

Effective Defence in Death Penalty Cases in Asia

Working Paper

November 2022

Acknowledgements

We are grateful to all of the organisations across Asia who generously shared their time and expertise for this project. We thank them for carrying out detailed research to inform this working paper: Our Chinese researcher; Project 39A in India; Institute for Criminal Justice Reform (ICJR) in Indonesia; Malaysian Centre for Constitutionalism and Human Rights (MCCHR) and Abdul Rashid Ismail in Malaysia; Justice Project Pakistan (JPP) in Pakistan; Transformative Justice Collective and Rocky Howe in Singapore; and Taiwan Alliance to End the Death Penalty (TAEDP) in Taiwan.

This publication has been produced with the assistance of the European Union. The contents of this publication are the sole responsibility of The Rights Practice and can in no way be taken to reflect the views of the European Union.

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Introduction

With 144 countries abolitionist in law or in practice states that retain the use of the death penalty are bucking a global trend towards eliminating the death penalty from the criminal justice process.¹ Although capital punishment is not prohibited under international law its use is heavily circumscribed by requirements for a fair trial and other safeguards. The decision to retain use of the death penalty has profound implications for a country's legal system and the capacity of its judicial institutions to protect those facing execution from a miscarriage of justice.

Criminal lawyers are critical actors in defending the rights of persons facing the death penalty to a proper scrutiny of the state's case against them and the decision to impose a capital sentence. Yet lawyers face legal, institutional, political and professional obstacles to providing an effective defence. Without high quality legal representation during all stages of a death penalty case there is a strong risk of a wrongful conviction or unjust sentence. For advocates of abolition, there is evidence that an effective legal defence reduces the number of executions and contributes to a climate of opinion in which the death penalty is increasingly seen as unacceptable.

A majority of countries in the Asia region retain the death penalty though there is marked variation between states in the frequency with which it is used. The Rights Practice has begun a programme of work with criminal justice research institutes and NGOs in seven Asian countries. Together, and with EU financial support, we have launched an initiative to look at the question of effective defence in death penalty cases in Asia. As a first step, we supported our partners to carry out research into the law and practice context for defence representation in death penalty cases.² This Working Paper introduces our approach, discusses the international legal framework for representing death penalty cases, provides an overview of the research findings and highlights issues for further investigation.³

Preliminary conclusions from the research reports suggest little progress in the Asia region since the Anti-Death Penalty Asia Network (ADPAN) published its *Unfair Trials Report* in 2011. Researchers in our study looked at the legal and institutional barriers to fair trials and the limited role international law plays in informing domestic law and practice across the region. A common thread in the research reports was inadequate legal and practical provisions to allow lawyers to provide appropriate legal assistance during the pre-trial stage. Too often the case was assumed to begin when it came to court. As researchers from Malaysia and Pakistan highlighted, the absence of lawyers during the investigation phase heightened the risk of torture and coerced confessions. The lack of time, resources and authority to investigate the alleged crime and prepare the case for trial was a frequent complaint from lawyers questioned during the study.

Lawyers clearly face formidable obstacles to playing a more effective role in representing a client facing the death penalty. Inadequate resources were a constant refrain. All countries reported

¹ Amnesty International. "Death Sentences and Executions 2021". Figure as of 31 December 2021. <https://www.amnesty.org/en/documents/act50/5418/2022/en/>

² The national research reports which informed this background document are currently in draft and are expected to be published in 2023.

³ This paper is a background document for a side event at the 2022 World Congress Against the Death Penalty in Berlin. A fuller revised report is expected to be published in 2023. Our research partners have not yet had a chance to review this working paper. Any errors are the sole responsibility of The Rights Practice.

insufficient funding to pay for relevant expertise. With most clients unable to pay for good quality representation poorly rewarded legal aid lawyers are the norm in most countries.

Resources are unlikely to be allocated to this unpopular area of law unless policy makers recognise the need for lawyers to be able to provide a defence that goes, in the words of the expanded UN Safeguards (1989), “above and beyond” their practice in ordinary criminal cases.⁴ Yet, with our lens focussed on the role of the lawyer, interviews also revealed a troubling complacency among many defence lawyers and a lack of aspiration to raise professional standards. Our research suggests that increasing the effectiveness of defence lawyers in capital cases will require raising awareness among lawyers, the judiciary and the legal system more widely of the significance of the death penalty as an irreversible punishment.

The experiences and views of lawyers in capital cases is an understudied topic. Such research sheds light on how the law works in practice: the gaps in the law and the shortcomings in institutions, including the legal profession. As the American Bar Association (ABA) experience illustrates, any attempt to raise performance standards in death penalty cases will need to be undertaken in consultation with lawyers themselves⁵.

Approach

To undertake this study, The Rights Practice chose to work with NGOs and research institutes that engage in law and policy advocacy in our seven target countries – China, India, Indonesia, Malaysia, Pakistan, Singapore and Taiwan. We wanted the research process to encourage stakeholder engagement, particularly with lawyers, and for our partners to be able to use the findings for their own in-country advocacy. At a regional level, our intention is to draw attention to patterns and common issues which may benefit from lesson sharing. We had no intention to grade countries against each other; each report indicates some positive law or practice as well as areas of concern.

Our research approach was influenced by a comprehensive study in Europe into effective defence in criminal cases and a methodology centred on international human rights obligations.⁶ We were also inspired by the work of the ABA to raise performance standards among American capital defence lawyers. A number of US studies suggest that more effective defence lawyering helps to reduce the number of executions.⁷

The Rights Practice held online consultations with partner organisations in Asia to reach a consensus on the value of undertaking this study and to agree a common research and report structure for the national studies to allow comparisons between countries. Although not all of the focus countries are state parties to the International Covenant on Civil and Political Rights (ICCPR) research partners

⁴ Additions to UN Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty as Agreed by the Economic and Social Council Resolution 1989/64. https://www.unodc.org/documents/commissions/CCPCJ/Crime_Resolutions/1980-1989/1989/ECOSOC/Resolution_1989-64.pdf

⁵ The Rights Practice. “ABA Guidelines for lawyers taking death penalty cases”. June 2021. <https://www.rights-practice.org/Event/american-bar-association-aba-2003-guidelines-for-lawyers-taking-death-penalty-cases>

⁶ Cape, Ed; Namoradze, Zara; Smith, Roger; and Spronken, Taru. *Effective Criminal Defence in Europe*. Intersentia. 2010.

⁷ See for example, Brandon L. Garrett. *End of Its Rope. How Killing the Death Penalty Can Revive Criminal Justice*. Harvard University Press. 25 September 2017.

agreed that the ICCPR, notably article 14, provided the best framework for assessing respect for fair trial rights and the UN's Minimum Safeguards for those facing the death penalty.⁸ In addition to a review of legislation, government policies and cases, researchers were encouraged to undertake surveys and interviews, particularly among criminal defence lawyers.

Continuing covid-19 related restrictions on meetings and travel limited the extent to which interviews could take place as planned. Another less anticipated limitation was limited cooperation from lawyers in several jurisdictions. Women are underrepresented among criminal defence lawyers across Asia and women lawyers were a very small percentage of the interviewees. With such a small sample it is not possible to draw any conclusions on a gender dimension to defence lawyering. A lack of transparency and the political sensitivity of the research topic, particularly in China, was a further barrier for researchers.

Fair trial rights

The right to a fair trial lies at the heart of international protections for those facing the death penalty. The principle is generally held to be part of international customary law with minimum standards set out in article 14 of the ICCPR. It is a key protection under the UN Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty (UN Safeguards) (1984) which require "all possible safeguards to ensure a fair trial at least equal to those contained in article 14."⁹ Ensuring the right in practice to a fair trial in death penalty cases is an under-examined topic. As Project 39A observes, "while the right to a fair trial in India is clearly established, the meaning of this right has largely been restricted to having legal representation with little conversation on the quality and standards of legal representation."

ICCPR article 14 states that all individuals are entitled to a fair and public hearing by a competent, independent, and impartial tribunal established by law. The Human Rights Committee, in General Comment 36 (2018) concluded that the imposition of the death penalty would be arbitrary in nature where it is imposed in proceedings that violate the fair trial guarantees provided for in article 14.¹⁰ ICCPR article 6, the right to life, states that no one shall be arbitrarily deprived of his life and no state may derogate from article 6 during any time of public emergency (article 4(2)). Justice Project Pakistan (JPP) concluded that despite Pakistan having ratified the ICCPR, the Government of Pakistan's implementation of the death penalty is arbitrary at its core and fair trial rights cannot be guaranteed.

Given the centrality of article 14 protections to our understanding of fair trials all country reviews in this study used this minimum standard to inform their discussion of the role of lawyers in death penalty cases. However, not all the Asian states included in this study have signed or ratified the

⁸ International Covenant on Civil and Political Rights. General Assembly resolution 2200A (XXI). 16 December 1966.

<https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>

⁹ Safeguards guaranteeing protection of the rights of those facing the death penalty. Approved by Economic and Social Council resolution 1984/50 of 25 May 1984.

https://www.unodc.org/pdf/criminal_justice/Safeguards_Guaranteeing_Protection_of_the_Rights_of_those_Facing_the_Death_Penalty.pdf

¹⁰ General comment No. 36 on article 6: right to life. UN Human Rights Committee. 30 October 2018. UN document: CCPR/C/GC/36. <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>

ICCPR. State parties to the convention include India, Indonesia and Pakistan. The administrative, judicial and legal steps they have taken to implement the ICCPR are reviewed periodically by the UN Human Rights Committee. Although Taiwan is not recognised in the United Nations system and cannot formally become party to international covenants, it has incorporated the ICCPR into its legal system and domestic laws. Domestic courts at all levels shall also apply the ICCPR with reference to interpretations of the Human Rights Committee. India, Indonesia and Pakistan have incorporated the convention to varying extents in domestic law.

As a signatory, though not a state party, to the ICCPR China is nevertheless obliged to act in good faith and to not act against the purpose of the convention. Neither Malaysia nor Singapore are signatories of the ICCPR; although not formally bound by the treaty the right to a fair trial will face international scrutiny in these countries as part of the extradition arrangements they enjoy with liberal democracies. In the absence of a regional human rights mechanism it is difficult for countries across Asia to develop a shared understanding of how best to protect human rights in criminal proceedings. Meanwhile, both domestic and international civil society organisations continue to campaign for all countries to ratify the ICCPR and to take steps to incorporate the Convention into domestic laws.

The extent to which fair trial rights are protected in domestic law and practice differs across Asian states. Indonesia ratified the ICCPR in 2005, and the right to a fair trial including access to a lawyer is regulated in various Indonesian national laws and regulations. However, the Institute for Criminal Justice Reform (ICJR) found that in practice these rights are not guaranteed. Their study also concluded that there were differences in the understanding of fair trial rights and effective defence in death penalty cases between groups of lawyers who had obtained their license in the years 1990-2011 (senior lawyers with more than 10 years' experience) and those who obtained their license between 2012-2022 (junior lawyers with less than 10 years' experience). Junior lawyers were more likely to understand fair trial rights in terms of international law.

In Indonesia, as many as 95% of lawyers surveyed agreed with the proposition that the Indonesian Criminal Procedure Code should be revised to strengthen the guarantee of fair trial rights protections for persons facing the death penalty.

Malaysian researchers observed that courts were reluctant to apply specific principles from the ICCPR. However, the right to a fair trial is embedded in article 5(1) of the Malaysian Federal Constitution. In addition to article 5(1), the right to fair trial is also provided in the Criminal Procedure Code, the Evidence Act and in judicial pronouncements.

Transparency

In 2006, the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, underlined the view that “transparency is among the fundamental due process safeguards that prevent the arbitrary deprivation of life.”¹¹ Without transparency in proceedings and access to information the role of the lawyer in representing their client is impeded and the risk of ill-treatment and torture increased.

“Transparency is among the fundamental due process safeguards that prevent the arbitrary deprivation of life.”

UN Special Rapporteur on extrajudicial, summary or arbitrary executions

In China, lack of transparency hinders not only lawyers in effectively defending their clients in death penalty cases, but also researchers in understanding the use of the death penalty.¹² Statistics on death penalty cases are classified as a state secret. This differs from the other countries analysed for this study where researchers had access to official national statistics on the use of the death penalty. Although Singapore publishes annual statistics on the number of executions, the government does not disclose the number of people on death row or the demographics of these individuals.

Lawyers in China are not permitted access to secondary files which may include “trial secrets”.¹³ This restricts lawyers’ access to information that may be vital for the defence of their client. Chinese legal professionals have previously called to reduce or abolish the secondary file as it contradicts calls by the Supreme People’s Court (SPC) for greater judicial transparency. In 2013, the SPC set up China Judgments Online, an online database of decisions from all levels of Chinese courts.¹⁴ However, observers have expressed concern at missing cases, notably death sentences. Our Chinese researcher noted that recently even more judgments have disappeared. In recent years Chinese courts have used “limited seating” or covid-19 controls as an excuse to restrict public access to the courtroom, including that of family members.

Issues of transparency and how this impacted on the role of the lawyer and also the families of those executed were raised by Taiwan Alliance to End the Death Penalty (TAEDP) in their report on Taiwan. They highlighted cases in which convicted defendants had not been informed of the decision to execute by firing squad until the morning of the execution. With lawyers also kept in the dark prior to the execution they had no possibility of assisting defendants in seeking special relief or pardon procedures. Families were not informed until the sentence was carried out.

¹¹ Report of Philip Alston, the Special Rapporteur on extrajudicial, summary or arbitrary executions. Transparency And The Imposition Of The Death Penalty. 24 March 2006. UN document: E/CN.4/2006/53/Add.3
<https://digitallibrary.un.org/record/572624>

¹² The Rights Practice. “Lack of Transparency on the Death Penalty Impacts Human Rights”. March 2021.
<https://www.rights-practice.org/news/lack-of-transparency-on-the-death-penalty-in-china-impacts-human-rights>

¹³ Ibid

¹⁴ Ibid

TAEDP also expressed concern at planned reforms which would reduce transparency in death penalty proceedings. Under a new lay judge system, due to be introduced in 2023, the deliberation process of the judges would not be made open to the public. There are fears in Taiwan that this new system may undermine the role of defence lawyers.

In Singapore, lawyers have raised concerns about problems accessing documents and case files relevant for those sentenced to death. The case file is only available to the lawyer on record, which poses a problem for lawyers who are seeking to review the case and represent death row inmates after an appeal. In a number of capital cases, there is also no written judgment by the Court of Appeal. There are usually minutes sheets but these are also only accessible to the lawyer on record.

Independence of Judiciary

The independence and impartiality of the court or other tribunal is essential to the conduct of a fair trial. The impartiality requirement applies both to judges and juries.

The UN Basic Principles on the Independence of the Judiciary (1985) state that “the judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.”¹⁵ The Bangalore Principles of Judicial Conduct (2002), drawn up following consultations with judges from both common law and civil law systems, include the provision that judges shall be free from “inappropriate connections with, and influence by, the executive and legislative branches of government”.¹⁶

All research reports for this study reflect concerns over a lack of independent and impartial courts. However, the extent to which the lack of impartiality impacts death penalty cases and the role of the lawyer differs. Moreover, the extent to which the issue of judicial independence can be challenged and discussed openly by civil society also varies, reflecting the different political systems in the region.

In Pakistan, 60% of survey respondents felt that public opinion, particularly in death penalty cases, impacts judges in their decision-making.

In China, the legal system is governed by Chinese Communist Party (CCP) policy and the death penalty, therefore, takes place within the context of a criminal justice system that is subject to the

¹⁵ Basic Principles on the Independence of the Judiciary. Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders. 6 September 1985. <https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-independence-judiciary>

¹⁶ The Bangalore Principles of Judicial Conduct, adopted by the Judicial Group on Strengthening Judicial Integrity. UN Office on Drugs and Crime. 2002. Para. 1.3. https://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf

party's interests. The courts are subject to CCP interference and police, prosecutors and judges all work within the same party-led system.

JPP argues that impartiality and bias within the Pakistani legal system have long been identified by lawyers and laypersons alike as a major weakness. The majority (60%) of JPP's survey respondents felt that public opinion, particularly in death penalty cases, impacts judges in their decision-making. JPP also found that 46% of respondents felt that courts faced hurdles when attempting to perform their duties free from the influence of government or private actors.

In Malaysia, the constitutional framework provides specific protections for judicial independence. For example, article 121(1) of the Malaysian Federal Constitution states that judicial power shall rest in the High Courts and in lower courts to the extent outlined under federal law. Legal provisions also set out the protection of judicial independence including a Judges' Code of Ethics (2009) which includes procedures to sanction a judge who has breached the code. However, the research report for this study raised concerns regarding both the constitutional and legal protections on judicial independence. For example, the Judicial Appointments Commission Act 2009 explicitly states that the Prime Minister has the duty to uphold the continued independence of the judiciary and directly appoints five out of nine positions on the Judicial Appointments Commission. The Prime Minister thus has great influence on judicial appointments.

Legal Assistance

Effective legal assistance is a critical component of a fair trial. The assistance must be available at every stage of the criminal proceedings and regardless of the ability to pay. ICCPR, article 14, states that all persons should be equal before the courts and tribunals which includes the right to defend oneself or through legal assistance of one's own choosing. The UN Human Rights Committee, General Comment 36, states that a "lack of effective representation involving confidential attorney-client meetings during all stages of the criminal proceedings, including criminal interrogation, preliminary hearings, trial and appeal" in death penalty cases is a violation of fair trial guarantees provided for in article 14 of the ICCPR.

An independent and ethical legal profession underpins the provision of effective representation. Governments must ensure that lawyers are able to perform their professional duties without intimidation, harassment or interference. The UN Basic Principles (1990) state that lawyers are entitled to form and join self-governing professional associations and these should be able to exercise their functions without external influence.

According to the UN Basic Principles on the Role of Lawyers, lawyers shall at all times act freely and diligently in accordance with the law and recognised standards and ethics of the legal profession.

According to our research reports from across Asia, lawyers face a number of challenges to carrying out their duties in death penalty cases independently. The role of an independent professional body

to ensure professional standards, as well as to uphold the independence of the judiciary and legal profession is critical. Institutional arrangements vary across the region. In Taiwan, the Ministry of Justice oversees the Bar Association which was set up in 1948, and is responsible for granting lawyer licenses and controlling, to a certain extent, the revocation of lawyers' licenses and disciplinary actions towards lawyers. However, the Bar Association enjoys a high degree of autonomy in operations, and the Ministry of Justice only exercises minimal influence over its work.

In Pakistan, only 60% of JPP's survey respondents felt that defence lawyers can effectively represent clients without interference from other actors. One lawyer interviewed for the purpose of this report felt that lawyers who were relatively financially stable were more independent than others. The same interviewee also felt that there is pressure from within the legal fraternity which inhibits independence and stressed the need for more minority and women's representation in the training of lawyers and appointment of judges.

In China, lawyers operate outside the CCP-led judicial system but a directive requires law firms to establish a party committee. The All China Lawyers Association (ACLA) is the official professional body for lawyers in China. Founded in 1986, the Association is directly answerable to the Ministry of Justice. Chinese lawyers are obliged to be members of the local ACLA branch and ACLA has the responsibility, each year, to renew lawyers' licenses and register law firms. This system of license renewal is used by the authorities to control and punish lawyers, especially those that take cases involving rights abuses and deemed politically sensitive.

Chinese lawyers and law firms must re-register annually, leaving them vulnerable to political pressure.

With Chinese lawyers facing obstruction meeting clients, accessing case files, and calling expert witnesses our researcher noted that lawyers and scholars in China have questioned the idea that the ACLA is intended to "safeguard lawyers' rights."

In Malaysia, the Malaysian Bar Council manages the affairs and functions of the Malaysian Bar, the largest of three bar associations. The Malaysian Bar is an independent professional body and has a total of 20,556 members. The Bar is active in defending human rights and fundamental civil liberties. Since 2006, the Bar has passed resolutions calling for the abolition of the death penalty following the imposition of an immediate moratorium on all executions. On 11 March 2012, lawyers unanimously passed a resolution at the Bar Council annual general meeting calling for capital punishment to be abolished and replaced with life imprisonment.

Equality Before the Courts

Under international law everyone should have equal access to adequate legal assistance regardless of whether they can pay for it. ICCPR article 14 provides for the right to legal assistance of one's own choice or "to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay

for it.” The government is the guarantor of counsel’s competence with the implication that the government must also ensure the availability of adequate funding for legal aid services. The 2012 United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems provide guidance for the delivery of all legal aid, including the principles of fairness, equality before the law and non-discrimination.¹⁷ The right to legal aid is recognised in Principle 1. Legal aid provides a foundation for the enjoyment of other rights.

The availability and quality of legal assistance, especially for indigent defendants, in death penalty cases is a recognised problem in all countries that continue to use the death penalty.

Although legal aid was not a focus of this study each research partner highlighted the problem of inadequate access to good quality legal aid for vulnerable groups, including individuals with mental disabilities. Problems cited include lack of information about how to access legal aid, insufficient funding and low levels of remuneration for legal aid lawyers. Individuals were being left without legal assistance for part, or all, of the criminal process.

In Pakistan, JPP has noted that while institutional mechanisms for legal aid exist, most of the time lawyers are either young and, therefore, inexperienced or they lack competence. According to JPP, in a country like Pakistan, where a substantial portion of the population lives under the poverty line, the existence of pro bono legal assistance is crucial in ensuring the delivery of justice. All six lawyer interviewees in JPP’s study stated that they were not aware of any functioning legal aid schemes.

The Constitution of Pakistan enshrines the right to legal aid in article 4 and article 10-A. As well as the Constitution, and domestic law, there are also institutional mechanisms to provide legal aid to those who cannot afford legal representation. One such mechanism is District Legal Empowerment Committees (DLEC) which were established in July 2011 by the Law and Justice Commission of Pakistan. While the DLEC has been functional for a decade, a fact sheet published by the Law and Justice Commission of Pakistan stated that almost 95 percent of the funds have not been utilised. The reasons are unclear: JPP suggests problems may include poor publicity, absence of selection criteria, lack of oversight and performance reviews, and delays in transferring funds.

All six interviewees in Justice Project Pakistan’s (JPP) study stated that they were not aware of any functioning legal aid schemes in Pakistan.

In India, it was noted that where the State did provide indigent capital defendants with legal representation the quality was poor. Either lawyers were found to be young, inexperienced and

¹⁷ United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems. Adopted by the General Assembly. 2012. <https://digitallibrary.un.org/record/748365>

incompetent or they were only brought in after the trial proceedings had started which disadvantaged their clients. Lawyers on legal aid panels receive remuneration of 4,000 INR to 7,000 INR per case (EUR 49 to EUR 86). All eight legal aid lawyers interviewed for Project 39A's report stated that this amount was grossly insufficient and that it ought to be increased. Legal aid lawyers are also not reimbursed for costs they incur over the course of the trial. Similar problems face legal aid lawyers in China.

ICJR also raised concerns regarding the legal aid system in Indonesia. According to the Criminal Procedure Code, article 56(1) and (2), if the defendant is charged with a crime punishable with the death penalty she must be provided with legal assistance free of charge. However, ICJR found that even though such provisions exist they merely function as administrative rules and are not practical in ensuring legal aid is available for all. Remuneration for legal aid cases is considered low. The legal aid budget is provided by the state to legal aid organisations. The budget for the handling of each criminal case is a maximum of IDR 8 million (EUR 500).

ICJR found evidence of indigent individuals sentenced to death being left without legal assistance. From research carried out in 2019, based on 306 court decisions (100 cases and 118 defendants) at the investigation stage, only 11 suspects were known to have been assisted by legal counsel, and nine received no assistance. For the remaining 98 defendants it is not known whether or not they had legal counsel. ICJR also found that there are no domestic regulations which regulate the quality of legal representation in legal aid cases.

In China, the Chinese Criminal Procedure Law, article 34, states that the police, procuratorate and courts shall notify the legal aid agency to provide a lawyer in cases where a criminal suspect or defendant faces the possibility of life imprisonment or the death penalty and they have not appointed anyone to defend them. Legal aid centres, under the local administrative level of the Ministry of Justice, are responsible for the provision of legal aid, either directly through lawyers working for the centre or, more commonly, through law firms contracted by the legal aid centres. However, Chinese lawyers and legal scholars report poor quality representation and inadequate levels of funding. The families of some defendants described their experience of legal aid lawyers who show little interest or motivation in the case.¹⁸

Poor families in China told of borrowing money from relatives in order to pay for the services of a lawyer rather than rely on legal aid.

A Legal Aid Law came into effect in China in January 2022. Article 25 introduces legal aid at the death penalty review stage and article 26 requires that lawyers appointed by legal aid institutions to provide legal aid in death penalty cases should have three or more years' experience.

¹⁸ The Rights Practice. "Respect for Minimum Standards? Report on the Death Penalty in China". October 2020. <https://www.rights-practice.org/news/respect-for-minimum-standards-report-on-the-death-penalty-in-china>

Effective Defence

At all stages of proceedings

The presence of a legal counsel in death penalty cases is not sufficient. International law demands that counsel is both effective and involved at all stages of proceedings. In General Comment 36 (2018) on the right to life, the UN Human Rights Committee stated that “in cases involving capital punishment, it is axiomatic that the accused must be **effectively assisted** by a lawyer **at all stages of the proceedings** [emphasis added].” The General Comment builds on the right, set out in the UN Safeguards, to **adequate legal assistance** at all stages of the proceedings.

Pre-trial stage

The participation of lawyers at the initial investigation stage of a death penalty case, following arrest and prior to police interviews is crucial. The involvement of a lawyer at the earliest stage possible is an important safeguard against the risk of torture and coerced confessions. Early involvement also allows lawyers to conduct their own investigations. However, researchers from all the countries in our study reported obstacles that prevented lawyers playing an effective role in the pre-trial stage.

In Taiwan, which has a civil law system, defence lawyers are, in principle, allowed to meet and correspond with their clients in custody and the right to do so may only be restricted where there are concerns with obstructing witnesses or the collection of evidence. However, the Code of Criminal Procedure does not grant defence lawyers the right to investigate the evidence. During the investigation stage, if the defence lawyer wants to seek evidence or investigate facts, they must make their case to the investigating authorities. The prosecutors conduct and lead the investigation including obtaining evidence, conducting searches, inquests or commissioning experts. Defence counsel can only be present at the scene when the prosecution carries out their investigation. Although defence lawyers in Taiwan can investigate evidence and call witnesses at the trial stage, lawyers, interviewed by TAEDP, felt this was too late. Not being fully involved at the investigation phase meant some defendants did not receive crucial legal assistance prior to police questioning or during the prosecutor’s investigations and lawyers had less time to prepare their client’s case.

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In Pakistan, there are no laws or customs providing an accused person with legal representation at the police investigation phase. Defence lawyers may face difficulties accessing their clients at this stage. Particularly for indigent defendants, their first opportunity to access a lawyer will be when

they begin interacting with courts. Prison visitation is limited not only by jail staff but also lawyers themselves. Of the lawyers surveyed by JPP, 57% stated that they regularly visit their clients in prison, while 23% of respondents stated that they ‘never’ do so.

Similarly, in India, the right to legal representation during trials is provided in the Indian Constitution, articles 22 and 39-A, but the right to be represented by a lawyer at the pre-trial stage is not. The Constitution only guarantees the right to ‘consult’ a lawyer. This allows the police to violate the accused’s right against self-incrimination by using torture and other coercive methods to extract confessions (often false). Out of the 20 death penalty lawyers interviewed by Project 39A, only three lawyers visited their clients in prison. All lawyers preferred to meet their clients in court premises on the days of court hearings.

In Malaysia, there are several limitations to the lawyer being involved in the initial arrest stage of a death penalty case. The Malaysian Federal Constitution, article 5(3) provides an accused person the right to be represented by legal counsel of their choice. The right to be defended by an advocate is also included in the Criminal Procedure Code, Section 255. However, our researcher found that in most cases, a suspect is not given free legal representation immediately upon arrest. The police may also lawfully deny legal representation on grounds that it would cause undue interference with investigations. In a 2006 report by SUHAKAN, the Human Rights Commission of Malaysia, the authors argue that the presence of legal counsel during the period of arrest is essential to prevent police brutality during detention. It is also necessary in order to remove any challenges raised in respect of the voluntariness of the statement given by the suspect during police investigation.

In Malaysia, the presence of legal counsel during the arrest period is essential to prevent police brutality during detention... However, the involvement of a lawyer at this stage is subject to several limitations.

Appeals stage

Under international law, free legal assistance must also be provided for all appeals and constitutional challenges. The ICCPR, article 14, states that “everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law”. International materials on the UN Safeguards set out four practices characteristic of an effective appeals process in death penalty cases: (1) substantive review of all matters of law and fact; (2) right to counsel during review; (3) right to appeal for amnesty, pardon, or commutation; and (4) stay of execution during review. States must take all feasible measures in order to avoid wrongful convictions in death penalty cases.

National research reports in our study raised several concerns with the right to appeal for those facing the death penalty. Some individuals were not granted the right to appeal, while others had no access to a lawyer when their case was reviewed. In Pakistan, the right to appeal is granted in article 14(5) of the Constitution of Pakistan. However, the appeals process is extremely slow. For example, in the case of Muneer Hussein, whose appeal was heard only after six years. Of JPP’s survey

respondents 13% listed the right to appeal in criminal cases as a right that is seldom upheld by the criminal justice system in Pakistan.

In Singapore, lawyers face significant challenges when trying to make late-stage appeals. In 2018, new amendments were made to the Criminal Procedure Code that made it harder to re-open cases or challenge findings of the court of appeal. The amendments also introduced personal liability for lawyers and made provisions for personal cost orders in which lawyers can be fined. Lawyers are also required to sign affidavits confirming that they believe their applications have merit before making late-stage applications to re-open criminal cases that have been decided by the appellate court. Singaporean lawyers have expressed concern about these requirements and have said that they seriously impede lawyers from accepting last minute instructions from death row inmates or their families. On 7 November 2022, a new bill “Post-appeal Applications in Capital Cases” underwent its first reading in Parliament. This bill introduces further amendments to the Supreme Court of Judicature Act and the Criminal Procedure Code. Lawyers argue that this bill establishes more obstacles for lawyers bringing post-appeal applications, and allows courts to find lawyers guilty of “abuse of process” for attempting to apply for late-stage appeals.

Adequate Time and Resources

ICCPR article 14 requires that defendants have the right to adequate time and facilities for the preparation of their defence and to communicate with the counsel of their choosing. Lawyers across Asia hold different understandings of what is considered “adequate time”, but there were common concerns at courts refusing to postpone trials and defence counsel being given insufficient time to meet their clients or collect evidence.

For example, in Pakistan, JPP found that, at times, courts refused to postpone trials even if the defendant had not yet met with counsel. A UN Human Rights Committee report on Pakistan noted that sometimes the situation is so dire that the lack of adequate time has resulted in counsel being unable to determine which witnesses to call.¹⁹ At times the defendant’s lawyer may face difficulties in accessing all the relevant documents due to a culture of bribery prevalent within Pakistan. All the lawyers interviewed for this study identified “access to case files and relevant documents” as a major obstacle in their court cases. The need to bribe court officials is a problem. A majority of interviewees identified accessing experts to provide evidence as an obstacle.

In India, the Supreme Court has published guidelines related to legal representation in death penalty cases. Counsel must be given sufficient time to prepare. All 20 lawyers interviewed by Project 39A agreed that they had adequate time to prepare their defence during the conviction stage. However, interviewees also reported that meetings with clients before court hearings would range from 10-25 minutes. Few of the lawyers met with the defendants in prison.

¹⁹ ‘Follow Up Report on Pakistan: Under Para. 18, CCPR/C/PAK/CO/1, 120th Session of Human Rights Committee’. Justice Project Pakistan, 2019.
https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/PAK/INT_CCPR_NGS_PAK_37168_E.pdf.

Expert evidence

The UN Safeguards stipulate that capital punishment can only be imposed when the guilt of the person is based on “clear and convincing evidence leaving no room for alternative explanation of facts.” ICCPR article 14 underlines the parties’ right to examine hostile witnesses as a significant element of a fair trial. The UN Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions demands that, “Defendants must be presumed innocent until their guilt has been proven without leaving any room for reasonable doubt, in application of the highest standards for the gathering and assessment of evidence. All mitigating factors must be taken into account”.²⁰ Practice in the use of expert witnesses to assist the court in the determination of guilt varies across Asia and in many countries the defence have no right to call their own experts.

In India, defence lawyers may seek the assessment or advice of experts with certain evidence, but this is rarely done at the trial stage of a death penalty case. None of the 20 death penalty lawyers interviewed by Project 39A engaged with evidence in any of their cases. In the 20 cases examined for this study, DNA evidence was used to convict the accused in seven cases and in one of these cases it was the sole piece of evidence on which the conviction was based. Defence lawyers in these cases did not challenge this evidence. The lawyers revealed that they believed that DNA evidence is unimpeachable evidence. In only one case, the defence lawyer suspected that his client probably had mental health issues. However, no mental health diagnosis was conducted and nor was this argument presented before the court.

In India, out of the 20 cases examined, in only one case, the defence lawyer suspected that his client probably had mental health issues. However, no mental health diagnosis was conducted and nor was this argument presented before the court.

In Taiwan, lawyers interviewed by TAEDP felt that substantive and effective defence in death penalty cases requires expertise in psychiatry, psychology and social work. However, lawyers often lack expertise beyond the legal field and may not have access to assistance of experts from other professions. According to the current Taiwanese Code of Criminal Procedure, defence lawyers are not allowed to select expert witnesses at their own discretion. Instead, they must request the prosecutor or the court to select experts or authorities to carry out the evaluation, and the prosecutor or the court will decide whether or not to do so.

²⁰ Extrajudicial, summary or arbitrary executions: Report by the Special Rapporteur. UN document: E/CN.4/1997/60, 24 December 1996, para.81. <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G97/100/51/PDF/G9710051.pdf?OpenElement>

Interpretation

Adequate resources are also an issue with regard to the provision of interpretation. To ensure a fair trial, a suspect must “be informed promptly and in detail in a language in which he understands of the nature and cause of the charge against him” (ICCPR, article 14). In the Strengthening of the UN Safeguards, countries retaining the death penalty are encouraged to provide interpretation or translation for defendants who do not sufficiently understand the language used in court to ensure they are fully informed of all charges against them and the content of the relevant evidence deliberated in court.²¹ Interpretation is particularly important for police interviews in the investigation stage after which translation errors can be hard to correct.

Our study revealed inadequate translation services for foreign nationals as well as minority groups in death penalty cases across Asia. In Taiwan, the Code of Criminal Procedure guarantees vulnerable defendants the right to be assisted by an interpreter, and provides for the appointment of an assistant and the suspension of a trial for defendants with mental disorders. However, TAEDP found that in practice, the investigating and trial authorities lack full-time judicial interpreters, and therefore rely heavily on contract interpreters without complete professional training. They are generally contacted at short notice and receive a small amount of remuneration. The current law does not provide a mechanism to guarantee that a defendant who is not proficient in Chinese will be assisted by an interpreter when communicating with her defence lawyer. If translation is needed, the defendant must hire an interpreter at her own expense.

An ICJR survey in Indonesia showed that of 23 defendants who required an interpreter, four received no assistance at all during proceedings. In Asian countries that retain the death penalty for drug crime a large number of foreigners face prosecution and will need interpreters. As with legal assistance, the competence and quality of interpretation was an issue. In one example, a Filipino defendant was provided with an English translator although she only understood Tagalog (Filipino language).

Our Malaysian researcher also found that access to interpreters for those facing the death penalty was inadequate. Although the right to interpretation in an open court is guaranteed in the Malaysian Criminal Procedure Code there are no guarantees that it will be available outside the courtroom. Whenever evidence is given in a language not understood by the accused, and he is present in person, it should be interpreted in open court in a language which he understands. However, our researcher found that the Court can find it difficult to secure competent interpreters with many unfamiliar with legal language. The interpreters will normally understand English but lawyers’ submissions or witness testimony is generally given in Malay. Thus, the accused may not understand all the evidence against him or the proceedings. With interpretation not guaranteed outside the courtroom, the support provided to foreign nationals to prepare their defence varies greatly and will largely depend on resources made available by their embassy.

²¹ Strengthening of the Safeguards as Agreed by the Economic and Social Council Resolution 1996/15. <https://www.un.org/ecosoc/sites/www.un.org.ecosoc/files/documents/2020/resolution-1996-15.pdf>

Sentencing and mitigation

Evidence from the US illustrates the importance of the defence team being adequately prepared for sentencing and mitigation.²² With defence and official resources largely focussed on determination of guilt, lawyers often give little thought to the preparation they need to do to prepare mitigation arguments that support alternative sentences. Project 39A interviews with Indian lawyers revealed that collecting mitigating information for the sentencing stage of the case was entirely absent from the lawyers' legal strategy.

Effective defence during sentencing often depends on the ability to persuade the court that the defendant, despite being found guilty, does not merit the use of the death penalty. The defence strategy should address both whether the crime meets the highest threshold of severity as well as whether there is mitigation evidence that could persuade the court not to impose a death sentence. As Taiwanese lawyers observed, the ability to make effective arguments in mitigation often depends on psychology and social work skills to help present the defendant in a sympathetic light.

Going “above and beyond” non-capital cases

In the 1989 Additions to the UN Safeguards there is a requirement on counsel to go “above and beyond the protection afforded in non-capital cases”. As part of The Rights Practice's longer term interest in encouraging performance standards for capital cases in Asia, our study sought to understand whether defence lawyers viewed their role in defending death penalty cases as distinctive. While some of the lawyers interviewed or surveyed said they did treat death penalty cases differently, others did not distinguish between death penalty eligible and other serious criminal cases. In countries with few executions lawyers may assume that there is little chance of a death sentence.

Taiwan lawyers reported that they treated death penalty cases differently in terms of their mentality and preparation. ICJR also found that among the lawyers they surveyed in Indonesia, the majority of respondents (88.7%) agreed or strongly agreed that defendants facing the death penalty should be given a higher standard of protection of fair trial rights than defendants in other criminal cases. A small minority disagreed; one interviewee argued that “whether he is facing the death penalty, whether he is sentenced to life, or punished for ordinary crimes... If we read the international bar association's code of conduct, there has never been a distinction in the administration of justice ... There is not a valid argument for different treatment. When it comes to strategy, the strategy is the same. If it is the quality of the assistance, it is also the same.”

Project 39A interviewed 20 Indian trial court lawyers who defend the accused at the first level. None of the lawyers treated death penalty cases differently from other serious cases. They placed greater focus on the conviction stage of the trial rather than the sentencing stage. The overwhelming justification for this, as stated by 11 lawyers, was that it is the duty of the lawyer to ensure that they mount the best possible defence for their client so that no innocent person is wrongfully punished and justice is delivered to the accused as well as the victim.

²² O'Brien, Sean D, “Capital Defence Lawyers: The Good, the Bad and the Ugly.” 105 Michigan Law Review 1067 (2007). <https://repository.law.umich.edu/mlr/vol105/iss6/3>

Lawyers' teams

There is evidence to support the view that a team approach is one of the most successful ways to help lawyers go “above and beyond” in capital cases. ABA Guidelines established minimum performance standards for lawyers taking death penalty cases in the United States. Experts have agreed that the promotion, under the guidelines, of legal teams, which can bring a range of experience and expertise to life and death cases, has brought about the most improvement.

The use of legal teams in death penalty cases in Asia appears to be limited. In interviews conducted by TAEDP, Taiwanese lawyers reported that death penalty cases were complex, requiring special attention to the sentencing phase. They felt that without a group of lawyers the workload would be overwhelming and it would be difficult to provide an effective defence. The lawyers also felt it would be difficult to achieve equality of arms between the defendant and the prosecution team. The existence of a team would also affect the lawyer's willingness to take on the case. In Taiwan, teams also provide an opportunity for experienced lawyers to pass on their knowledge and skills to those representing capital cases for the first time.

In China, wealthy clients may be able to hire a team of lawyers to help at every stage of a death penalty case and offer compensation to victims. However, indigent defendants will not benefit from such a range of experience and can only hope that their legal aid lawyer is motivated.

There is a lack of professional training for lawyers across Asia specifically on the death penalty. However, in some countries civil society organisations fill a gap where official providers fall short.

Training

Our survey asked researchers to explore the provision of post-qualification training. With defence lawyers expected to go “above and beyond” in death penalty cases there is a need for death penalty specific training. Researchers, however, found that, across Asia, there is a lack of professional training for lawyers focussing on the death penalty. Death penalty specific training is most likely to be unavailable in countries where the death penalty is very rare and lawyers see little need to spend time developing such skills. In some countries, civil society organisations help to fill a gap where the profession or official providers fall short. In China, where there is little space for an independent civil society to advocate on criminal justice and human rights, the provision of additional training is far more difficult.

JPP argues that in Pakistan, despite the establishment of the Pakistan Bar Council and the Provincial Bar Councils in 1973, there is a lack of ongoing professional and ethical training for lawyers. Some lawyers surveyed report that the Punjab Bar Council holds training sessions occasionally. However, the fact that most lawyers are not aware of these training sessions reflects failure on the part of the Bar Councils who are responsible for their members. In the absence of training provided by the Bar, NGOs have tried to fill the gap.

Similarly, in Taiwan, civil society organisations such as TAEDP work with the Legal Aid Foundation (a non-governmental organisation) to deliver training and select appropriate lawyers to take cases. There are no minimum qualification requirements, in current laws and regulations or the code of ethics, for lawyers taking death penalty cases in Taiwan.

Our researcher in China also found that ACLA does not provide specific training on how to handle death penalty cases although some law firms do. The Lawyers Law (2008) requires that lawyers must go through a one-year internship in a law firm and attend specified training before applying to practice. Since the pandemic much of the training has been conducted online. The training content includes eight learning modules for a total of 200 hours; only 20 hours focus on standards of practice and 120 hours on the “practice of a lawyer”. The remaining hours focus on CCP history, principles, policies and Xi Jinping Thought.

Performance standards

As part of our project to look at the question of effective defence for those facing the death penalty in Asia we asked researchers to look at whether there were relevant performance standards or other professional guidelines and to explore whether there was an interest in developing standards for death penalty cases. In 2003, responding to concerns at poor quality defence representation in capital cases, the ABA published updated guidelines for US lawyers taking death penalty cases. This initiative has resulted in a comprehensive set of performance standards and training programmes.²³ American scholars argue that better quality defence representation has contributed to the decline in the use of the death penalty in the U.S.

In none of the countries participating in our study were there specific guidelines for lawyers in death penalty cases.

In none of the countries participating in our study were there specific guidelines for lawyers in death penalty cases. In Pakistan, standards are applicable to all practicing lawyers, but the Bar Council does not provide guidelines for lawyers practicing criminal law, or more specifically, those dealing in cases where the maximum punishment is the death penalty. JPP also found that the guidelines provided by the Bar Council are extremely vague. When interviewees were asked about a code of conduct and its enforcement, they shared little evidence of implementation. Many lawyers argue that while these rules or guidelines exist on paper, the Bar Council does not enforce these standards adequately, thereby undermining the efficacy of the Pakistani criminal justice system.

In China, national and local lawyers’ associations have issued guidelines for handling criminal cases but they do not promote specific guidelines for handling death penalty cases. The ACLA produced

²³ American Bar Association (ABA). Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases. 2003.
https://www.americanbar.org/groups/committees/death_penalty_representation/resources/aba_guidelines/2003-guidelines/

“Rules on the Handling of Criminal Cases by Lawyers” (2000) in order to regulate the handling of criminal cases and guide lawyers’ defence, but there is only one chapter focused on defence work in death penalty cases. Following ABA engagement with Chinese counterparts there was interest in several provinces in developing standards for death penalty cases. In around 2010, lawyers’ associations in Shandong, Henan and Guizhou formulated “piloting” defence guidelines for death penalty cases. These pilot guidelines provided suggestions on the selection of defence strategies, advice on operational issues including interviews, reading files, investigation and evidence collection as well as challenges for the defence during first-instance, second-instance and review procedures, and risks to lawyers. Some scholars argue that the pilots played a positive role in improving defence quality, but it seems that nothing has happened after the pilot projects ended.

For many lawyers the topic of performance standards was a sensitive issue. More participatory research among lawyers is needed to understand the sensitivities, but the issue highlights concerns that go well beyond the motivation and performance of lawyers to include obstacles facing lawyers in the criminal process, low remuneration rates and lack of support from their professional bodies.

Lawyers in Indonesia, surveyed by ICJR, were very supportive of the idea that the Bar associations should establish specific guidelines on providing effective defence in death penalty cases. Lawyers and judges in Taiwan, interviewed by TAEDP, however, felt that there was no need, at this stage, to establish a code of ethics or guidelines specifically for taking death penalty cases. Lawyers are guided by the general Lawyers’ Code of Ethics and there are no guidelines regarding criminal cases. Lawyers observed that there was no comprehensive training or education programmes for defence lawyers in Taiwan so requiring them to adhere to a higher code of ethics or defence guidelines would be unfair. However, lawyers did note that two lawyers had been disciplined by the Legal Aid Foundation for providing poor quality pleadings in a death penalty case, with one also dismissed from his legal aid job.

Defence lawyers in Taiwan felt that there was a lack of comprehensive training and education programmes so requiring them to adhere to a higher code of ethics or defence guidelines [in death penalty cases] would be unfair.

Conclusion

The lack of a regional human rights mechanism is an obstacle to developing a common discourse on the human rights implications in Asia of using the death penalty. In the absence of such a mechanism The Rights Practice and our partners in Asia hope that sharing experience across the region will stimulate debate on the use of capital punishment and establish higher expectations of the criminal justice system within retentionist countries. Decisions to introduce a moratorium or take other steps to reduce the use of the death penalty lie with each country’s national authorities, but we believe that developments and trends in the region can inform public understanding and shape the climate for policy making.

There are limitations to comparative research on defence lawyering in death penalty cases. A review of laws, policies and practice cannot tell the whole story of the multiple cultural, historical and political factors that also influence the decision to retain and use the death penalty. Nevertheless, we hope that by shedding some light on the role of the lawyer and the obstacles that prevent him (it usually is him) providing a more effective defence we can help open up important conversations among lawyers, with lawmakers and the judiciary.

It is critical that lawyers are part of any conversation to raise performance standards. Researchers reported difficulties securing interviews with lawyers. While covid-19 restrictions were a factor, a reluctance to be interviewed may also reflect unfamiliarity with social science research methodologies and a degree of defensiveness among lawyers. The lack of continuous post-qualification professional training, particularly on specialist topics such as the use of the death penalty, limits the opportunities for lawyers to reflect critically on the law and their own performance. Research from the US demonstrates the importance of lawyers understanding the specific challenges of death penalty cases. Lawyers convinced they could secure a not guilty verdict were unprepared for the critical sentencing hearing. NGOs in several countries are plugging an important gap in awareness of these specific challenges and the need to go above and beyond in life or death cases.

Our study supports the case for more resources to support lawyers. More funding is needed to ensure lawyers have adequate time and facilities to prepare the defence case, including being able to play a full role at each phase of the criminal proceedings. Without adequate funding most lawyers cannot adopt the kind of team based approach that can draw on all relevant expertise both to challenge the evidence and make a compelling case for mitigation.

The poorest are disproportionately impacted by the death penalty. Our preliminary findings suggest the inadequacy of most legal aid systems in Asia particularly where the death penalty is involved. During the next phase of our research we plan to look at legal aid in more detail and try to build the political case for more support.

Finally, while more resources – both money and people – are necessary, the legal (and political) context in which lawyers work is also critical. This paper tries to raise awareness of some of the legal and institutional obstacles that lawyers face when representing persons facing the death penalty. These findings will be discussed at a side event at the World Congress Against the Death Penalty in Berlin in November 2022. We expect to publish a fuller revised report in the coming year.