Crime Neighborhoods" (J. Deslonde and J. Fagan). Presented at the 1986 Annual Conference of Blacks in Criminal Justice, Washington DC, March 1986

"Complex Behaviors and Simple Measures: Understanding Violence in Families" (J. Fagan and S. Wexler). Presented at the Annual Meeting of the American Society of Criminology, San Diego, November, 1985

"Social Ecology of Violent Delinquency" (J. Fagan, P. Kelly and M. Jang). Presented at Annual Meeting of the Academy of Criminal Justice Sciences, Chicago, IL, March, 1984.

"Delinquent Careers of Chronically Violent Juvenile Offenders" (E. Hartstone, J. Fagan and M. Jang). Presented at Pacific Sociological Association, San Jose, CA, April 1983.

"*Parens Patriae* and Juvenile Parole." Presented at the National Conference on Criminal Justice Evaluation, Washington, DC, November 1978.

"Indigenous Justice: The San Francisco Community Board Program" (J. Fagan). Presented at the Annual Meeting of the American Society of Criminology, November 1977, Atlanta, Georgia.

"An Assessment of the Impact of Treatment and Other Factors on Successful Completion of a Pretrial Intervention Program" (J. Fagan). Presented at the National Conference on Criminal Justice Evaluation, February 1977.

EXPERT TESTIMONY:

Kansas v Kyle D. Young, CK001, Sedgewick County Superior Court, Wichita KS., February 8-9, 2023

Joel Stallworth, et. al., v. Nike Retail Services, Inc. et. al., 2:20-cv-05985-VAP (GJSx), U.S. District Court, Central District of California

Jermont Cox and Kevin Marinelli v. Commonwealth of Pennsylvania, 102/103 RM 2018, Supreme Court of Pennsylvania (Consultant)

People v. Miguel Contreras-Perez, Pueblo County (Colo.) Dist Ct. No. 18CR1538.

U.S. v. Murray Lawrence, U.S. District Court, Eastern District of New York, 16-CR-243, Judge Jack B. Weinstein (2017)

U.S. v. Antonio Williams and John Hummons, 12-CR-887, Chief Judge Ruben Castillo, U.S. District Court, Northern Division of Illinois (2013)

In re: Ferguson Police Department, Special Litigation Section, Civil Rights Division, U.S. Department of Justice, DJ 207-42-6

Floyd, et al. v. City of New York, et al., U.S. District Court, Southern District of New York, 08 Civ. 1034 (SAS) (2008)
Davis et al. v. City of New York, U.S. District Court, Southern District of New York, 10 Civ. 0699 (SAS) (2010)
Ligon et al. v. City of New York, U.S. District Court, Southern District of New York,12 Civ. 2274 (SAS) (2012)
State v. Raheem Moore, Circuit Court # 08CF05160, State of Wisconsin, Criminal Division, Milwaukee County
Connecticut v Arnold Bell, Docket # CR02-0005839, District Court of Connecticut, New Haven
Jessica Gonzales v. United States, Petition No. 1490-05, Inter Am. C.H.R., Report No. 52/07, OEA/Ser.L./V/II.128, doc. 19 (2007)
U.S. v. Joseph Brown and Jose Lavandier, U.S. District Court for the District of Vermont, Docket No. 2:06-CR-82-2
United States v. Khalid Barnes, U.S. District Court, Southern District of New York, 04 Cr. 186 (SCR)
Loggins v. State, 771 So. 2d 1070 (Ala. Crim. App. 1999)
Truman-Smith v. Bryco Firearms et al. (02-30239 (JBW)), and *Johnson v. Bryco Firearms et al.* (03-2582 (JBW)), Eastern District of New York
U.S. v. Alan Quinones, S3 00 Cr. 761 (JSR), Southern District of New York
National Association for the Advancement of Colored People (NAACP) and National Spinal Cord Injury Association (NSCIA) v. American Arms Corporation, Accu-sport Corporation, et. al., Eastern District of New York, 99 CV 3999 (JBW), 99 CV7037 (JBW)
U.S. v. Durrell Caldwell, J-2045-00; J-2250-00, Family Division, Juvenile Branch, Superior Court of the District of Columbia
Nixon v. Commonwealth of Pennsylvania, Department of Public Welfare, 839 A.2d 277 (Pa. 2003)
National Congress of Puerto Rican Rights v. City of New York, 99 Civ. 1695 (SAS) (HBP)
State of Wisconsin v. Rodolfo Flores, 99-CF-2866, Circuit Branch 28 (Hon. Thomas R. Cooper)
State of Wisconsin v. Rolando Zavala, 97-CF-547, Circuit Branch 3 (Hon. Bruce E. Shroeder)
Hamilton v. Accu-Tek et al., 935 F. Supp. 1307 (E.D.N.Y. 1996)
U.S. v. Yohann Renwick Nelson, 920 F.Supp. 825 (M.D. Tenn., 1996)

OTHER PRESENTATIONS:

"The New Policing," U.S. Commission on Civil Rights, New York State Advisory Group, New York, March 2017
"Guns, Social Contagion, and Youth Violence." Presented at the Annual Conference of the Cuyahoga County Mental Health Institute, Case Western Reserve University, Cleveland, May 1998.
"The Future of the Criminal Law on Domestic Violence." Presented to the Governor's Criminal Justice Conference, Albany, New York, October 1996.
"Women, Law and Violence: Legal and Social Control of Domestic Violence." Presented at the 29th Semi-Annual Research Conference of the Institute for Law and Psychiatry, School of Law, University of Virginia, Charlottesville VA, November 1995.
"Punishment versus Treatment of Juvenile Offenders: Therapeutic Integrity and the Politics of Punishment," Delaware Council on Criminal Justice, Wilmington DE, October 1995.
Keynote Speaker, "The Criminalization of Domestic Violence: Promises and Limitations," National Conference on Criminal Justice Evaluation, National Institute of Justice, Washington DC, July 1995.
"Limits and Promises of New Jersey's Prevention of Domestic Abuse Act," Institute of Continuing Legal Education, Bar Association of the State of New Jersey, New Brunswick, July 1993.

"Technical Review on Alcohol and Violence," National Institute on Alcoholism and Alcohol Abuse, Rockville MD: May 1992.
Plenary Speaker, "Race and Class Conflicts in Juvenile Justice," Annual Meeting of the Juvenile Justice Advisory Groups, Washington DC, April 1991
Plenary Speaker, "Punishing Spouse Assault: Implications, Limitations and Ironies of Recent Experiments on Arrest Policies," Annual Meeting of the Society for the Study of Social Problems, Washington DC, August 1990.
"Drug Use, Drug Selling and Violence in the Inner City," Joint Center for Political Studies, Washington DC: November 1989.
"Technical Review on Drugs and Violence," National Institute on Drug Abuse, Rockville MD: September, 1989.
Carnegie Council on Adolescent Development, "Workshop on Adolescent Violence." Washington DC: May 1989.
"National Symposium on Families in Courts." National Judicial College, National Center for State Courts, and the American Bar Association (joint conveners). Reno NV, May 1989.
Plenary Panelist, "Delinquency Research in the 1990's." Annual Meeting of the Western Society of Criminology, Anaheim CA, February 1989.
Keynote Speaker, Philadelphia Coalition for Children and Youth, Juvenile Justice Conference, June, 1988
Ohio Governor's Task Force on Juvenile Violence, Statewide Conference on Gangs, May, 1988
OJJDP State Advisory Groups, Regional Workshops, 1982, 1987
Michigan Commission on Juvenile Justice, Symposium on Contemporary Programs in Rehabilitation of Serious Juvenile Offenders, 1986
Interagency Panel on Research and Development on Children and Adolescents, National Institute of Education, 1985, 1987
Symposium on Addressing the Mental Health Needs of the Juvenile Justice Population, National Institute of Mental Health, l985
OJJDP/ADAMHA Joint Task Force on Serious Juvenile Offenders with Drug and Alcohol Abuse and Mental Health Problems, National Institute on Drug Abuse, 1984
National Conference on Family Violence as a Crime Problem, National Institute of Justice, 1984
Governor's Task Force on Juvenile Sex Offenders, California Youth Authority, Sacramento, CA, 1984
Los Angeles County Medical Association, Los Angeles, California: Family Violence and Public Policy, 1983
Minority Research Workshop, National Institute of Law Enforcement and Criminal Justice, LEAA, Department of Justice, 1979

TECHNICAL REPORTS (SELECTED):

Final Report: An Analysis of Race and Ethnicity Patterns in Boston Police Department Field Interrogation, Observation, and Frisk or Search Reports (J. Fagan, A. Braga, R.K. Brunson, and A. Pattavina). Submitted to the Boston Police Department, June 2015, at https://www.issuelab.org/resources/25203/25203.pdf
Project Safe Neighborhoods in Chicago: Three Year Evaluation and Analysis of Neighborhood Level Crime Indicators, Final Technical Report (J. Fagan, A. Papachristos, T.L. Meares), Grant # 2004-GP-CX-0578, Bureau of Justice Assistance, U.S. Department of Justice (2006).
Social and Ecological Risks of Domestic and Non-Domestic Violence against Women in New York City (J. Fagan, J. Medina-Ariza, and S.A. Wilt). Final Report, Grant 1999-WT-VW-0005, National Institute of Justice, U.S. Department of Justice (2003).
The Comparative Impacts of Juvenile and Criminal Court Sanctions on Recidivism among Adolescent Felony Offenders(J. Fagan, A. Kupchik, and A. Liberman). Final Report, Grant 97-JN-FX-01,

Office of Juvenile Justice and Delinquency Prevention (2003).

Drug Control in Public Housing: The Impact of New York City's Drug Elimination Program on Drugs and Crime (J. Fagan, J. Holland, T. Dumanovsky, and G. Davies). Final Report, Grant No. 034898, Substance Abuse Policy Research Program, Robert Wood Johnson Foundation (2003).

The Effects of Drug Enforcement on the Rise and Fall of Homicides in New York City, 1985-95 (J. Fagan). Final Report, Grant No. 031675, Substance Abuse Policy Research Program, Robert Wood Johnson Foundation (2002).

Getting to Death: Fairness and Efficiency in the Processing and Conclusion of Death Penalty Cases after Furman (J. Fagan, J. Liebman, A. Gelman, V. West, A. Kiss, and G. Davies). Final Technical Report, Grant 2000-IJ-CX-0035, National Institute of Justice (2002).

Analysis of NYPD AStop and Frisk Practices" (J. Fagan, T.Dumanovsky, and A. Gelman). Office of the Attorney General, New York State, 1999 (contributed chapters and data analyses).

Situational Contexts of Gun Use by Young Males in Inner Cities (J. Fagan and D.L.Wilkinson). Final Technical Report, Grant SBR 9515327, National Science Foundation; Grant 96-IJ-CX-0021, National Institute of Justice; Grant R49/CCR211614, Centers for Disease Control and Prevention (NIH), 1999.

The Specific Deterrent Effects of Arrest on Domestic Violence (C. Maxwell, J. Garner and J. Fagan). Final Technical Report, Grant 93-IJ-CX-0021, National Institute of Justice, 1999.

The Epidemiology and Social Ecology of Violence In Public Housing (J. Fagan, T. Dumanovsky, J.P. Thompson, G. Winkel, and S. Saegert). National Consortium on Violence Research, National Science Foundation, 1998.

Reducing Injuries to Women in Domestic Assaults (J. Fagan, J. Garner, and C. Maxwell). Final Technical Report, Grant R49/CCR210534, Centers for Disease Control, National Institutes of Health, 1997.

The Effectiveness of Restraining Orders for Domestic Violence (J. Fagan, C. Maxwell, L. Macaluso, & C. Nahabedian). Final Technical Report, Administrative Office of the Courts, State of New Jersey, 1995.

Gangs and Social Order in Chinatown: Extortion, Ethnicity and Enterprise (K. Chin, J.Fagan, R. Kelly). Final Report, Grant 89-IJ-CX-0021 (S1), National Institute of Justice, U.S. Department of Justice, 1994.

The Comparative Impacts of Juvenile and Criminal Court Sanctions for Adolescent Felony Offenders: Certainty, Severity and Effectiveness of Legal Intervention (J. Fagan). Final Report, Grant 87-IJ-CX-4044, National Institute of Justice, U.S. Department of Justice, 1991.

Final Report of the Violent Juvenile Offender Research and Development Program, Grant 85-MU-AX-C001, U.S. Office of Juvenile Justice and Delinquency Prevention:

- *Volume I: Innovation and Experimentation in Juvenile Corrections: Implementing a Community Reintegration Model for Violent Juvenile Offenders* (J. Fagan and E. Hartstone), 1986.
- *Volume II: Separating the Men from the Boys: The Transfer of Violent Delinquents to Criminal Court* (J. Fagan and M. Forst), 1987.
- *Volume III: Rehabilitation and Reintegration of Violent Juvenile Offenders: Experimental Results* (J. Fagan, M. Forst and T. Scott Vivona), 1988.

Drug and Alcohol Use, Violent Delinquency, and Social Bonding: Implications for Policy and Intervention (J. Fagan, J.G. Weis, J. Watters, M. Jang, and Y. Cheng), Grant 85-IJ-CX-0056, National Institute of Justice, 1987.

Minority Offenders and the Administration of Juvenile Justice in Colorado (E. Slaughter, E. Hartstone, and J. Fagan). Denver: Colorado Division of Criminal Justice, 1986.

Final Report: The Impact of Intensive Probation Supervision on Violent Juvenile Offenders in the Transition Phase Adolescence to Adulthood (J. Fagan and C. Reinarman), Grant 82-IJ-CX-K008, National Institute of Justice, 1986.

Final Report: National Family Violence Evaluation (J. Fagan, E. Friedman, and S. Wexler), Grant 80-JN-AX-0004, Office of Juvenile Justice and Delinquency Prevention, 1984. (Also, three

interim reports: History and Development, Process Analysis, Client and Program Characteristics.)

A Resident Mobilization Strategy for Prevention of Violent Juvenile Crime (J. Deslonde, J. Fagan, P. Kelly, and D. Broussard). San Francisco: The URSA Institute, 1983.

Background Paper for the Violent Juvenile Offender Research and Development Program (J. Fagan, S. Jones, E. Hartstone, & C. Rudman), Washington, DC: Office of Juvenile Justice and Delinquency Prevention, April 1981.

EDITORIAL:

Senior Editor, *Criminology and Public Policy*, 2001 - 2008
Advisory Board, *Family and Child Law Abstracts*, Legal Scholarship Network, 1999-present
Editorial Advisory Board, *Journal of Criminal Law and Criminology*, 1996-2010
Editorial Board, *Criminology*, 1997-2001
Editorial Board, *Journal of Quantitative Criminology*, 2001-2008
Editorial Board, *Crime and Justice: A Review of Research*, 1998-present
Editorial Board, *Journal of Research in Crime and Delinquency*, 1997-present
Editor, *Journal of Research in Crime and Delinquency*, 1990 - 1995
Editor, *Contemporary Drug Problems*, Special Issues on Crack (Winter 1989, Spring 1990)
Co-Editor, *Oxford Readers in Crime and Justice* (w. Michael Tonry), Oxford University Press, 1994-95

ADVISORY BOARDS AND COMMITTEES:

Faculty Affiliate, Data Science Institute, Columbia University (2020-present)
Advisory Board, 8th Amendment Project (2015-present)
Research Advisory Board, The Innocence Project (2009 – present)
Committee on Law and Justice, National Academy of Sciences (2000-2006) (Vice Chair, 2004-6)
Member, Committee to Review Research on Police Policy and Practices, National Research Council, National Research Council (2001-2003)
Working Group on Law, Legitimacy and the Production of Justice, Russell Sage Foundation (2000-present)
Working Group on Incarceration, Russell Sage Foundation (2000-2006)
Academic Advisory Council, National Campaign Against Youth Violence (The White House) (1999-2001)
Fellow, Aspen Roundtable on Race and Community Revitalization (1999 - 2001)
Fellow, Earl Warren Legal Institute, University of California School of Law (1998 - present)
Research Network on Adolescent Development and Juvenile Justice, MacArthur Foundation (1996-2006)
National Consortium on Violence Research, Carnegie Mellon University (NSF) (1996-present)
Committee on the Assessment of Family Violence Interventions, National Research Council, National Academy of Sciences (1994-1998)
Advisory Board, Evaluation of the Comprehensive Gang Intervention Program, University of Chicago (1997-present)
Committee on Opportunities in Drug Abuse Research, Institute of Medicine, National Academy of Sciences (Special Consultant) (1995 - 1996).
Initial Review Group, Violence and Traumatic Stress Research Branch, National Institute of Mental Health, National Institute of Health (1994-1998)
Chair, Working Group on the Ecology of Crime in Inner Cities, Committee for Research on the Urban Underclass, Social Science Research Council (1989-1994)

Advisory Board, Evaluation of the Jobs Corps, U.S. Department of Labor (1993-present)
Advisory Board, National Service Action Corps, Robert F. Kennedy Memorial (1993-1997)
Advisory Board, Evaluation of Family Violence Prevention and Services Act, The Urban Insitute (1993-1994)
Scientific Core Group, Program on Human Development and Criminal Behavior, MacArthur Foundation (1991-1992)
Injury Control Panel on Violence Prevention, Centers for Disease Control and Prevention, U.S. Department of Health and Human Services (1990-1991)
Princeton Working Group on Alternatives to Drug Prohibition, Woodrow Wilson School of Public and International Affairs, Princeton University (1990-1994)
Racial Disparities in Juvenile Justice, Pennsylvania Juvenile Court Judges Commission (1991-92)
Racial Disparities in Juvenile Justice, Missouri Department of Law and Public Safety (1990-91)
Conditions of Confinement of Juveniles, National Institute for Juvenile Justice and Delinquency Prevention (1990-1992)
Research Program on "Linking Lifetimes -- Intergenerational Mentoring for Youths at Risk and Young Offenders," Temple University (1989-91)
Research Program on Juvenile Court Sanctions for Family Violence, National Council of Juvenile and Family Court Judges, Bureau of Justice Assistance, U.S. Department of Justice (1987-1988)
School Crime Research and Development Program, Office of Juvenile Justice and Delinquency Prevention, National Institute for Juvenile Justice and Delinquency Prevention (1986-1988)
Research and Development Project on Sexually Exploited Children, Tufts University, New England Medical Center Hospital, Boston, MA (1980-83)
Administration of Justice Program, National Urban League, New York, NY (1982-1987)

PROFESSIONAL ASSOCIATIONS:

Society for Empirical Legal Studies
American Society of Criminology
American Sociological Association
Law and Society Association
American Association for the Advancement of Science
American Public Health Association

RESEARCH GRANTS:

Principal Investigator, Racial Inequality in Police Violence: Injuries and Fatalities from Police Use of Force, Russell Sage Foundation Grant#: 2008-2769, July 2021 - June 2023
Principal Investigator, *Citizens, Police and the Legitimacy of Law in New York*, Grant # 20033258, Open Society Foundations, October 2011-September 2013
Principal Investigator, *Proactive Policing and Mental Health: Individual and Community Effects*, Grant # 69669, Public Health Law Research Program, Robert Wood Johnson Foundation, 2011-13
Co-Investigator, *Street Stops and Police Legitimacy*, Grant 2010-IJ-CX-0025 from the National Institute of Justice, U.S. Department of Justice, subcontract from New York University, 2011 – 2012
Principal Investigator, "Evaluation of Project Safe Neighborhoods in Chicago," May 2004 – September 2010, Grant # 2004-GP-CX-0578, Bureau of Justice Assistance, Office of Justice Programs, U.S. Department of Justice.
Principal Investigator, "Capital Sentencing of Adolescent Murder Defendants," March –

December 2004, Grant #20012433 from the Open Society Institute. Additional support from the Wallace Global Fund.

Principal Investigator, "Legitimacy, Accountability, and Social Order: Majority and Minority Community Perspectives on the Law and Legal Authorities," September 2002 - August 2003, Russell Sage Foundation.

Principal Investigator, "Social Contagion of Violence," Investigator Awards in Health Policy Program, Robert Wood Johnson Foundation, September 2002 – June 2004

Principal Investigator, "Getting to Death: Fairness and Efficiency in the Processing and Conclusion of Death Penalty Cases after Furman," Grant #2000-IJ-CX-0035, September 2000 - August 2001, National Institute of Justice, U.S. Department of Justice.

Co-Principal Investigator, "Columbia Center for the Study and Prevention of Youth Violence," Grant R49-CCR218598, October 1, 2000 - September 30, 2005, Centers for Disease Control, U.S. Department of Health and Human Services.

Principal Investigator, "Neighborhood Effects on Legal Socialization of Adolescents," John D. and Catherine T. MacArthur Foundation, October 1, 2000 - September, 30, 2002.

Principal Investigator, "Violence Prevention through Legal Socialization," 1 R01-HD-40084-01, October 1, 2000 - September 30, 2003, National Institute of Child and Human Development, U.S. Department of Health and Human Services.

Principal Investigator, "The Effects of Incarceration on Crime and Work In New York City: Individual And Neighborhood Impacts," Russell Sage Foundation, Grant 85-00-11, September 2000 - August 2002.

Principal Investigator, "Community Courts and Community Ecology: A Study of The Red Hook Community Justice Center," Grant 2000-MU-AX-0006, June 1, 2000 - December 31, 2002, National Institute of Justice, U.S. Department of Justice.

Principal Investigator, "Age, Crime and Sanction: The Effect of Juvenile Versus Adult Court Jurisdiction on Age-specific Crime Rates of Adolescent Offenders," Grant JR-VX-0002, June 1999 - August 2000, Office of Juvenile Justice and Delinquency Prevention, U.S. Department of Justice.

Principal Investigator, "Social and Ecological Risks of Domestic and Non-domestic Violence Against Women in New York City," Grant WT-VX-0005, April 1999 - December 2000, National Institute of Justice, U.S. Department of Justice.

Principal Investigator, "Drug Control in Public Housing: An Evaluation of the Drug Elimination Program of the New York City Public Housing Authority," September 1998 - August 2001, Robert Wood Johnson Foundation.

Principal Investigator, "The Criminalization of Delinquency: Comparative Impacts of Juvenile and Criminal Court Sanctions on Adolescent Felony Offenders," March 1997 - September 2000, Office of Juvenile Justice and Delinquency Prevention, Annie E. Casey Foundation, Open Society Institute.

Co-Principal Investigator, "Post-Traumatic Stress Among Police," October 1997 - April 2000, National Institute of Mental Health, 1 R01 MH56350-01, National Institute of Health (subcontract from University of California at San Francisco).

Principal Investigator, "The Rise and Fall of Drug-Related Homicides in New York City: 1985-95," July 1997 - June 2000, Robert Wood Johnson Foundation.

Principal Investigator, "Lethal and Non-Lethal Violence: Individual, Social and Neighborhood Risk Factors," October 1996 - September 1999, Centers for Disease Control and Prevention, National Institute of Health, R49/CCR212753-01; National Institute of Justice, 97-IJ-CX-0013.

Principal Investigator, "The Situational Context of Gun Use by Young Males," October 1995 - January 1998, National Science Foundation, SBR-9515327; National Institute of Justice, 96-IJ-CX-0021; Centers for Disease Control and Prevention (NIH) R49/CCR211614.

Principal Investigator, "The Situational Context of Gun Use by Young Males in Inner Cities," February 1995 - August 1996, The Harry Frank Guggenheim Foundation.

Principal Investigator, "Reducing Injuries to Women from Spouse Assault," September 1994 -

February 1996, Centers for Disease Control and Prevention, National Institute of Health, R49/CCR210534-01.

Co-Principal Investigator, "Crime Commission Rates of Incarcerated Prisoners: Estimates from the Second Generation of Inmate Surveys," June 1994 - February 1995, National Institute of Justice, 94-IJ-CX-0017.

Principal Investigator, "Impacts of Arrest on the Social Control of Violence Among Intimates," October 1993 - June 1994, National Institute of Justice, 93-IJ-CX-0021.

Principal Investigator, "The Role of Legal and Social Controls in Controlling Violence among Intimates," July 1993 - December 1994, The Harry Frank Guggenheim Foundation.

Co-Principal Investigator, "Measuring the Use of Force by Police," September 1993 - August 1994, National Institute of Justice, 92-IJ-CX-K028.

Co-Principal Investigator, "Female Participation in Drug Selling," September 1992 - August 1994, National Science Foundation, SES-92-07761. Also supported by the Rockefeller Foundation.

Principal Investigator, "Civil and Criminal Sanctions for Domestic Violence," June 1992 - September 1994 Administrative Office of the Courts, State of New Jersey.

Co-Principal Investigator, "Careers in Crack, Drug Use and Distribution, and Non-Drug Crime," February 1991 - January 1993, National Institute on Drug Abuse, National Institute of Health, 1R01-DA-06615-01.

Principal Investigator, "Patterns of Organized Crime Activities among Asian Businesses in the New York Metropolitan Area," October 1989 - March 1991, National Institute of Justice, 89-IJ-CX-0021.

Principal Investigator, "Desistance from Family Violence," July 1990 - January 1992, The Harry Frank Guggenheim Foundation.

Principal Investigator, "Pipeline Study for a Field Experiment on Drug Testing in Community Corrections," June-December, 1990, National Institute of Justice, 90-IJ-R-026

Principal Investigator, "Changing Patterns of Drug Abuse and Criminality among Crack Users," December 1987 - September 1989, National Institute of Justice, 87-IJ-CX-0064-S1.

Principal Investigator, "The Comparative Impacts of Criminal and Juvenile Sanctions for Adolescent Felony Offenders," October 1987 - September 1989, National Institute of Justice, 87-IJ-CX-4044.

Principal Investigator, "Drug Abuse and Delinquency among Dropouts and Gang Members: A Secondary Analysis," October 1987 - December 1988, National Institute for Juvenile Justice and Delinquency Prevention, 87-JN-CX-0012.

Principal Investigator, "Drug and Alcohol Use, Violent Delinquency, and Social Bonding," October 1985 - December 1986, National Institute of Justice, 85-IJ-CX-0056.

Principal Investigator, "Violent Juvenile Offender Research and Development Program," November 1980 - June 1987, National Institute for Juvenile Justice and Delinquency Prevention, 80-JN-AX-0012, 85-MU-CX-0001.

Principal Investigator, Preventive Detention and the Prediction of Dangerousness Among Juveniles: Pretrial Crime and Criminal Careers in the *Schall v. Martin* Cohort, New York City Criminal Justice Agency.

Principal Investigator, "AIDS Community Education Effectiveness Study," January 1986 - June 1987, California Department of Health, Grant D0056-86.

Principal Investigator, "Longitudinal Evaluation of Intensive Probation Supervision for Violent Offenders," October 1982 - June 1985, National Institute of Justice, 82-IJ-CX-K008.

Principal Investigator, National Evaluation of the LEAA Family Violence Program," October 1978 -January 1984, National Institute for Juvenile Justice and Delinquency Prevention, 80-JN-AX-0003.

PEER REVIEW:

Scholarly Journals

Stanford Law Review
NYU Law Review
Yale Law Journal
Proceedings of the National Academy of Science
Social Problems
Journal of Contemporary Ethnography
Journal of Drug Issues
Crime and Justice: An Annual Review of Research
Journal of Criminal Justice
Alcohol Health and Research World
Criminal Justice Ethics
Criminology
Journal of Urban Affairs
Columbia Law Review
J. Crim Law & Criminology
Social Science Quarterly
Law and Society Review
American Journal of Sociology
American Sociological Review
Sociological Methods and Research
Journal of Quantitative Criminology
Justice Quarterly
Violence and Victims
Contemporary Drug Problems
Criminology and Public Policy

University Presses

Rutgers University Press
State University of New York Press
Temple University Press
University of Chicago Press
Cambridge University Press
Oxford University Press
Princeton University Press
New York University Press

Other Presses

MacMillan Publishing
St. Martins Press
Greenwood Publications
Sage Publications

Research Grant Reviews

National Institute on Mental Health, Violence and Traumatic Stress Branch
Centers for Disease Control and Prevention, National Center for Injury Prevention and Control, USPHS
Law and Social Science Program, National Science Foundation
Sociology Program, National Science Foundation
National Institute on Drug Abuse, Prevention Branch
National Institute on Drug Abuse, Epidemiology Branch
National Institute of Justice
Office of Juvenile Justice and Delinquency Prevention
The Carnegie Corporation of New York
The W.T. Grant Foundation

COURSES TAUGHT:

Seminar on Neuroscience and Criminal Law
Seminar on Mass Incarceration
Empirical Legal Studies Laboratory
Seminar on the Social and Legal Regulation of Firearms
Seminar on Policing
Criminal Law
Capital Punishment
Empirical Analysis of Law
Juvenile Justice
Seminar on Crime and Justice in New York
Pro-Seminar on Race, Crime and Law
Pro-Seminar on Community Justice and Problem-Solving Courts
Seminar on Regulation in the Criminal Law
Law and Social Science
Seminar on Criminology
Foundations of Scholarship
Seminar on Violent Behavior
Seminar on Drugs, Law and Policy

Seminar on Communities and Crime
Research Methods in Criminal Justice and Criminology
Advanced Research Methods
Qualitative Research Methods
Criminal Justice Policy Analysis
Administration of Juvenile Corrections
Research Methods
Seminar on Deterrence and Crime Control Theory

CONSULTATIONS:

Robina Institute, University of Minnesota School of Law, 2012
Boston Police Department, 2012-present
New Jersey Commission on Law Enforcement Standards and Practices, 2006-7
London School of Economics, Urban Age Colloquium, 2005
Inter-American Development Bank, Urban Security and Community Development, 2002-3
Trans.Cité (Paris, France), Security in Public Transportation, 2002
Institute for Scientific Analysis, Domestic Violence and Pregnancy Project, 1995-96
Department of Psychology, University of Wisconsin (Professor Terrie Moffitt), 1995-1999
National Funding Collaborative for Violence Prevention (Consortium of foundations), 1995
National Council on Crime and Delinquency, 1989-94
Victim Services Agency, City of New York, 1994-2000
National Conference of State Legislatures, 1994-2001
U.S. Department of Labor, 1994
City of Pittsburgh, Office of the Mayor, 1994
Center for the Study and Prevention of Violence, Colorado University, 1993 - 2000
Washington (State) Department of Health and Rehabilitative Services, 1993
National Council of Juvenile and Family Court Judges, 1993
Center for Research on Crime and Delinquency, Ohio State University, 1992, 1993
New York City Criminal Justice Agency, 1992, 1993
Violence Prevention Network, Carnegie Corporation, 1992-3
Research Triangle Institute, 1993
National Institute of Corrections, 1992, 1993
Colorado Division of Criminal Justice, 1991
Juvenile Delinquency Commission, State of New Jersey, 1991
University of South Florida, Dept. of Criminology, 1991-92
Florida Mental Health Institute, 1991
Rand Corporation, 1991-92
Juvenile Corrections Leadership Forum, 1990
Texas Youth Commission, 1990
California State Advisory Group on Juvenile Justice, 1989
New York State Division of Criminal Justice Services, Family Court Study, 1989
Juvenile Law Center, Philadelphia, 1988
American Correctional Association, 1988
Institute for Court Management, National Center for State Courts, 1987-present
Correctional Association of New York, 1987
Eisenhower Foundation, Washington DC, 1987-1990
New York City Department of Juvenile Justice, 1987-1990
Juvenile Justice and Delinquency Prevention Council, Colorado Division of Criminal Justice, 1983-87
Office of Criminal Justice Services, State of Ohio, 1983
Utah Youth Corrections Division, Salt Lake City, Utah, 1982
Office of Criminal Justice, State of Michigan, 1982,1986
National Center for the Prevention and Control of Rape, NIMH, 1980

SERVICE:

Columbia University
University Senate, Mailman School of Public Health, 2003-2007
Director, JSD Program, Columbia Law School, 2001-2010
Curriculum Committee, Columbia Law School, 2003-4

Professional
Chair, Sutherland Award Committee, American Society of Criminology, 2006-7
Chair, National Policy Committee, American Society of Criminology, 2002-2003
Delegate from the American Society of Criminology to the American Association for the Advancement of Science, 1995-1999
Executive Counselor, American Society of Criminology, 1994-97
Chair, Nominations Committee, American Society of Criminology, 1995-96.
Counsel, Crime, Law and Deviance Section, American Sociological Association, 1993-94
Nominations Committee, American Society of Criminology, 1993-94, 2016-7
Site Selection Committee, American Society of Criminology, 1992
Program Committee, American Society of Criminology, 1988, 1990, 2000
Awards Committee, Western Society of Criminology, 1988

Public
Domestic Violence Working Group, New Jersey Administrative Office of the Courts, 1991-1998
Prevention Task Force, New Jersey Governor's Commission on Drug and Alcohol Abuse, 1990
State Judicial Conference, State of New Jersey, Administrative Office of the Courts, 1990
Task Force on Youth Gangs, State of New York, Division for Youth, 1989-90

JEFFREY FAGAN, PH.D. 專家報告
死刑的嚇阻效應

I. 概覽

A. 資格

1. 我是哥倫比亞法學院教授 (Isidor and Seville Sulzbacher Professor)，也是哥倫比亞大學梅爾曼公共衛生學院流行病學系教授。我的簡歷請見附錄 A。
2. 我是美國犯罪學學會當選會員，曾任美國國家科學研究委員會法律和司法組成員與副主席，也擔任過卡內基美隆大學國家暴力研究聯盟成員。我是麥克阿瑟青少年發展與少年司法研究網絡創始成員，亦曾任美國犯罪學學會國家政策委員會主席、獲選美國犯罪學學會執行委員會委員 (Executive Council)。另外，我曾服務於美國國家司法研究院 (National Institute of Justice)、美國心理健康研究院 (National Institute of Mental Health) 及美國國家科學基金會的同儕審查小組，也曾在美國國家研究委員會科學審查委員會任職。
3. 我的研究發表於刑法、社會學和犯罪學領域頂尖期刊，包括《法實證研究期刊》(*Journal of Empirical Legal Studies*)、《哥倫比亞法律評論》(*Columbia Law Review*)、《康乃爾法律評論》(*Cornell Law Review*)、《芝加哥大學法律評論》(*University of Chicago Law Review*)、《定量犯罪學期刊》(*Journal of Quantitative Criminology*)、《刑法與犯罪學期刊》(*Journal of Criminal Law & Criminology*)、《福坦莫都市法律評論》(*Fordham Urban Law Journal*)、《犯罪學》(*Criminology*)、《犯罪學與公共政策》(*Criminology & Public Policy*)、《美國社會學評論》(*American Sociological Review*)、《刺胳針》(*The Lancet*)，以及《公共科學圖書館：綜合》(*PLOS One*)，在同儕審查期刊發表逾 100 篇文章，並在選集發表過諸多章節。
4. 我曾任《犯罪與犯罪研究期刊》(*Journal of Research in Crime and Delinquency*) 編輯。目前任職《刑法和犯罪學雜誌》編輯委員會，曾於多家犯罪學專業和學術期刊編輯委員會任職，包括《犯罪與司法》(*Crime & Justice*)、《定量犯罪學期刊》和《犯罪學》。我的研究獲得美國國家司法研究院、美國國家心理健康研究院、美國國家藥物濫用研究院、美國國家科學基金會、青少年司法和犯罪預防辦公室、疾病管制中心、洛克菲勒基金會、麥克阿瑟基金會、安妮凱西基金會 (Annie E. Casey Foundation)、羅素塞奇基金會 (Russell Sage Foundation)、羅伯特伍德強生基金會 (Robert Wood Johnson) 及開放社會基金會支持。

B. 回應議題和問題

1. 在本專家報告中，我提供實證研究證據，回應針對死刑嚇阻效力的兩大主要主張。更具體來說，我分析暫停判處和執行死刑對殺人率的影響，以及廢除死刑對殺人率的影響。

2. 「死刑專案」（The Death Penalty Project）委託我提供報告，詳細說明是否有可靠證據顯示死刑比其他嚴厲刑罰有更大嚇阻效果。

3. 我了解我的報告將納入台灣國家人權委員會提交的法庭之友意見書，提交至憲法法庭。我也清楚我的首要任務是提供法庭我專業領域內的公正證據。

4. 為回應上述議題，我分析理論並針對以下問題進行研究：

    a. 何謂一般嚇阻理論？

    b. 一般嚇阻要件和流程為何？

    c. 何謂特別嚇阻理論？

    d. 特別嚇阻要件和流程為何？

    e. 美國和其他國家的比較研究是否有證據顯示死刑對殺人有嚇阻效果？

    f. 關於死刑對殺人的一般和特別嚇阻效果的有效性，實證研究是否已有*共識*？

    g. 台灣是否有證據顯示暫停判處與執行死刑會對殺人率造成影響？

C. 意見摘要

1. 以死刑作為預防犯罪的措施無效。謀殺率的上升和下降，與死刑判處或執行與否無關。
2. 實證證據顯示，死刑的施行恣意、反覆無常，並且受到令人反感的種族和族群偏見影響。
3. 刑事制裁的嚇阻效果與犯罪嫌疑人面對犯罪偵破與遭逮捕的風險才有特定關聯性，而與懲罰的嚴厲程度無關。
4. 相較於第二嚴厲的終身監禁不得假釋刑度，並沒有實證證據顯示死刑更能嚇阻謀殺或非預謀殺人。
5. 實證研究顯示，相較於無期徒刑或終身監禁不得假釋，判處死刑對謀殺率並無邊際嚇阻效應。
6. 並無證據顯示暫停執行死刑或廢除死刑會導致殺人率上升。
7. 並無證據顯示暫停執行死刑或廢除死刑會導致非殺人暴力犯罪增加。

II. 回應

A. *何謂一般嚇阻理論？*

1. 一般嚇阻理論指的是，懲罰的威脅越大，犯罪的可能性就越小。[1] 經濟學家在一般嚇阻的觀點中加入預期收益，將犯罪視為成本和收益之間的選擇。[2]

2. 嚇阻的核心目標在於讓威脅可信：刑罰將會以確定、迅速且代價高昂的方式降臨。以死刑而言，維持死刑的國家希望向考慮實施殺人或任何其他符合執行死刑條件的犯罪者傳達訊號：如果犯罪後遭判處死刑，他們便將面對由國家結束性命的巨大風險。前提在於：潛在犯罪者若理解執行死刑的威脅，將會因而會放棄犯罪行為，因為在此情況下的成本，是犯罪者無法接受的死亡，遠遠超過犯罪本身的任何假定邊際利益。該理論假設理性行為者經過風險報酬計算，會避免死刑犯罪，並且校準風險感知與執行可能性。理論也假設風險巨大且可被觀察到。[3]

3. 「理性犯罪者」會在不犯罪的好處、犯罪不被抓到的好處，以及犯罪被抓到並受

[1] Andy B. Anderson, Anthony R. Harris and JoAnn Miller, "Models of Deterrence Theory," 12 *Social Science Research* 236 (1983).
[2] Gary S. Becker, "Crime and Punishment: An Economic Approach," 76 *Journal of Political Economy* 169 (1968). Isaac Ehrlich, "Participation in Illegimate Activities: A Theoretical and Empirical Investigation," 81 *Journal of Political Economy* 521(1973). Isaac Ehrlich, "The Deterrent Effect of Capital Punishment: A Question of Life and Death," 65 *American Economic Review* 397 (1975).
[3] Roger Hood and Carolyn Hoyle, THE DEATH PENALTY: A WORLDWIDE PERSPECTIVE (Oxford, UK: Oxford University Press, 2015). 日本等國家認為，民眾對死刑的支持，包括文化上相信其嚇阻價值，也連結到政府本身的正當性。亦請見 Mai Sato, THE DEATH PENALTY IN JAPAN: WILL THE PUBLIC TOLERATE ABOLITION? (Weisbaden, GDR: Springer Publishing, 2014).

到懲罰的好處之間進行權衡，決定是否犯罪。[4]

4. 「在這樣的公式中，惟有滿足以下條件時，人才會選擇犯罪：…只要其期望效用超過不行為的效用，便值得犯罪。」[5]

5. 貝克 (Becker) 因此得出結論：「(1) 犯罪供給將隨被捕機率上升而下降；(2) 犯罪供給將隨刑事制裁嚴厲程度提升而下降；(3) 犯罪供給將隨犯罪機會成本上升而下降。」[6]

6. Robinson and Darley 證明：嚇阻需要在潛在犯罪者了解法律禁止某行為（法律知識），且犯罪者了解被查獲以及受到懲罰的風險。該公式也要求行為者能夠理性權衡犯罪的利益與懲罰成本和被查獲的風險（理性選擇），並且感知的益處高於成本（感知的淨收益障礙）[7]

7. 雖然大體而言，Robinson and Darley 對大多數犯罪的嚇阻可能持樂觀態度，但他們發現對殺人事件並不存在嚇阻效應。針對重罪謀殺，他們指出，雖然重罪謀殺法規可能會抑制非致命搶劫，但重罪謀殺法規的存在往往會增加致命搶劫謀殺的發生率。[8]

B. *何謂特別嚇阻理論？*

1. 一般嚇阻是指刑事懲罰對潛在犯罪者的效果，特別嚇阻是指刑事懲罰對已經犯罪並受到懲罰者的效果。特別嚇阻的目的在於透過懲罰的實際經驗去說服人放棄未來的犯罪行為。[9]
2. 如果犯罪者受到的懲罰迅速（速度）、確定（高可能性）且嚴厲（長時間監禁和削弱自由），會認為能嚇阻犯罪者未來犯罪。[10] 在死刑制度中，特別嚇阻絕對有保證，因為犯罪者會被國家處決。

[4] Gary S. Becker, “Crime and Punishment: An Economic Approach,” supra n. 2.
[5] Aaron Chalfin, and Justin McCrary, “Criminal Deterrence: A Review of the Literature,” 1 *Journal of Economic Literature 1* (2014).
[6] 同前註，7。
[7] Robinson, Paul and Darley, John M. “Does the Law Deter? A Behavioral Science Investigation,” 24 *Oxford Journal of Legal Studies* 173-205 (2004).
[8] 同前註，203。
[9] Johannes Andenaes, PUNISHMENT AND DETERRENCE (Ann Arbor, MI, USA: University of Michigan Press, 1974).
[10] Marchese di Beccaria, Cesare, AN ESSAY ON CRIMES AND PUNISHMENTS (Philip H. Nicklin, 1819).

C. *特別嚇阻要件和流程為何？*

1. 特別嚇阻需要犯罪者感知到針對其犯罪活動的制裁威脅。
2. 制裁威脅感知包括懲罰的風險或確定性（威脅），以及懲罰的後果。對威脅和嚴厲程度的感知和評估會根據犯罪者與其犯罪活動相關的懲罰經驗而有所改變。具體來說，犯罪者是否參與犯罪活動取決於該犯罪活動可能會或不會帶來的後果。該模型的前提在於「信念更新」的概念。也就是說，制裁威脅感知並非靜態，而會根據行為者的持續經驗而不斷演進。[11]
3. 這些命題留下若干實務和實證問題。我們如何得知那些原本有在考慮謀殺或其他可能判死的犯罪但因死亡威脅而放棄的案例？有多少起謀殺案因此得以避免，要符合什麼門檻才能假設具有嚇阻效應？如果我們避免一起謀殺，是否足以聲稱具有嚇阻力？執行是放棄犯下死刑犯罪的理由嗎？那麼其他懲罰威脅呢，例如不可逆轉的無期徒刑，最終在獄中死去？執行與死刑犯罪比需要多少才算「嚇阻」證據？需要執行多少次死刑才能傳達可信的嚇阻威脅？

[11] Greg Pogarsky et al., "Modeling Change in Perceptions about Sanction Threats," 20 *Journal of Quantitative Criminology* 343 (2004); McCrary, Justin, and Lee, David S, "The Deterrence Effect of Prison: Dynamic Theory and Evidence," *Berkeley Program in Law & Economics, Working Paper Series* (2009).

D. *證據：各國嚇阻、執行和謀殺*

1. 五十年來的研究顯示，無論犯罪行為是謀殺、毒品犯罪還是恐怖主義行為，支持嚇阻信念的科學證據都並不可靠，而且在許多情況下根本就是錯的。[12] 這樣的結論是根據匯集幾十年研究的證據，透過各式廣泛進行的科學研究策略所得。

2. 實驗是科學證據的「黃金標準」。[13] 基於顯而易見的道德和倫理原因，沒有也不可以進行執行死刑的實驗。[14] 然而，有若干研究非常接近實驗。[15] 例如，部分研究檢視暫停死刑對暫停死刑地區的影響。也有研究將實行死刑的地區與廢除或暫停執行死刑的地區進行了仔細配對並進行比較，發現謀殺率並無差異，且無論維持死刑的地區執行次數為何，皆得到如此的結果。還有部分研究會比較情況類似的死刑實行州或國家與不實行死刑的州或國家。

3. 美國於 1972 年至 1976 年間暫停執行死刑。暫停執行的原因其中之一在於，在暫停前的十年間，越來越多人對於死刑對謀殺的嚇阻效應抱持懷疑的主張。[16] 之後有研究發表，宣稱死刑確實可以嚇阻殺人事件的發生，美國便恢復執行死刑。前述主張的立場相當大膽：每次執行可以嚇阻未來多達八起殺人事件的發生。問題是，其證據備受質疑，隨後美國國家科學院專家小組在 1978 年發現：幾乎沒有證據可以顯示嚇阻主張正確。[17]

4. 基於 13 個歐洲國家在廢死前後殺人率變化統計證據的比較研究，也得出大致相同的結論。[18] 最近針對 700 項威懾研究（包括 52 項死刑研究）進行的統合分析 (meta-analysis) 顯示，針對輕罪和擾亂治安罪可以達到嚇阻效應，但任何懲罰（包括死刑執行和長期監禁）對殺人罪都無法達成嚇阻效應。[19] 前述死刑研究中，有 90% 於美國進行，34% 發表於 1995 年之後。[20]

5. 儘管缺乏實驗證據，美國國內趨勢也證實並無可靠證據足以顯示執行具嚇阻效應。在美國，自 1993 年以來不管是維持死刑、暫停死刑還是廢除死刑的州，謀殺率一

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[12] National Research Council, Deterrence and the Death Penalty (D. Nagin and J.V. Pepper, eds.) (2012). See, also, John J. Donohue, "Empirical Analysis and The Fate of Capital Punishment," 11 Duke J. Const. L. & Pub. Pol'y 51(2016).

[13] National Research Council，同前註，31（指出「實驗是一種被廣泛接受、科學測試因果效應的方法：大家普遍認為研究發現反映因果效應」）。

[14] 同前註。

[15] 同前註，32。

[16] 弗曼訴喬治亞州 (*Furman v Georgia)*，408 U.S. 238, 315 (1972) (Marshall，協同意見書)。弗曼法院也對起訴和量刑的恣意和反覆無常表示擔憂，因此法院將1960-72年美國實行的死刑描述為「致命彩券」。弗曼法院也對種族偏見表達擔憂，並得出結論：美國的死刑「由大多數的『我們』強加給少數的『他們』」(Douglas, J.，協同意見書)。

[17] National Research Council, Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates. Panel on Research on Deterrent and Incapacitative Effects (1978)（結論是「現有的研究並未提供死刑嚇阻效應之有用證據」(9) 且無有用證據顯示「美國實行的死刑可進行統計分析，有效確定死刑的存在或缺乏具嚇阻效應」(62)）。

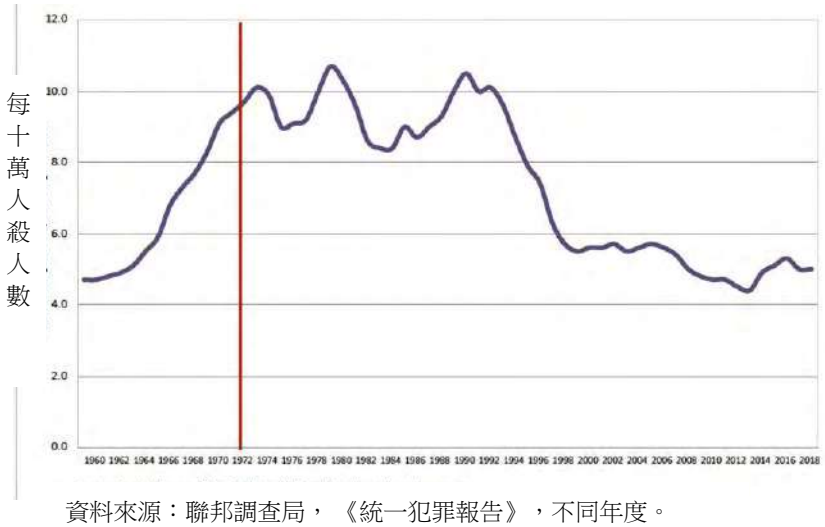
[18] [18] Dane Archer, Rosemary Gartner, Marc Beittel, "Homicide and the Death Penalty: A Cross-National Test of a Deterrence Hypothesis," 74 *Journal of Criminal Law & Criminology* 991, 1013 (1983)（比較13個國家和城市的子研究證據得出結論：「沒有壓倒性證據顯示嚇阻，而現有研究則有相反結論顯示不會有此種嚇阻之證據）。

[19] Dieter Dolling, Horst Entorf, Dieter Hermann, and Thomas Rupp, "Is Deterrence Effective? Results of a Meta-Analysis of Punishment," 15 *European Journal of Crime Policy Research* 201 (2009).

[20] 同上，219。

直在下降。

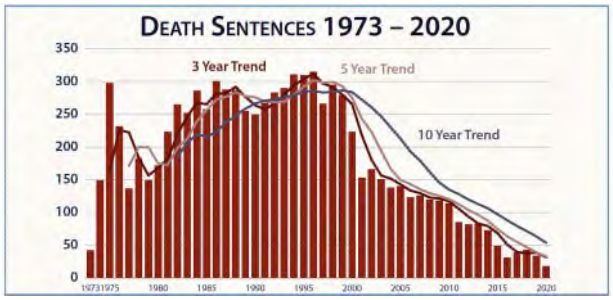
圖 1　美國殺人案數，1960-2020 年



資料來源：聯邦調查局，《統一犯罪報告》，不同年度。

6. 圖 2 和圖 3 顯示，自 1999 年以來，死刑判決和執行數量近 15 年同時且以相同速度下降。死刑判決於 1998 年達到高峰，一定程度反映 1990 年代中期的高峰期，之後便一直下降。執行數量於 1999 年達到高峰，之後也一直下降。

圖 2 和 3　死刑判決與執行，美國，1977-2020 年



死刑判決 1973-2020 年

執行 1973-2020 年

7. 謀殺率，不管是全國，還是在維持死刑和廢除死刑的州，皆未受到死刑執行或判決風險等變化之影響，呈現出持續下降趨勢。[21] 美國數州近期的廢死事件 [22] 可以

[21] Donohue, supra n. 12.

[22] 紐澤西、新墨西哥、伊利諾、康乃狄克、紐約、馬里蘭。詳見死刑資訊中心 (Death Penalty Information Center)，http://www.deathpenaltyinfo.org/recent-legislative-activity。 另有其他幾州最近廢除死刑：德拉瓦、華盛頓、科羅拉多和新罕布夏。

用以比較執行前後之謀殺率。近五年來，紐澤西州、伊利諾伊州和新墨西哥州並無證據顯示廢死後謀殺率增加。事實上，伊利諾伊州主要城市芝加哥的殺人率於2014年達到50年來最低點，已與上一次執行，也就是1990年代末期距離甚久。也有其他幾州暫停執行：俄勒岡州、賓州和加州。過去十年來，共有十州不是正式暫停執行，就是實際上並未執行死刑。[23]

8. 最近兩項研究使用新穎方法檢驗死刑的嚇阻效應，透過打造與執行州相符的合成州來模擬實驗。第一項研究比較2000年以來廢死的七州的謀殺率與維持死刑的29州的配對樣本。[24] 分析發現，並無證據顯示一州之死刑法規足以嚇阻謀殺。第二項研究使用類似設計，比較四個宣布暫停執行的州與在1979年至2019年間持續執行的州的殺人率。[25] 與帕克（第一項）研究類似，研究表明，暫停執行的四州，其殺人率皆無顯著降低。兩項研究結論呈現出的結果與嚇阻假設不一致：無證據顯示死刑法規或執行具嚇阻效應。

9. 其他國家的證據也顯示類似的長期趨勢。東歐在1990年代初期廢死後，殺人率持續下降。[26] 日本一項關於執行和暴力犯罪的研究顯示，不管是死刑率還是執行率，對殺人率和搶劫殺人率的影響都無統計顯著性，而無期徒刑率則對搶劫殺人率有顯著負向影響。[27]

10. 一項研究比較新加坡和香港謀殺率：新加坡針對謀殺罪經常執行死刑，且一直以來皆如此；而香港則自1970年代以來便禁止執行死刑。結果顯示，自香港停止執行死刑以來，近三十年兩地謀殺率並無差異。[28] 圖4將香港與新加坡比較更新至2016年，呈現出兩地之長期趨勢（一地頻繁執行死刑，另一則自1960年代以來從未執行），殺人率仍幾乎相同，且長期軌跡也幾乎相同，都呈下降趨勢。

[23] https://deathpenaltyinfo.org/news/dpic-2019-year-end-report-death-penalty-erodes-further-as-new-hampshire-abolishes-and-california-imposes-moratorium

[24] Brett Parker, "Death Penalty Statutes and Murder Rates: Evidence from Synthetic Controls." Journal of Empirical Legal Studies (2021). https://doi.org/10.1111/jels.12291

[25] Stephen N. Oliphant, Estimating the effect of death penalty moratoriums on homicide rates using the synthetic control method, 21 Criminology & Public Policy 915 (2022).

[26] U.N. Office of Drugs and Crime, 2011 Global Study on Homicide: Trends, Contexts and Data (Vienna, Austria, 2011). 捷克、波蘭、摩爾多瓦、匈牙利和羅馬尼亞2000-2008年殺人率下降61%。U.N. Report at 33

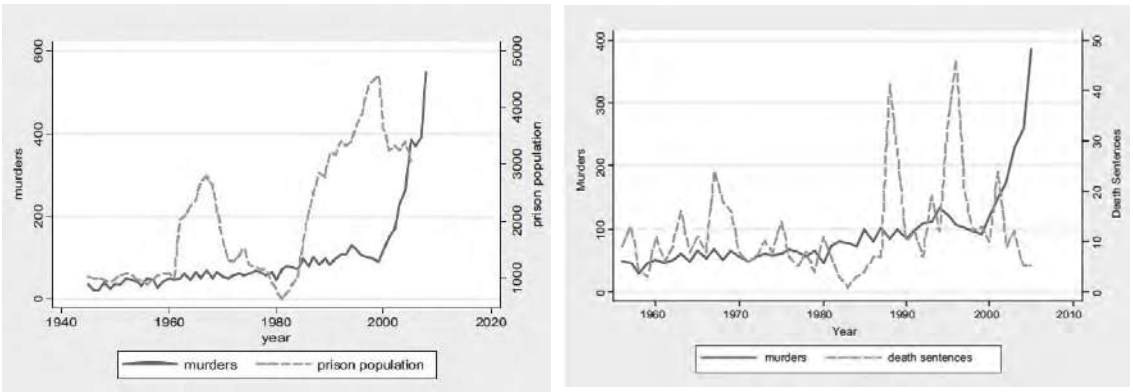
[27] Daisuke Mori, "Deterrent Effect of Capital Punishment in Japan: An Analysis Using Nonstationary Time-Series Data." 28 *Supreme Court Economic Review* 6 1 (2020).

[28] Franklin E. Zimring, Jeffrey Fagan, and David T. Johnson, “Executions, Deterrence, and Homicide: A Tale of Two Cities,” 7 *Journal of Empirical Legal Studies* 1-29 (2010).

圖 4 新加坡與香港每十萬人口殺人數，1973-2016 年

11. Greenberg and Agozino 於千里達及托巴哥進行的研究也顯示，儘管執行數量增加，殺人率並無變化。[29] 最全面性的研究顯示，從 1960 年至 2010 年的 50 年間，一旦謀殺率根據監禁和社會經濟因子進行調整後，執行對謀殺並沒有嚇阻效應。下圖 5 和圖 6 顯示，謀殺率不會因為監獄人口數或死刑判決率的變化而有所改變。

圖 5 和圖 6 謀殺、死刑判決和監獄人口，千里達及托巴哥，1960-2010 年



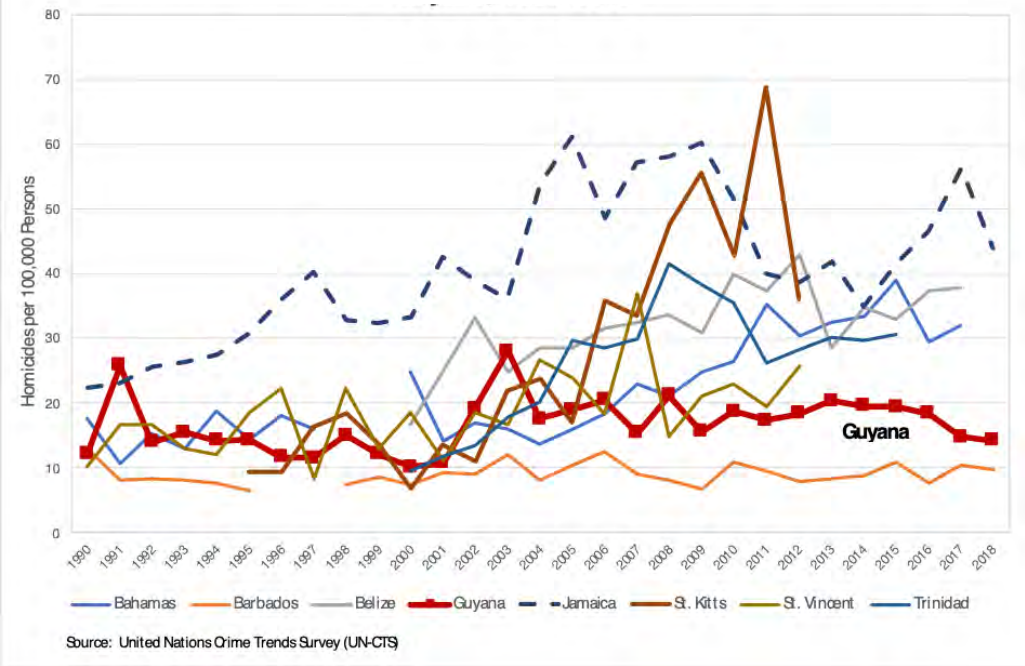
12. 作者結論認為，「50 年來，這些制裁的實施程度差異甚大，無論是監禁、死刑或執行都與殺人數沒有任何顯著關係。在上訴法院做出限制執行決定後的幾年裡，謀殺率下降了。」執行在千里達及托巴哥可能對謀殺數造成不利影響。1999 年大量執行之後，[30] 圖 6 顯示謀殺數隔年開始增加，並持續逾十年。[31]

[29] David Greenberg and Biko Agozino, "Executions, Imprisonment, and Crime in Trinidad and Tobago," 52 *British Journal of Criminology* 113 (2012).
[30] Greenberg and Agozino, id. See, also, Larry Roberts, Trinidad Executes Four in Nine Days, World Socialist Web Site, http://www.wsws.org/en/articles/1999/06/cari-j17.html.
[31] https://deathpenaltyworldwide.org/database/

E. *蓋亞那暫停執行死刑和執行死刑對殺人率的影響證據顯示，死刑無嚇阻效應。*

1. 為回應這個問題，我們彙整多個不同來源的資料，包括 1990 年至 2018 年謀殺和其他犯罪，以及死刑判決和執行的資料。此外，也彙整南美洲和加勒比地區鄰近國家的資料，比較這些國家與蓋亞那之趨勢。資料透過年度聯合國犯罪趨勢調查 (UN-CTS) 收集，為各國官方資料。[32]

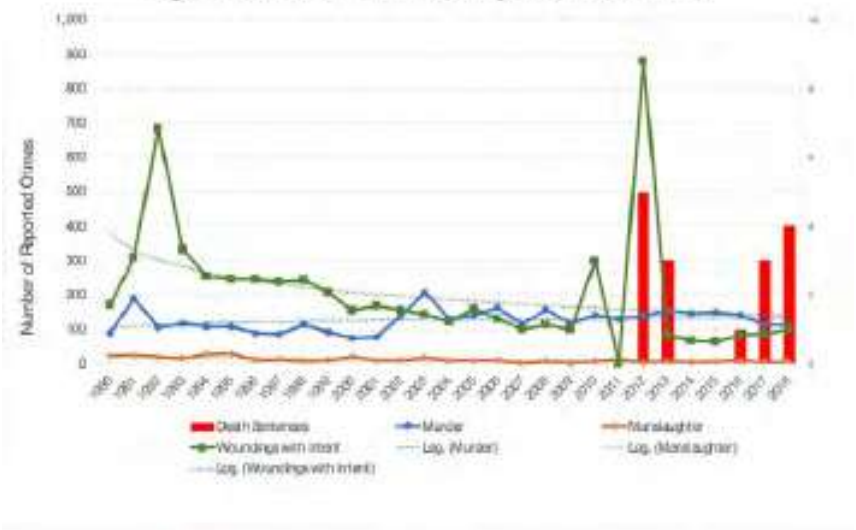
圖 2 每十萬人殺人數，加勒比地區國家與蓋亞那，1990-2018 年



2. 圖 2 比較其他七個加勒比地區國家每十萬人口的殺人率。從 2008 年開始的十年間，除一國外，蓋亞那的殺人率遠低於其他國家，包括許多維持死刑的國家。牙買加是維持死刑的國家，幾乎整段期間殺人率皆最高。聖克里斯多福及尼維斯 2005 年至 2012 年殺人率急遽增加（2012 為聖國參加聯合國毒品和犯罪問題辦公室年度調查的最後一年）。在圖 2 的其他七個加勒比地區國家中，僅巴貝多在 18 年間比率較低。

[32] https://www.unodc.org/unodc/en/data-and-analysis/United-Nations-Surveys-on-Crime-Trends-and-the- Operations-of-Criminal-Justice-Systems.html (last visited January 28, 2021). 其他資料從聯合國毒品和犯罪問題辦公室 (UNDOC) 從最可靠可用來源取得。所有資料皆送至聯合國會員國審查和驗證。

圖 4 暴力犯罪，蓋亞那，1990-2018 年



3. 圖 4 顯示，謀殺 [33] 曲線一直以來維持穩定，並且與 2012 年開始死刑判決實施之前的多年期趨勢一致。傷人和過失殺人有些微負向趨勢。但與謀殺趨勢類似，2012 年死刑判決實施前十年至死刑判決實施後多年的趨勢並無改變。

4. 這些數據強烈顯示，並無證據顯示蓋亞那實施暫停執行死刑或廢除死刑會導致殺人率增加。謀殺和其他犯罪的趨勢似乎並未受到之前暫停執行或 2012 年恢復死刑的影響。

[33] 由於資料從蓋亞那警方取得，因此採用與警方詞彙一致用語謀殺 (murder)。

F. *台灣的證據*

1. 台灣通常僅在殺人案件中判處死刑。[34] 殺人罪屬於有可能裁量判處死刑的案件。儘管法律仍然授權針對其他罪行判處死刑，但在這些案件中很少判死。殺人罪自2006 年起可酌情科處死刑。[35]

2. 實務上，自 2002 年以來，最高法院並未對殺人以外的其他罪行維持下級法院的死刑判決。最高法院最後一次針對非殺人罪判決死刑的是販毒。[36] 地方法院和高等法院 2002 年至 2015 年間共將 14 名*殺人罪以外*罪名的被告判處死刑，而最高法院後來則將這些判決全部減為較輕刑罰。目前台灣有 37 名死刑犯因殺人罪遭定罪。

3. 表 1 呈現 2002 年至 2022 年二十年間殺人案、殺人案逮捕、死刑判決和執行資料。表中亦呈現殺人案、死刑判決和執行比率。

4. 以下圖表顯示了殺人案、殺人案逮捕（犯罪者）、死刑判決和執行比率和數量。比率根據人口標準化，以每十萬人事件數呈現。由於部分年度事件數為零（死刑判決、執行），因此進行調整資料後，將這些年度以 0.99 事件數呈現，以便計算人口比率，或每次死刑判決或執行比率。[37] 事實上，使用 0.99 事件數反而會過度估算這些制裁，因為參數小於一但大於零。

[34] Carolyn Hoyle, *Unsafe convictions in capital cases in Taiwan: A report based on the research and findings of Chang Chuan-Fen* (2019) The Death Penalty Project. 8-9. 另詳見放棄死刑走向文明（2015），台北律師公會，頁525-531。

[35] 王兆鵬 (Jaw-Perng Wang)，“The current state of capital punishments in Taiwan”, *6(1) National Taiwan University Law Review 143* (2011) 147

[36] Carolyn Hoyle, *Unsafe convictions in capital cases in Taiwan: A report based on the research and findings of Chang Chuan-Fen* (2019) The Death Penalty Project. 8-9

[37] 必須進行這項調整才能避免在沒有死刑判決或執行的情況下多年來一直下降至零。

圖 1 台灣每一個死刑判決和執行的殺人率，2002-2022 年

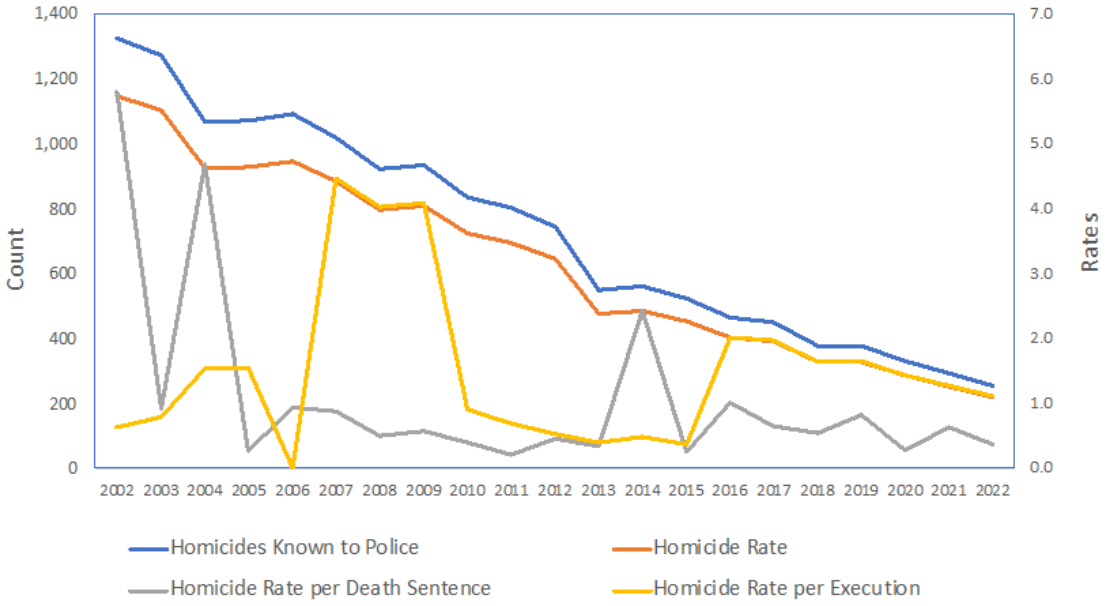


表 1 殺人數、殺人率和死刑，台灣，2002-2022 年

Year	Homicide Rates (Offenses Known to the Police)	Homicides per 100,000 Persons(a)	Homicide Offenders	Homicide Offenders per 100,000 Persons(a)	Death Sentences (b)	Executions (c	Homicide Rate per Death Sentence	Homicide Rate per Execution
2002	1,326	5.7	1,998	8.7	0.99	9	5.8	0.6
2003	1,273	5.5	2,000	8.7	6	7	0.9	0.8
2004	1,070	4.6	1,695	7.3	0.99	3	4.7	1.5
2005	1,071	4.6	1,620	7.0	17	3	0.3	1.5
2006	1,093	4.7	1,921	8.3	5	0.99	0.9	0.0
2007	1,020	4.4	1,682	7.3	5	0.99	0.9	4.5
2008	922	4.0	1,501	6.5	8	0.99	0.5	4.0
2009	935	4.1	1,580	6.8	7	0.99	0.6	4.1
2010	836	3.6	1,531	6.6	9	4	0.4	0.9
2011	804	3.5	1,573	6.8	16	5	0.2	0.7
2012	744	3.2	1,593	6.9	7	6	0.5	0.5
2013	551	2.4	951	4.1	7	6	0.3	0.4
2014	561	2.4	1,043	4.5	1	5	2.4	0.5
2015	522	2.3	897	3.9	9	6	0.3	0.4
2016	465	2.0	844	3.7	2	1	1.0	2.0
2017	451	2.0	842	3.6	3	0.99	0.7	2.0
2018	379	1.6	849	3.7	3	1	0.5	1.6
2019	378	1.6	806	3.5	2	0.99	0.8	1.7
2020	332	1.4	632	2.7	5	1	0.3	1.4
2021	292	1.3	561	2.4	2	0.99	0.6	1.3
2022	254	1.1	424	1.8	3	0.99	0.4	1.1

a. Taiwan population ranged from 2000-2020 was 22,194,731 in 2000 to 23,821,464 in 2022, an average of 23,081,544 The annual homicde rate and rate of homicide offenders per 10 million perrsons is based on that average.
b. Years with no death sentences are set to .99. This provides a conservative estimate of the rate per death senence.
c. Years with no death sentences are set to .99. This provides a conservative estimate of the rate per death senence.
Sources
Death Sentences and Executions:Amnesty International Annual Report, various years
Violent Crime, Various Years
Population: Worldometer (www.Worldometers.info)

5. 表 1 和圖 1 分別顯示，從 2002 年到 2022 年，殺人數量和殺人率皆穩定下降，而死刑執行和判決數量則有所波動，雖然總體呈下降趨勢。殺人率相對於懲罰風險的波動，並不受影響。即使在 2011 年死刑判決量急遽上升，仍維持殺人案整體下降的長期趨勢。嚇阻理論認為，隨著死刑制裁降低，期間內殺人案的數量和比率將會增加。但在這些資料中並無觀察到這一點。二十年來，死刑制裁的減少顯示似乎沒有任何嚇阻效應。

6. 表 1 包括所有殺人案：謀殺和非故意或過失殺人。為了僅測試這些模式對謀殺案件的穩定性，亦對 2018-2023 年謀殺案進行相同分析。結果如表 2 所示。

7. 如表 1 所示，這五年間謀殺案、謀殺率、謀殺案逮捕和每十萬人謀殺案逮捕率急遽下降。儘管謀殺罪的死刑判決這幾年升升降降，趨勢還是持續下降。雖然這段期間幾乎沒有任何執行，但下降幅度急遽且持續。與殺人案相同，死刑制裁的減少對謀殺率或謀殺案逮捕似乎沒有嚇阻效應。[38]

表 2 謀殺數、謀殺率和死刑判決和執行，台灣，2018-2022 年

Year	Murders (Known to the Police)	Murders per 100,000 Persons(a)	Murder Offenders	Murder Offenders per 100,000 Persons(a)	Death Sentences (b)	Executions (c)	Murder Rate per Death Sentence	Murder Rate per Execution
2018	301	1.3	760	3.3	3	1	0.4	1.3
2019	283	1.2	695	3.0	2	0.99	0.6	1.2
2020	218	0.9	489	2.1	5	1	0.2	0.9
2021	197	0.9	498	2.2	2	0.99	0.4	0.9
2022	163	0.7	304	1.3	3	0.99	0.2	0.7

a. Taiwan population ranged from 2000-2020 was 22,194,731 in 2000 to 23,821,464 in 2022, an average of 23,081,544. The annual homicde rate and rate of homicide offenders per 10 million perrsons is based on that average.

b. Years with no death sentences are set to .99. This provides a conservative estimate of the rate per death senence.

c. Years with no death sentences are set to .99. This provides a conservative estimate of the rate per death senence.

Sources:

Death Sentences and Executions:Amnesty International Annual Report, various years

Murder and Murder Arrests: National Police Agency of Taiwan, Ministry of Interior, Republic of Taiwan Statistical Yearbook, Table 2 - Violent Crime, Various Years

Population: Source: Worldometer (www.Worldometers.info)

[38] 2023年數據顯示，此下降趨勢已持續六年。由於缺乏2023年死刑制裁資訊，表中並未呈現這些數字。

8. 除了檢視最近五年的謀殺率之外，我還檢視了同期的搶劫率。嚇阻理論所依據的文獻中其一問題為，隨著執行率的變化，其他暴力犯罪是否會取代謀殺而增加。[39] 或者，搶劫率和與搶劫相關殺人（即搶劫謀殺或重罪謀殺）可能會隨著執行的威懾力降低而增加。為評估這些假設，使用自台灣警政署取得的搶劫資料並重複表 2 分析。[40] 分析結果如表 3 所示。

9. 表 3 顯示，2018 年至 2022 年期間，搶劫數和搶劫犯罪者人數均穩定下降。在此期間，死刑判決和執行的數量基本上保持不變，每年變化不大。此外，五年間搶劫率和搶劫逮捕率也持續下降。結果顯示，與謀殺相同，搶劫在死刑制裁減少的脈絡下不變。

表 3 搶劫、搶劫犯罪者、死刑判決和執行，台灣，2018-2022 年

Year	Robberies (Known to the Police)	Robberies per 100,000 Persons(a)	Robbery Offenders	Robbery Offenders per 100,000 Persons(a)	Death Sentences (b)	Executions (c)	Robbery Rate per Death Sentence	Robbery Rate per Execution
2018	197	0.9	362	1.6	3	1	0.3	0.9
2019	187	0.8	325	1.4	2	0.99	0.4	0.8
2020	151	0.7	341	1.5	5	1	0.1	0.7
2021	150	0.6	294	1.3	2	0.99	0.3	0.7
2022	129	0.6	231	1.0	3	0.99	0.2	0.6

a. Taiwan population ranged from 2000-2020 was 22,194,731 in 2000 to 23,821,464 in 2022, an average of 23,081,544. The annual homicde rate and rate of homicide offenders per 10 million perrsons is based on that average.

b. Years with no death sentences are set to .99. This provides a conservative estimate of the rate per death senence.

c. Years with no death sentences are set to .99. This provides a conservative estimate of the rate per death senence.

Sources:

Death Sentences and Executions:Amnesty International Annual Report, various years

Robberies and Robbery Arrests: National Police Agency, Ministry of the Interior, Republic of Taiwan, Statistical Tables Yearbook, Table 2 - Violent Crime, Various Years

Population: Source: Worldometer (www.Worldometers.info)

10. 與整體致死事件和殺人案件一樣，在這五年間，死刑制裁的減少對搶劫犯罪、搶劫逮捕或搶劫率似乎不存在嚇阻效應。[41]

[39] See, Becker, supra n. 8

[40] 台灣內政部警政署，統計年報，表 2 – 暴力犯罪，不同年度。

[41] 2023年數據顯示，此下降趨勢已持續六年。由於缺乏2023年死刑制裁資訊，表中並未呈現這些數字。

G. 結論

1. 以上這些統計數據和分析強烈指出，並無證據顯示死刑判決或執行會和台灣的致死罪行、殺人案件或搶劫率的上升有關聯性。三類暴力犯罪的趨勢，並未受到死刑判決或執行數量隨時間下降的影響。因此，就觀察結果而言並沒有證據顯示死刑制裁具有整體嚇阻效應。

署名

Jeffrey Fagan, Ph.D.
2024 年 3 月 7 日

Expert Opinion Contributing to the National Human Rights Commission Amicus Curiae Brief for the Case of Constitutionality of the Death Penalty

Prof. Dr. Dainius Žalimas

Upon receiving the request from the National Human Rights Commission (NHRC) to share the experience of the Republic of Lithuania, I have prepared and submitted this expert opinion. I wish to clarify that I am not receiving compensation from any party, and this opinion has been formulated independently, without collaboration with the parties of the cases in the Constitutional Court of Taiwan, any related party, or its agent.

It is a privilege to offer an expert opinion to the NHRC's amicus brief. Taiwan is a country I admire and where I had the pleasure of visiting in 2022 as an invited guest. It was an honor to engage in dialogue with scholars, legal professionals, and members of Taiwan's civil society. I was profoundly struck by the similarities of our countries' experiences. Relations between our constitutional courts were established over sixteen years ago. In 2017 the delegation of the Constitutional Court (Judicial Yuan) took part in the 4th Congress of the World Conference on Constitutional Justice in Vilnius. We regard Taiwan as a partner of international judicial cooperation and dialogue. This expert opinion draws largely from the remarks that I gave there and my experience as the President and Justice of the Constitutional Court of Lithuania, as well as my current positions as Dean of the Law Faculty at Vytautas Magnus University and Member of the European Commission "Democracy through Law" (the Venice Commission).

Although our countries are separated by oceans and thousands of miles, it is worth observing the parallels between the Constitutional Court of Lithuania and the Constitutional Court of Taiwan. Both constitutional courts strictly follow the rule of law. Both respect the human rights of their citizens and have incorporated international instruments into domestic law. Both are young democracies for which global interdependence is at both an ideal and pragmatic necessity. We have much to learn from one another.

I hope that my observations will be useful to the Constitutional Court of Taiwan as it reviews the constitutionality of the death penalty, which our Constitutional Court unanimously abolished in 1998.

Introduction

In terms of a purely formal point of view, the Constitutional Court could have decided that the Constitution was silent regarding the death penalty and thus decline to prohibit it. There was no mention of the death penalty in the text of the Constitution. In addition, at that time the Constitutional Court decided to abolish it, Lithuania was not yet a party to Protocol No. 6 to the European Convention on Human Rights concerning the abolition of the death penalty. Nonetheless, Lithuania's Constitutional Court ruled against the death penalty without signing Protocol 6 and prior to European Union membership. What methods of legal interpretation did it use to find the death penalty unconstitutional?

This expert opinion briefly outlines an answer to that question. It summarizes the various methods of legal interpretation used by the Constitutional Court in finding the death penalty unconstitutional, among them systemic, logical, teleological, historical, and comparative. At the outset the Constitutional Court observed the nature of the Constitution as an integral act that provides principles, guidelines, and rules for an entire legal system; it cannot be interpreted exclusively from a literal or textual method. Its opinion found that the Constitution had to be understood not only according to its letter, but in the light of its spirit as well. Later, this constitutional doctrine was reaffirmed and developed by formulating the concept of a living Constitution, i.e., the Constitution that evolves, to a certain extent, together with the development of the state and society itself. In this context, it should also be emphasized that the attitudes or stereotypes prevailing in a certain period of time among the majority of the members of society cannot form the basis for the interpretation of the Constitution[1].

First, applying the historical method, the Constitutional Court found that Lithuania has historically limited the application of the death penalty. Second, applying the systemic method, the Constitutional Court stressed that, in deciding on the constitutionality of death penalty, the Constitution is an integral act, consolidating the protection of human life in its provisions. Third, in a method both comparative and systemic, the Constitutional Court adopted an approach based on Lithuania's respect for innate human rights and openness to trends of humanization of international law. The Constitutional Court took pains to describe the international community's

[1] See: Constitutional Court of the Republic of Lithuania, Case No 16/2016, ruling of 11 January 2019. All the acts of the Constitutional Court are available in English at the official website of the Constitutional Court: https://lrkt.lt/en/court-acts/rulings-conclusions-decisions/171/y2023.

regulation of the death penalty and the international obligations of the State of Lithuania. Finally and relatedly, the Court recognized innate human rights, of which the right to life and dignity and prohibition against torture, are absolute and which the death penalty violates. The application of this range of methods of legal interpretation enabled the Constitutional Court to find the death penalty unlawful. In the words of the Council of Europe, the death penalty serves "no purpose in a civilized society governed by the rule of law and respect for human rights."[2]

Substantial Concept of the Rule of Law

In 2017, the 4th Congress of the World Conference on Constitutional Justice adopted the Vilnius Communiqué and agreed that the rule of law constitutes the cornerstone of every legal system in the modern world. The rule of law is integrally linked to democracy and the protection of human rights. The Vilnius Communiqué stated that the rule of law is a generally recognized principle, inseparable from the constitution itself; as a fundamental constitutional principle, it requires that the law be based on certain universal values, and it is essentially inherent to every constitutional issue. The Vilnius Communiqué expresses the adherence of the world constitutional courts to the substantial concept of the rule of law. It expressed that this concept encompasses and embraces the respect for human rights, in particular human dignity, rather than literal observance of the constitution and laws.

In its rulings, the Lithuania's Constitutional Court also noted that constitutional principle of a state under the rule of law is a universal principle on which the entire legal system of Lithuania and the Constitution of the Republic of Lithuania itself are based; one of the essential features of a state under the rule of law is the protection of the rights and freedoms of individuals.

Accordingly, modern constitutions, including those of our countries, contain not only provisions on administration, division of powers, but fundamental rights and corresponding restrictions of the state power. The purpose of all modern constitutions is to protect human rights and freedoms by imposing restrictions on the state power. The principal task assigned to the constitutional courts is to ensure the supremacy of the constitution, and rule of law is the constituent element that protects human dignity and fundamental rights. In order to effect their mission, constitutional courts must not restrict itself to the powers expressly provided in the text of the

[2] Contribution of the Council of Europe, Working Session 12, Warsaw (11-12 September 2017).

constitution but also use various methods to find implied powers that can be derived from and indispensable for their mission.

Historical Method

Applying the historical method, the Constitutional Court offered an overview of legal regulation of the death penalty starting from the sixteenth century, when the Statutes of the Grand Duchy of Lithuania were enacted. It concluded that even early legal regulation restricted application of the death penalty.[3] For instance, the Statutes prohibited its imposition in cases where the crime was committed due to unavoidable necessity or indispensable defense. They also forbid the application of penalty to servants who committed a crime following the order of their master and persons who killed traitors or outlaws. In addition, they pardoned "pregnant women or persons who had committed crimes out of foolishness or madness."[4] Furthermore, the law permitted the reconciliation of parties to the case at any point of time, prior to the decision or after it. Thus, the Court found an earlier historical development of jurisprudence limiting the death penalty. The Constitutional Court observed that in 1918, when Lithuania declared independence, its modern state regarded the death penalty as inadmissible in the absence of extreme circumstances.

However, as the Court observed, the 1922 Constitution of the State of Lithuania did not regulate the death penalty, and, as there was a state of emergency, the state applied the death penalty. Following the Soviet Union's occupation in 1940, the Criminal Code of the Russian Soviet Federative Socialist Republic provided for the death penalty for so-called counterrevolutionary and other crimes, mandating this punishment in total eighteen state and criminal crimes and sixteen military crimes. Thousands of people of Lithuania were punished by death. On the restoration of the independence of Lithuania on March 11, 1990, the Criminal Code was still in effect.

But since 1990, as the Constitutional Court observed, Lithuanian institutions of authority have adopted essential decisions on limiting the application of the death penalty. In December 1991, an amendment of the Criminal Code reduced the number of crimes that provided for the death

[3] As the court put it, "Reviewing the historical practice of the legal regulation of the death penalty in Lithuania it needs to be noted that the most prominent monument of Lithuanian law—the Statutes of the Grand Duchy of Lithuania (the First Statute of 1529, the Second Statute of 1566 and the Third Statute of 1588)—provided for limitations on the application of the death penalty. It could be imposed by a court only." *On the compliance of the death penalty provided for by the sanction of Article 105 of the Republic of Lithuania Criminal Code with the Constitution of the Republic of Lithuania*, Constitutional Court of the Republic of Lithuania, Case No 2/98, ruling of 9 December 1998.
[4] *Ibid.*

penalty from eighteen to one: purposeful murder with aggravating circumstances, provided for by Article 105 of the Criminal Code. This was the provision that was led to the Constitutional Court's review of the lawfulness of the death penalty in 1998. In July 1994 a law "On Amending and Supplementing the Criminal Code, the Code of Correctional Labour, and the Code of Criminal Proceedings of the Republic of Lithuania" provided that the death penalty need not be imposed on women; persons who were under the age of eighteen at the time of the commission of the crime; and persons recognized as partially insane. Furthermore, it was established that a court, sentencing a person to death, may replace this punishment by life imprisonment. On July 25, 1996, the President of the Republic submitted to the Seimas, the Parliament of Lithuania, a draft law on the moratorium on the death penalty. The process of historical development shows that the Constitutional Court has been moving towards restricting the death penalty.

Systemic Method

The Constitutional Court applied the systemic method in several ways. First, it examines the constitutional provisions as an integral act. Second, it aims to harmonize Lithuanian law with international law and to obey the international law standards that have been codified and domesticated. Third, it requires special consideration of the innate nature of human rights. I describe each of these in turn.

First, applying the systemic method, the Constitutional Court paid special attention to the constitutional provisions consolidating the recognition of human rights, the right to life, and the prohibition of torture and cruel, inhuman or degrading treatment. The Constitutional Court noted that the death penalty extinguishes human life, and there is no possibility of rectifying a mistake if a person who does not deserve it is sentenced to death. It found that the death penalty deprives the convict of human dignity, as the state treats the person as a mere object that needs to be eliminated from the human community. In its later rulings, the Constitutional Court emphasized that only such a state that has respect for the dignity of every human being can be considered to be truly democratic; the Constitution is an anti-majoritarian act, which protects an individual.[5]

Second, the systemic method allowed the Constitutional Court to observe the development of international standards with regard to human rights protection and, in particular, of the emergence

[5] See: Constitutional Court of the Republic of Lithuania, Case No 23/04, ruling of 19 August 2006; Case No 16/2016, ruling of 11 January 2019.

of the European standard concerning the inadmissibility of the death penalty. I elaborate more on the harmonization with international and European law below. Briefly, the Constitutional Court invoked the constitutional imperative of striving for an open, just, and harmonious civil society, the importance of rule of law, and the constitutional obligation of Lithuania to follow international legal norms and principles.

(a) Harmonization with International Law.

After considering the relevant international treaties and multiple soft law documents adopted by the United Nations General Assembly, the Council of Europe, and the European Parliament, the Constitutional Court concluded that the abolition of the death penalty was increasingly regarded in Europe as a universally recognized norm. The Constitutional Court also pointed to the "evident trend" in criminal law of European states towards the humanisation of criminal punishments. It observed that Lithuania had established limitations on the application of the death penalty through its signing of the International Covenant on Civil and Political Rights ("the Covenant"), the 1949 Geneva Convention Relative to the Treatment of Prisoners of War, and the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War.

In particular, the Constitutional Court of Lithuania quoted extensively from the Covenant, observing that in 1966 the UN General Assembly adopted the International Covenant on Civil and Political Rights. Lithuania signed it on 20 November 1991. In Lithuania it came into force on 20 February 1992. As the Constitutional Court stated, "This Covenant is regarded as an international agreement and belongs to the category of agreements of action, because it obligates the states which have recognised it to take concrete actions to implement its provisions."[6] Article 6 of the Covenant, the Constitutional Court continued, "is directly devoted to the death penalty," providing:

> 1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.
> 2. In countries which have not abolished the death penalty, sentence of death may be imposed only for most serious crimes in accordance with law in force at the time of the commission of the crime.
> 3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorise any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.

[6] Constitutional Court of the Republic of Lithuania, Case No 2/98, ruling of 9 December 1998.

> 4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence.
> 5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.
> 6. 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.[7]

The Constitutional Court then concluded that the Covenant was quite unequivocally stating that the death penalty violated international principles of human rights:

> The Covenant is oriented towards two essential provisions: (1) the death penalty may only be applied for the most serious crimes and by strict adherence to the procedure established by law; (2) the abolition of the death penalty is an objective of the international model of human rights.
>
> In 1989, the UN General Assembly adopted the Second Optional Protocol to the International Covenant on Civil and Political Rights. Article 1 of the said Protocol provides: (1) no one within the jurisdiction of a State Party to the present Protocol shall be executed; (2) each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction.

I emphasize the Covenant in particular because it appears that Taiwan has experienced a parallel development, implementing the Covenant domestically in 2009; Taiwan's Article 8 of the ICCPR Implementation Act requires that government institutions revise laws and regulation incompatible with the ICCPR. I would consider this domestic law's reference to the ICCPR as requiring a systemic approach. From what I understand, Taiwan's courts came to insist in 2012 that all capital cases be heard and began to apply international human rights case law in its opinions. The death penalty became permitted only in cases without mental illness and in which the defendant commits "the most serious crimes," limiting to crimes of killing under *dolus directus*.

Finally, international and EU law, as well as, to a certain extent, the jurisprudence of foreign constitutional courts, must be regarded as the sources for the interpretation of the Constitution. Otherwise, the State and its people could find itself in self-isolation, as it fails to show compatibility with the principles of an open global civil society. The Constitution is a supreme law that integrates, among others, the principle of respect for international law, the principle of an open, just, and harmonious civil society, and the principle of the geopolitical orientation of the State. Therefore, the Constitutional Court must see the Constitution in the broader international context and ensure harmonization with international and EU law.

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[7] *Ibid.*

(b) Innate and Irrevocable Human Rights

The constitutional doctrine of human rights exemplifies how the principles of the development of the implied powers of the Constitutional Court and the jurisprudential Constitution are applied. They also demonstrate how the substantial concept of the rule of law influence the constitutional concept of human rights.

The constitutional order is based on the priority of the rights and freedoms of a human being and a person. These provisions are the points of departure in the formulation of the further doctrine of human rights. In interpreting the constitutional provisions on human rights, the Constitutional Court must consider the overall constitutional regulation, including the relevant explicit and implicit provisions and principles as well as the constitutional values. In other words, the Constitutional Court is guided not only by the letter of the Constitution but also by its spirit. It must use all available powers to protect human rights as the greatest constitutional value.

It is not possible to make the detailed overview of the whole constitutional human rights doctrine. However, here I emphasize the recognition of two key elements of this doctrine, namely, the irrevocability of innate human rights and international and the EU law as the constitutional minimum standard for human rights protection.

First, in ruling the death penalty unconstitutional, the Constitutional Court of Lithuania defined innate human rights as inseparable from an individual and linked to neither a territory nor a nation. Individuals possess innate rights regardless of whether they are entrenched in the legal acts of the state or not. Every individual has these rights, and this means that the best and worst people have them. Innate human rights are an individual's innate opportunities that ensure their human dignity in the spheres of social life. Innate human rights constitute that minimum, that starting point from which all other rights are developed and supplemented, and which constitute the values unquestionably recognized by the international community.

Modern constitutions protect the innate human rights of people and their dignity. In its rulings, the Constitutional Court clearly stated the irrevocability of innate human rights by any means, including the ordinary legislation, constitutional amendments and outcomes of referendums[8]. The innate nature of human rights is the supreme constitutional values that cannot be denied in any circumstances.[9] It constitutes the foundation for the Constitution, as the social contract, as well as

[8] See: Constitutional Court of the Republic of Lithuania, Case No. 5/2019, ruling of 30 August 2020; Case No. 16/2014-29/2014, ruling of 11 July 2014.
[9] *Ibid.*

the foundation for the nation's common life, which is based on the Constitution, and for the State of Lithuania itself.[10] Their denying would amount to the denial of the essence of the Constitution itself; with the denying of these rights, the identity of our nation as a political collective entity, embodied in the Constitution, would collapse.[11] Thus, no one has and cannot have the power to eliminate innate human rights deriving from the natural human dignity.

Second, the Constitutional Court perceived international and the EU law as the constitutional minimum standard for the human rights protection. If the State is obliged to follow the generally recognized norms and principles in its international relations, then there is no constitutional ground to apply the less favorable standards for its own people. Therefore, as a consequence, once it is established that the law provides for the less favorable standard of human rights protection than that established by international law, this provides a basis to declare this law unconstitutional. For example, on this basis the Constitutional Court declared unconstitutional the provision that allowed the retroactive application of the definition of genocide under national Criminal Code, which was broader than that established by the 1948 Genocide Convention. The Constitution can always establish the higher standard for the human rights protection than that provided by international law.

Conclusion

In spite of geographical distance and cultural differences, our constitutional courts share a mission to ensure the supremacy of the Constitution and the rule of law, in particular the use of law to protect human rights. This overview of the development of the constitutional review and the protection of human rights by the Constitutional Court of the Republic of Lithuania demonstrates principles and methods of interpretation that led the Court to abolish the death penalty. In particular, modern constitutional courts must ensure that no legal act is immune from the constitutional review. For this purpose, when necessary, in interpreting the Constitution, the Constitutional Court can reveal its own implied powers that can be justified by the mission of the Constitutional Court, including the powers to assume the jurisdiction over the acts not expressly

[10] *Ibid.*
[11] *Ibid.*

mentioned in the text of the Constitution and the power to declare null and void all the consequences of anti-constitutional acts detrimental to the foundations of the constitutional order. Further, it is up to the Constitutional Court to develop the jurisprudential Constitution that ensures both the stability and dynamism of the constitutional order, as well as the independent functioning of the Court. In this respect, the development of the jurisprudential Constitution can be successful, provided that it is based on the principles of gradual and consistent development, considering the constant progress of the state and society itself.

Under this system, the Constitution is open to the progressive development of international law. It is a living Constitution, constituting not only of its letter, but also holding a spirit. The principles of the evolution of the powers and the development of the jurisprudential Constitution are also applied in the formation of the human rights doctrine by the Constitutional Court. Here, guided by the substantial concept of the rule of law, the Constitutional Court can take all available means to protect innate human rights, in particular human dignity. Under any constitution, even in the absence of the express provisions, the Constitutional Court can find irrevocable values (including human dignity) that cannot be denied by no one and by any means. These fundamental values are also protected by international law; here the Constitutional Court can and must consider the respective international rules as a minimum constitutional standard.

The development of constitutional review, including the protection of human rights, leads to the disclosure of new elements of the constitutional reality and the further development of the already existing ones, as well as the harmony between the spirit and the letter of the Constitution. It is a gradual, consistent, ongoing and never-ceasing process. The peaceful and progressive development of our societies should also follow the same path.

Prof. Dr. Dainius Žalimas 

提供臺灣國家人權委員會（NHRC）擔任死刑釋憲案件法庭之友的專家意見

Dainius Žalimas 教授（博士）

在收到臺灣國家人權委員會（NHRC）請求分享立陶宛共和國的經驗後，我準備並提交了這份專家意見。我要強調，此份意見報告是完全由本人獨立撰擬，並未接受任何一方的報酬，也沒有與台灣憲法法院案件的任何人或其代理人合作。

能為臺灣國家人權委員會（NHRC）就死刑釋憲案以法庭之友身分出席憲法法庭提供專家意見，對我來說是莫大的榮譽，我對此國家抱有深深的敬意。在 2022 年，我有幸作為受邀嘉賓訪問台灣，並與當地學者、法律專業人士和公民社會成員進行深入對話，這次訪問讓我深刻感受到我們兩國在許多方面的相似經歷。兩國憲法法院之間的關係建立於十六年前。2017 年，台灣憲法法庭（司法院）代表團參加了在立陶宛首都維爾紐斯(Vilnius)舉行的第四屆世界憲法司法大會，進一步加強了雙方作為國際司法合作夥伴的關係。這份專家意見主要基於我在會議上的發言，以及我作為立陶宛憲法法院院長、法官的經驗，還包括我目前在維陶塔斯•馬格努斯大學(Vytautas Magnus University)擔任法學院院長及和歐盟「法治民主」(Democracy through Law) 威尼斯委員會成員的職責。

儘管兩國地理上相隔遙遠，立陶宛和台灣的憲法法院在遵循法治、尊重公民人權及將國際標準納入國內法等方面擁有許多相似之處。作為年輕的民主國家，理解全球相互依存的重要性對我們來說既是理想也是必須。有許多方面我們可以相互學習。

我希望我的見解能對台灣憲法法庭在審理死刑是否合憲的問題上提供幫助，立陶宛憲法法院於 1998 年已一致決定廢除死刑。

簡介

從純粹形式的角度來看，憲法法院本可以判決憲法對於死刑的問題沒有明文規定，因此有理由拒絕禁止之。此外，在立陶宛尚未成為《歐洲人權公約》第 6 號議定書的締約方且未加入歐盟之前，立陶宛憲法法院已判決死刑違憲。立陶宛使用了哪些法律解釋方法來判定死刑違憲？

這份專家意見提供了概述，彙整了憲法法院在判決死刑違憲時所使用的系統性、邏輯性、目的性、歷史性及比較性等解釋方法。憲法法院首先認為，憲法應被視為提供整個法律體系原則、指南與規則為一體。法院認為，理解憲法應考慮其精神，不能僅依字面或文本解釋，憲法必須不僅根據其文字，還要根據其精神來理解，並透過「活憲法」(living Constitution)的概念得到重新確認和發展，即憲法在一定程度上隨著國家和社會的發展而演變。在此基礎上，法院強調，某時期社會大多數人的態度或刻板印象不應成為解釋憲法的依據。

首先，通過歷史解釋方法，法院發現立陶宛歷史上已限制死刑使用。其次，採用系統解釋方法，強調在判斷死刑憲法合法性時，憲法是一整體，其條款中堅持保護人類生命的立場。第三，法院以比較與系統化的方法，採納基於尊重固有人權及對國際人道主義潮流開放的態度。法院努力描述國際對死刑的規範及立陶宛的國際義務。最後，法院確認生命權、人性尊嚴及禁止酷刑等人權，而死刑違反這些權利。透過這些法律解釋方法，憲法法院得以判決死刑是非法的。正如歐洲理事會所言，在一個法治及尊重人權主導的文明社會中，死刑「完全沒有存在的空間」。

法治的實質概念

2017 年，在第四屆世界憲法司法大會上，通過了《維爾紐斯公報》(Vilnius Communiqué)，強調法治是現代法律體系的根基，並與民主及人權保障緊密相連。《維爾紐斯公報》明確指出法治是公認原則，與憲法密不可分，並要求法律必須建立在普世價值之上，這一基本的憲法原則與每個憲法問題息息相關。此外，該公報表達了對於法治實質概念的堅持，即重視人權特別是人的尊嚴(human dignity)，而不僅僅是字面涵義上遵循憲法和法律。

立陶宛憲法法院在其裁決中強調，國家依法治理的憲法原則是整個立陶宛法律體系和憲法的基礎，其核心在於保護個人的權利與自由。

現代憲法不只涵蓋行政和權力分立的條款，也著重於基本權利及對於國家權力的規範，旨在保護人權和自由。因此，憲法法院的主要職責是確保憲法的至上和法治原則，其職責不僅限於憲法文本明確賦予的權力，還包括使用不同方法來運用其根據憲法法院使命衍生而來的隱含權限(implied powers)。

歷史方法

憲法法院透過歷史方法回顧了自 16 世紀起立陶宛大公國法令對死刑法律規範的演變，指出早期法律已經在某種程度上限制了死刑的使用。例如，法令禁止如犯罪源於不可避免的必要或正當防衛的情況下實施死刑。它們還禁止對按照主人的命令犯罪的僕人和殺害叛徒或亡命之徒的人進行懲罰。此外，它赦免了「懷孕的婦女或因非理性行為或精神狀態異常(foolishness or madness)而犯罪的人」。憲法法院觀察到，在 1918 年立陶宛宣布獨立時，已經認識到死刑的不適用性。

然而，1922 年立陶宛國憲法並未規定死刑，而在當時處於緊急狀態下，國家實行了死刑。在 1940 年蘇聯占領之後，俄羅斯蘇維埃聯邦社會主義共和國的刑法對所謂的反革命和其他罪行規定了死刑，總共有十八項國家和刑事罪行以及十六項軍事罪行被規定了這一刑罰，導致許多立陶宛人被處死。1990 年 3 月 11 日立陶宛恢復獨立後，刑法仍然有效。

但自 1990 年以來，正如憲法法院所觀察到的，立陶宛的權力機構已開始限制死刑的適用。1991 年 12 月，刑法的修正案將規定死刑的罪行數量從十八項減少到一項，大幅減少至僅包括加重情節的故意謀殺。1994 年 7 月，立陶宛共和國修正刑法、勞動改造法和刑事訴訟法的法律，禁止對女性、未成年人和精神疾病患者執行死刑。此外，在法制上也已經確立：法院在審理涉及科處特定人死刑的案件中，有權將死刑判決變更為終身監禁。1996 年 7 月 25 日，立陶宛共和國總統向立陶宛議會提交了關於暫停死刑的法案草案。這一系列歷史發展顯示，立陶宛一直朝著限制死刑的方向進步。

系統方法

憲法法院運用了系統方法來審視死刑問題，強調將憲法各條文視為一整體並考量其與國際法的協調性及人權的特性。

首先，憲法法院重視在憲法中確立的人權、生命權及禁止酷刑和不人道或有辱人格的待遇。法院認為，死刑終結生命且一旦判決錯誤無法挽回，剝奪了人的尊嚴，將其視為需要從社會中消除的對象。

其次，透過系統方法，憲法法院觀察到國際人權保護標準的進展，尤其注意到關於死刑不可接受性的歐洲標準的出現。憲法法院進一步強調，尊重每一個人的尊嚴才能被視為真正的民主國家，憲法旨在保護少數者免受多數

的壓迫。此外，法院援引憲法的義務，指出立陶宛應追求一個開放、公正、和諧的社會，強調法治的重要性，以及遵循國際法規範和原則的必要性。

(a) 在與國際法的協調方面

審視聯合國大會、歐洲理事會及歐洲議會通過的相關國際條約文件，憲法法院指出，歐洲逐漸普遍認同廢除死刑。此外，憲法法院也注意到在歐洲國家的刑法中，存在著向著刑罰人道化的顯著趨勢。法院特別提到，立陶宛透過簽署《公民與政治權利國際公約》、1949 年《關於對待戰俘的日內瓦公約》和《關於戰時保護平民之日內瓦公約》，對死刑的使用設立了限制。

立陶宛憲法法院廣泛引用《公民與政治權利國際公約》的內容，該公約於 1966 年由聯合國大會通過，立陶宛於 1991 年 11 月 20 日簽署，並於 1992 年 2 月 20 日在立陶宛生效。憲法法院強調，《公約》被視為國際協議，屬於行動協議的範疇，要求承認該公約的國家採取具體行動實施其條款。法院進一步指出，《公約》第 6 條直接關聯到死刑問題，並提供：

1. 根據《公民與政治權利國際公約》，每個人都擁有不可剝奪的生命權，該權利受到法律的保護，任何人的生命都不得被任意剝奪。
2. 在還未廢除死刑的國家中，死刑只能在犯下最嚴重罪行且根據當時有效的法律時施行。
3. 此外，當剝奪生命行為構成種族滅絕罪時，不得以本公約為由免除《防止及懲治危害種族罪公約》下的任何義務。
4. 任何被判處死刑者都有權尋求赦免或減刑。
5. 並禁止對未成年人和孕婦執行死刑。
6. 本公約的任何規定都不應被用來延遲或阻止廢除死刑的行動。

憲法法院進而得出結論，強調《公民與政治權利國際公約》明確指出死刑違背了國際人權的基本原則。

《公約》明確規定了兩項關鍵條款：首先，死刑只能針對最嚴重的犯罪施行，並且執行過程必須嚴格遵循法律規定的程序；其次，廢除死刑被視為國際人權發展的目標。

1989 年，聯合國大會通過了《公民與政治權利國際公約》的第二任擇議定書，明確規定：（1）批准該議定書的國家不得在其管轄範圍內執行死刑；（2）各締約國應採取所有必要措施，在其管轄範圍內廢除死刑。

台灣於 2009 年將《公民與政治權利國際公約》國內化，根據實施法第 8 條的規定，政府機構需要修訂不符合《公約》的法律及法規，展現了對《公約》的系統性適用。從 2012 年起，台灣法院審理所有死刑案件時，開始引用國際人權案例法，並規定只有在犯下「最嚴重的罪行」且無精神疾病時，才允許執行死刑，限制於具有直接故意的殺人罪行。

此外，國際法、歐盟法以及一定程度上的外國憲法法院判例被視為對憲法解釋的來源。這體現了憲法不僅是國家的最高法律，也融合尊重國際法原則、促進公正和諧的公民社會，以及國家地緣政治定位的原則，確保憲法法院的判決與國際及歐盟法律一致。

(b) 憲法法院強調天賦且不可被剝奪的人權

人權憲法學說展現了憲法法院隱含權力的發展原則及判例憲法的運用，以及法治的實質概念如何影響憲法的人權概念。

憲法建立在尊重人權和自由的基礎之上，其中包括了人權的不可被剝奪性，以及以國際法和歐盟法作為人權保護的最低標準。

立陶宛憲法法院在宣判死刑違憲時，將固有人權定義為與個人不可分割，並指出個人即使在沒有國家法律行為的支持下也擁有這些權利。

此外，憲法法院認為，無論立法、憲法修正案還是公民投票結果，都不能剝奪天賦人權。強調這些權利是憲法的基礎，是社會契約的基礎，也是立陶宛國家的基礎。

憲法法院還將國際法和歐盟法視為保護人權的最低標準，認為國家不能對其民用較低的標準，並且憲法可以確立比國際法提供的更高的人權保護標準。

結論

儘管面對地理與文化的廣大差異，我們兩國憲法法院仍共同承擔著確保憲法至上及維護法治的使命，特別是在運用法律來保障人權的領域上。本文概述了立陶宛共和國憲法法院在其憲法審查及人權保護的發展歷程中，展現

了針對法院廢除死刑的憲法解釋原則及方法。尤其是，現代憲法法院必須確保沒有任何法律行為能免於被憲法審查。在此框架下，憲法法院在解釋憲法時，得以揭示其根據憲法法院使命衍生而來的隱含權限(implied powers)，包含對憲法文本中未明確提及行為的管轄權，以及針對有損憲法秩序的違憲行為，宣告無效的權力。憲法法院亦負有發展判例憲法的責任，旨在保障憲法秩序的穩定與動態發展，以及法院的獨立運作。判例憲法的發展是基於漸進與一致性原則，並考量到國家與社會的持續進步。

在這個體系下，憲法對於國際法的發展保持開放態度，形成了一個既包含其文本也蘊含精神的活憲法。憲法法院在形成人權學說時，也應用了權力進化與司法憲法發展的原則，透過實質法治概念，可運用一切可行方法來保障人權，尤其是人的尊嚴。即便在缺少明文規定的情況下，憲法法院也能找到無法被任何人或任何方式否認之不可撤銷價值，如人的尊嚴。這些基本價值亦受到國際法的保護，因此，憲法法院須將相關的國際規範視為憲法的最低標準。

憲法審查的發展，包括人權保護，不僅揭示了憲法實體的新元素，也促進了現有元素的進一步發展，並實現了憲法精神與文本之間的和諧。這是一個持續不斷、漸進且一致的過程。我們社會的和平與進步發展也應遵循此路徑前行。