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The systemic failure to grant special protection and all guarantees to ensure a fair trial in capital cases in the Caribbean, Africa and Asia

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INTRODUCTION

Human rights law is clear that fair trial guarantees in death penalty cases must be implemented in all cases without exception. The understanding is that those facing the death penalty should be afforded special protection and all guarantees to ensure a fair trial above and beyond the protection afforded in non-capital cases. If countries favour the retention of the death penalty for intentional murder of the gravest kind, those countries have to pay a price in terms of effective legal resources for fair trials and appeals in all capital cases.

The reality is that the prevailing law and practice in far too many retentionist countries across the Caribbean, Africa and Asia, does not adequately provide the level of protection required in all capital cases. Unless and until states can meet the universally accepted standards, the death penalty should not be enforced. Too many countries are seeking to keep the death penalty without assuming responsibility for the proper administration of criminal justice and on closer analysis many states fail to provide special procedural protections to suspects and defendants in capital cases.

THE RELEVANCE OF UNIVERSAL STANDARDS AND NORMS ON CAPITAL PUNISHMENT

(i) The scheme of the ICCPR

Article 6(2) of the International Covenant on Civil and Political Rights (ICCPR) provides that:

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

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

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

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

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

The comprehensive provisions of Article 14 of the ICCPR set out in detail the minimum guarantees for a fair trial. These provisions must be respected in all capital

cases. The United Nations Human Rights Committee has consistently held that if Article 14 (fair trial) of the ICCPR is violated during a capital trial, then Article 6 (right to life) of the ICCPR is also breached. In Carlton Reid v. Jamaica the HRC held that:

> *"*[T]he imposition of a sentence of death upon the conclusion of a trial in which the provisions of the Covenant have not been respected constitutes … a violation of Article 6 of the Covenant. As the Committee noted in its general comment 6(16), the provision that a sentence of death may be imposed only in accordance with the law and not contrary to the provisions of the present Covenant implies that "the procedural guarantees therein prescribed must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence, and the right to review by a higher tribunal"."[1]

(ii) The Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty

The restrictions on capital punishment set out in Article 6 of the ICCPR are reflected and further developed in the Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty (hereinafter 'the Safeguards') which, " … constitute an enumeration of minimum standards to be applied in countries that still impose capital punishment."[2]

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

[1] (Communication No. 250/1987), U.N. Doc. CCPR/C/39/D/250/1987, at paragraph11.5.
[2] *Capital punishment and implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty*, Report of the Secretary-General, UN Doc. E/2010/10, at p.33

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

The fifth Safeguard states: “Capital punishment may only be carried out pursuant to a final judgment rendered by a competent court after legal process which gives all possible safeguards to ensure a fair trial, at least equal to those contained in Article 14 of the ICCPR, including the right of anyone suspected of or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings.”

The UN Special Rapporteur on extrajudicial, summary, or arbitrary executions has stated that fair trial guarantees in death penalty cases “must be implemented in all cases without exception or discrimination”.[3] The Special Rapporteur has reiterated that “proceedings leading to the imposition of capital punishment must conform to the highest standards of independence, competence, objectivity and impartiality of judges and juries, in accordance with the pertinent international legal instruments.”[4] Those facing the death penalty should be afforded special protection and all guarantees to ensure a fair trial (sometimes referred to as “*super” due process’)* above and beyond the protection afforded in non-capital cases.

The potential for wrongful conviction and execution of the innocent or those who have not had fair trials, is precisely why international norms require such exacting standards and a heightened level of due process in capital cases. The key question is whether there are significant gaps between the absolute minimum conditions required in all capital cases and the law and practice in retentionist countries? If so, the only option is that the death penalty should no longer be enforced.

[3] *Extrajudicial, summary or arbitrary executions: Report of the Special Rapporteur…,* UN Document E/CN.4/2001/9, 11 January 2001, paragraph 86.
[4] *Extrajudicial, summary or arbitrary executions: Report of the Special Rapporteur…,* UN Document E/CN.4/1997/60, 24 December 1996, paragraph 81.

THE ADMINISTRATION OF JUSTICE IN CAPITAL CASES

(i) Observations on the Caribbean

There are many concrete examples of miscarriages of justice and unfair trials in capital cases from Caribbean countries. Wrongful convictions and unfair trials are all too commonplace and the ratio of successful appeals on its own reveals that the proper administration of justice is called into question in far too many capital cases.[5]

There are serious concerns that the common law as applied in the 19th century is not an adequate instrument for control of poorly paid, lightly disciplined police forces who are under pressure to secure results in the face of rising crime rates and criminal violence. The law as it stands does not provide an adequate basis for the exclusion of unreliable confessions, identifications and other aspects of a defective investigation. Persons who face the death penalty are tried and convicted typically upon challenged confession evidence given at a time when legal aid is not available. The right of access to a lawyer while in custody remains, on the whole, theoretical rather than practical, and trial and appeal lawyers are too frequently ill-equipped and/or insufficiently experienced to ensure a fair trial and often lack sufficient resources to obtain the expert assistance (medical or otherwise) needed adequately to prepare the defence.[6]

The vast majority of prisoners in the Caribbean cannot afford to pay for legal representation and are therefore provided with an attorney under the inadequate legal aid systems in the Caribbean. It is often the practice for an accused person to be assigned a very junior member of the bar, who will be required to prepare the defence, usually without the assistance of any expert help, medical or otherwise.

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5 Since 1992, more than fifty condemned prisoners in the Caribbean, represented by the Death Penalty Project, have successfully appealed against their convictions for murder and death sentences. On appeal, their convictions for murder were found to be 'unsafe' and were quashed, and they were removed from death row.

6 See for example the Community Legal Services Act Cap. 112A of the Laws of Barbados and decision of the Court of Appeal in Civil Appeal No. 20 of 1997 in Hinds –v- Attorney General of Barbados (30 September 1999). On Legal Aid fees see also the Poor Persons Defence Act of Jamaica.

In R v. Bethel[7], the appellant's conviction for murder and his death sentence was quashed and a retrial ordered as his trial lawyer had failed to take proper instructions before the trial and failed to take a proper proof of evidence. The Court of Appeal of Trinidad and Tobago emphasised that whatever the time spent taking instructions, in a murder case involving the death penalty, the gravity of the charge required counsel to pursue with his client a "full and searching inquiry into the facts".

The domestic courts in the Caribbean have on a number of other occasions considered the effectiveness of legal representation and the conduct of counsel in a capital case.

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

> *"*In the present case Mr Sawh's multiple failures, and in particular his extraordinary failure when he became aware on 17th February,1998 that he was engaged on a retrial to enquire into what happened at the first trial, revealed either gross incompetence or a cynical dereliction of the most elementary professional duties…it is the worst case of the failure of counsel to carry out his duties in a criminal case that their Lordships have come across. The breaches are of such a fundamental nature that the conclusion must be that the defendant was deprived of due process... The conclusion must be in this exceptional case the defendant did not have a fair trial."*[8]*

Another recent death penalty case from Trinidad (Dookran and another v. The State [2007] UKPC 15), raised many of the fair trial concerns which commonly arise in capital cases in the Caribbean. The case has features concerning the investigation and collection of the evidence by the police and the conduct of the trial itself which is typical of the cases of many others facing the death penalty. It reveals that the law

[7] Unreported, Court of Appeal of Trinidad & Tobago, delivered on 23 March 2000.
[8] [2002] 1 Crim. App.R.12, [40]

as it stands does not provide the level of fairness required by international standards and norms in the investigation, prosecution and trial of a capital case.

In 1997, Chitrah Dookran and her mother Malharri Dookran were convicted of the murder of Chanardai Bookran-Bissoon, who was the sister of Chitrah and the daughter of Malharri. The co-accused, Devon Cunningham (the alleged hitman), was acquitted whilst Chitrah and Malharri were sentenced to death.

Both were unrepresented when taken into police custody and the case centred on their respective incriminating statements allegedly given to the police. Chitrah claimed her statement was involuntary and preceded threats and promises by a police officer who the prosecution never called as a witness, but the trial judge still admitted her statement into evidence. The Court of Appeal held that Chitrah's statement should not have been admitted in evidence before the jury, but nevertheless held that there had been no miscarriage of justice. The Privy Council disagreed and held that the approach of the Court of Appeal was fundamentally flawed as they could not be satisfied that a reasonable jury would have *inevitably* convicted her had the statement not been admitted into evidence. This was a clear miscarriage of justice and Chitrah's conviction was quashed and she was released from death row.

Malharri, who was elderly, of low intelligence and who had a history of being battered by her husband contended at trial that she was kept in custody without food for over 14 hours before her statement was taken. She alleged that the investigating police officer made her take off her glasses and threatened to bang her head against a wall before she eventually put her cross (X) on the statement that the police officer had written out for her at 11:45pm.

The trial judge admitted Malharri's statement into evidence in spite of the allegations of physical abuse and coercion by the police and evidence indicating Malharri was especially vulnerable due to her low intelligence and the history of domestic abuse.

Having already quashed Chitrah's conviction and death sentence, the Privy Council held that they could not *"avoid a residual feeling of unease about whether justice has been done in Malharri's case"* and concluded that there was a *"lurking doubt"* as to

the safety of her conviction. The appeal was allowed and Malharri was also released from death row.

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

In 2012, on the strength of fresh psychiatric evidence, the appeal of Shorn Samuel,[9] a prisoner who was under sentence of death in St. Vincent & the Grenadines was allowed by the Eastern Caribbean Court of Appeal (ECCA). The Court of Appeal found that the new medical evidence clearly demonstrated that Mr. Samuel was suffering from severe mental disorder at the time of the murder and the contribution of his disorder substantially diminished his responsibility for the offence. Mr. Samuel's conviction for murder was therefore quashed and a conviction of manslaughter was substituted by reason of diminished responsibility. The death sentence was reduced to a sentence of life imprisonment.

In 2012, the appeal of Sheldon Issac,[10] a prisoner under sentence of death in St Christopher and Nevis, was determined by the ECCA. With the last hanging taking place in St Christopher and Nevis in 2008, Mr Isaac and his three co-defendants were at real risk of execution and the Privy Council granted all four defendants stays of execution pending the determination of their appeals. Psychiatric and psychological evidence was adduced before the Privy Council demonstrating that Mr Isaac was severely brain damaged and should never have stood trial in the first

[9] Shorn Samuel v The Queen, Eastern Caribbean Court of Appeal, Criminal Appeal No. 22 of 2008
[10] Sheldon Issac v Director of Public Prosecutions, Eastern Caribbean Court of Appeal, Criminal Appeal No. 19 of 2008

place. The Privy Council remitted the case to the ECCA to review the safety of his conviction and death sentence in light of the fresh evidence. The Court of Appeal accepted the evidence that he was severely (and visibly) mentally disordered and concluded that he was unfit to stand trial, and should not therefore have been convicted of murder and sentenced to death. The Court rejected the possibility of ordering a retrial as being "inappropriate and unnecessary". The system of criminal justice in St Christopher and Nevis clearly failed in this capital case because no one recognised or had the foresight to enquire into his mental state. The investigating authorities, the prison service, the lawyers as well as the trial judge all failed to appreciate that Mr Isaac was so severely mentally disordered that he was unfit to stand trial. As a result, he was tried, convicted, sentenced to death and very nearly executed contrary to international standards and recognised norms.

All of these cases have drawn attention to the long held principle that the State may not execute or condemn to death any person with significant mental illness or mental impairment. The reality though is that a large proportion of prisoners under sentence of death have never been properly examined by a psychiatrist and/or a psychologist resulting in many prisoners who are mentally disordered or impaired facing the death penalty in the Caribbean and beyond.

(iii) Observations on Africa

I am not aware of any academic research into innocence and miscarriages of justice in capital cases in Africa, but there are concerns that many of the features identified in Caribbean death penalty cases also prevail in African retentionist countries. The position in Malawi is instructive.

Like many Commonwealth Caribbean countries, Malawi's criminal justice system is based on the English common law. The obvious difference is that capital murder trials are held in the High Court before a single judge who determines guilt and imposes sentence, not before a jury. Although Malawi's Criminal Procedure Code provides for the right of trial by jury, jury trials in homicide cases were discontinued in 2009 by executive fiat, a decision justified at least in part by the cost of selecting and paying jurors.

Article 42 of the Malawi Constitution provides that indigent defendants facing criminal charges are entitled to free legal aid "where the interests of justice so require." In practice, however, legal aid is provided only in homicide cases, but because approximately 20 lawyers serve the entire country they rarely find time to visit criminal clients in prison. Below is an extract on the current position:

> "Malawi has struggled for years with a tremendous backlog of homicide cases causing severe prison overcrowding throughout the country (Wines 2005). Bail is rarely granted in such cases, and homicide trials are frequently suspended, meaning many accused persons spend several years awaiting trial. These "remand" prisoners typically will not speak to a lawyer until the day of trial. A legal-aid advocate will interview them briefly before the trial begins. Only rarely does the defence call witnesses or conduct any investigation; in most cases counsel simply cross-examines the prosecution's witnesses based on a thin file containing witness statements and a post-mortem examination.
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> In theory, each individual convicted of homicide has the right to appeal to the Malawi Supreme Court under Section 11 of the Supreme Court of Appeals Act. In practice, however, the right to appeal is often frustrated by the lack of an effective case-management system and the failure of legal-aid attorneys to track cases on appeal. Case files often go missing (Wines 2005). As of January 2012, no appeals had been filed for 11 of the prisoners sentenced to death from 2005-2009. In several of these cases, the courts appear to have lost all court records relating to the conviction, including the trial transcript and exhibits introduced as evidence."[11]

It is beyond dispute that the requisite fair trial standards cannot be applied to each and every case involving the death penalty in countries that lack the necessary resources to ensure the highest standards of due process. The inescapable conclusion must be that the innocent are at great risk of being sentenced to death. The law and practice as applied in countries such as Malawi, does not protect against the likelihood that a mistake has been made and the wrong person convicted and sentenced to death. Where a criminal justice system is so severely under resourced the risks that miscarriages of justice will occur naturally increase, however, the evidence from around the world also indicates that no system of capital

[11] Sandra Babcock and Ellen Wight McLaughlin, "Reconciling Human Rights and the Application of the Death Penalty in Malawi: The Unfulfilled Promise of Kafantayeni v. Attorney General".

punishment, however sophisticated and resourced will eliminate miscarriages of justice and the execution of an innocent person.

(iv) Observations on Asia

The Report of the Secretary-General *"Question of the Death Penalty"*[12] states that:-

> "In many countries in Asia, specifically in death penalty cases, the right to a fair trial was impeded by laws which denied due process. Even in countries where due process safeguards exist in principle, they were not applied in practice." [13]

The Anti-Death Penalty Asia Network has reported that:

> "Courts continue to rely on "confessions" extracted through torture as evidence in criminal trials – despite the international ban on torture and on the use of such confessions. Laws impose mandatory death sentences for crimes such as drug trafficking, and place the burden of proof on the accused, depriving them of the right to be presumed innocent until and unless proven guilty according to law. Access to a lawyer before, during and after trial is often denied, and in some countries the independence of the judiciary is not assured. Some states have established special courts which sentence people to death after hasty proceedings."

There have been six executions in Taiwan in 2013, in spite of growing public disquiet about the death penalty with the knowledge that there is a real danger the state could execute someone in error following an unfair trial.

In January 2011, Taiwan's Ministry of Justice admitted that Chiang Kuo-ching had been executed in error in 1997, for the rape and murder of a five-year-old girl committed 15 years previously. After a campaign by Chiang's parents, the Military Supreme Court Prosecutor's Office filed an extraordinary appeal with the Military Supreme Court to reopen the case in 2010. The authorities acknowledged that Chiang's statement to "confessing" to the crime had been made as a result of torture by military investigators, including being subjected to a 37 hour long interrogation, exposed to strong lights and threatened with an electric prod and deprived of sleep

[12] *Question of the Death Penalty*, Report of the Secretary- General, (2nd July 2012) UN Doc. A/HRC/21/29
[13] "When Justice Fails, Thousands Executed in Asia After Unfair Trials", Report by Anti Death Penalty Asia Network, Amnesty International ASA 01/023/2011 at p.6.

while being forced to undergo strenuous physical activities.[14] It was accepted that the trial court had ignored Chiang's allegations of torture and his pleas of innocence and that his conviction had been rushed through by the military court.[15] In September 2011, a military court formally acquitted Chiang and in October 2011, and Taiwan's Ministry of Defence agreed to US$3.4m in compensation to Chiang's relatives. The President, Ma Ying-Jeou publicly apologised to Chiang's mother in February 2011 and conceded that the authorities had "acted wrongly" in the case.[16]

In many retentionist countries in Asia prisoners facing the death penalty have little or no access to a lawyer following arrest and when preparing for trial or the appeal process. According to a recent report on the death penalty in Asia:

> "Many of those sentenced to death in Afghanistan do not have proper legal representation at the time of their trial. In fact, defence lawyers in Afghanistan are normally not even present in the trial court but must submit a written rebuttal of the charges against their client to the court. In Indonesia even though the Criminal Procedure Code guarantees the right to be assisted by a lawyer, in practice there are documented cases of defendants who do not have access to a lawyer. In China, the authorities may block or make it very difficult for defence lawyers to meet with their clients, gather evidence and access case documents. Lawyers defending clients involved in politically sensitive cases have been subjected to intimidation and excluded from proceedings. Others have had charges filed against them for advising their clients to withdraw forced confessions or for trying to introduce evidence that challenges the prosecution's case."[17]

In Japan, there are no legal provisions requiring the effective assistance of defence counsel. Indeed, Japanese courts tend not to find problems even when defence counsel's assistance is clearly ineffective and inappropriate.[18] There are some cases where death sentences have been imposed and finalised despite insufficient

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[14] Taiwan Alliance Against the Death Penalty, "Doubts raised over soldier's execution", 30 January 2011 at http://www.taedp.org.tw/en/story/1875

[15] Note 13 above at p.5. See also Amnesty International, China: Against the law: Crackdown on China's human rights lawyers, 30 June 2011 at http://www.amnesty.org/en/library/info/ASA 17/018/2011.en

[16] The National, Taiwan 'child rapist' cleared 14 years after his execution, 2 February 2011 at http://www.thenational.ae/news/world/asia-pacific/taiwan-child-rapist-cleared-14-years-after-his-execution

[17] Note 13 above at p.24.

[18] "The Death Penalty in Japan: A Report on Japan's legal obligations under the International Covenant on Civil and Political Rights and an assessment of public attitudes to capital punishment". The Death Penalty Project, 2013 at pp.7-8. Available at http://www.deathpenaltyproject.org/legal-resources/research-publications/the-death-penalty-in-japan/.

assistance from a defence lawyer, but there have been no cases in which a death sentence has been overturned because of the ineffective assistance of counsel.

A minimum fair trial guarantee that needs to be respected in all capital cases is the right of appeal. In the Caribbean, the availability of an automatic appeal has saved many innocent lives as the appellate courts have on numerous occasions overturned capital convictions However, in a number of Asian countries there is no mandatory right of appeal thus increasing the risk that wrongful convictions will not be remedied. Any person sentenced to death must have an effective right to appeal with effective access to each stage of the appellate process, and this must include the provision of legal assistance (in public hearings) at all stages.

China now provides for more than one appeal as part of the appellate process, 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 because the present procedures are insufficient to meet developing human rights standards. All appeals must be governed by the principles and safeguards of Article 14, and in order to ensure an effective right of appeal, the convicted person should be granted effective access to the review process with adequate legal representation in an open, public hearing.

In Japan there is no system of mandatory appeal. Appeal to a higher court against a death sentence is not automatic despite repeated recommendations by the UN Committee against Torture[19] and the UN Human Rights Committee[20]. The government of Japan insists that a mandatory appeal system is unnecessary because most defendants do exercise their right to appeal. But the numbers are troubling. Of the first 15 death sentences imposed by lay judge panels in Japan, three (20 percent) became finalised after defendants withdrew their appeals. Moreover, persons sentenced to death in Japan who withdraw their appeals tend to be executed more quickly than non-volunteers (these inmates seldom file requests for retrial or pardon either).

[19] paragraph 20, CAT/C/JPN/CO/1, 3 August 2007.
[20] paragraph 17, CCPR/C/JPN/CO/5, 30 October 2008.

In South Korea and parts of Pakistan, there is no mandatory requirement for appeal to a higher court in death penalty cases and in North Korea there is no possibility of appeal at all.[21]

Japan - where there has already been five executions in 2013 - still fails to conform to the universally agreed standards for protecting the arbitrary deprivation of the right to life through the insistence on special protection and all guarantees to ensure a fair trial beyond the protection offered in non-capital cases.[22] Capital punishment is not deemed a *different* form of punishment in Japan despite claims to the contrary. As a result, there are few special procedural protections accorded to suspects and defendants in potentially capital cases.[23] In 2009, Japan's lay judge system started and the courts have become more restrictive about what evidence can be introduced at trial. The change is largely motivated by the desire to minimise the 'burden' felt by citizens who serve as lay judges and the courts have become more likely to demand that expert testimony be presented in extremely abbreviated forms. As a result the defendant's psychological conditions and developmental problems are seldom considered by the lay judge tribunals as carefully as they should be.[24] Furthermore, in Japan there is no unanimity requirement that all judges and lay judges agree that a death sentence is deserved, nor is there even a requirement that a "super-majority" of six or seven or eight of the nine people on a panel agree before the ultimate penalty can be imposed. A bare "mixed majority"—five votes, with at least one from a professional judge—is enough to condemn a person to death. It has thus been stated that *"it is difficult to square Japan's mixed majority rule with the claim often made by Japanese officials that the country is extremely "cautious" (shincho) about capital punishment".*[25]

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[21] Note 13 above at p.31.
[22] "The Death Penalty in Japan: The Law of Silence", Report by International Federation for Human Rights, October 2008, at http://www2.ohchr.org/english/bodies/hrc/docs/ngos/FIDHJapan94.pdf; and Death sentences and executions 2012, Report by Amnesty International, at http://www.amnesty.org/en/library/asset/ACT50/001/2013/en/bbfea0d6-39b2-4e5f-a1ad-885a8eb5c607/act500012013en.pdf. See also note 18 above.
[23] David T. Johnson, "Capital Punishment without Capital Trials in Japan's Lay Judge System", *Asia Pacific Journal*, Vol. 8, Issue 52 (December 27, 2010), pp.1-38. Available at http://www.japanfocus.org/-David_T_-Johnson/3461.
[24] Note 18 above at pp.21-22.
[25] David T. Johnson, "Progress and Problems in Japanese Capital Punishment", in *Confronting Capital Punishment in Asia: Human Rights, Politics, Public Opinion, and Practices*, edited by Roger Hood and Surya Deva, Oxford University Press, 2013 (forthcoming).

The combination of a lack of effective judicial control over the use of lengthy pre-trial detention; the failure to demand unanimity among jurors before a sentence of death can be imposed; the lack of effective mandatory appeals and the need for a fair and functioning process of executive mercy places Japan in breach of its international obligations with regards to the death penalty. Japan is one of the wealthiest nations in Asia with a sophisticated and well-resourced legal system, but is yet another example of a country that fails to implement capital punishment in accordance with universally accepted safeguards. Miscarriages of justice will inevitably occur and when the death penalty is imposed it results in an irreversible injustice.

CONCLUDING REMARKS

There are many lessons that can be learned from the United Kingdom's experience of abolition of capital punishment. Most notably, a sequence of miscarriage of justice cases demonstrated that execution prevents rectification of injustice when cases of malpractice subsequently come to light. International attitudes to the death penalty have no doubt evolved with the knowledge that systems of criminal investigations are fraught with the possibility of human error and an over-hasty response to appalling crimes.

In the United Kingdom, the death penalty was effectively abandoned in 1965. Between 1966 and 1993, there were repeated attempts (13 in all) to persuade the House of Commons to reintroduce the death penalty for certain categories of murder. These attempts were all defeated, and these debates finally ended after a shocking series of miscarriages of justice in cases concerning particularly heinous crimes. The most notable were the cases of the "Birmingham Six" and the "Guildford Four", all wrongfully convicted of murder through "terrorist bombings", and Stefan Kisko, a man of limited intelligence, wrongfully convicted of a child sex murder. *"All would certainly have attracted the death penalty had it been available. This persuaded many who had previously supported the reintroduction of capital punishment to change their minds".*[26]

[26] Roger Hood, "Abolition of Capital Punishment in the United Kingdom", paper presented at a workshop in Beijing 'Global Survey on Death Penalty Reform', 25-26 August 2007, at p.13. See also Roger Hood and

De facto abolition in the United Kingdom had been achieved in 1965, the last execution having been carried out nearly 50 years ago in 1964. Nevertheless it was not until 1999, that the United Kingdom ratified Protocol No. 6 to the ECHR and Protocol No 2 to the ICCPR, thus marking the final rejection of capital punishment by international treaty. It has been noted that *"There have been no campaigns since then, in the press, by pressure groups, or in parliament to seek to reinstate the death penalty. Even the families of the victims of the most appalling types of crime, like the abduction and sexual murder of children, have expressed themselves generally as satisfied by a sentence of life imprisonment, with a guaranteed lengthy period of custody."*[27]

This rejection of capital punishment has been further fortified by a series of cases where the British Courts have posthumously reviewed the safety of the murder convictions of individuals who were executed. In 1998, the Court of Appeal quashed the conviction of Mahmoud Hussein Mattain, who was hanged in Cardiff Prison on 8th September 1952. In delivering judgement, Lord Justice Rose stated that the case had wide significance and clearly demonstrated that "*Capital punishment was not perhaps an appropriate culmination for a criminal justice system which was human and therefore fallible*." There is no reason to believe that the British police officers who dealt with the "Guildford Four" and "Birmingham Six" cases were uniquely wicked or that the prosecutors and scientists who failed in their duties in other miscarriage cases have no counterparts elsewhere in the world.

Miscarriages of justice and the execution of the innocent will occur in every system, however sophisticated, and this is of itself a reason why countries have moved towards abolition of the death penalty with increasing frequency. Pending abolition, all countries need to ask themselves whether the purest concepts of due process are routinely achieved in all capital cases. It must be accepted that the pre-condition for imposing the ultimate penalty is that the investigation, prosecution and trial have been conducted with such fairness and propriety that there can be no possibility that a mistake has been made and the wrong person convicted.

Carolyn Hoyle, *The Death Penalty: A World-wide Perspective,* (4th ed. 2008), Oxford: Oxford University Press, pp. 42-47.

[27] Note 26 above at p.14