

Is Public Opinion a Justifiable Reason Not to Abolish the Death Penalty? A Comparative Analysis of Surveys in Eight Countries¹

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¹ This paper is an updated and expanded version of an unpublished address entitled “Abolition of the Death Penalty: Public Opinion and Human Rights” which was delivered by the author at a Plenary Session of the International Conference against the Death Penalty on *Life and Death in Taiwan*, held in Taipei on 6-7 December, 2014. It has been rewritten in honor of Frank Zimring, whose writings on the subject of this essay have been of great importance to the debate on the future of capital punishment for over 30 years. During that time, he has discussed with characteristic insight the role of public opinion in all its aspects. See FRANKLIN E. ZIMRING & GORDON HAWKINS, *CAPITAL PUNISHMENT AND THE AMERICAN AGENDA* 13-23 (Cambridge University Press 1986); see also Franklin E. Zimring, *Is State Execution in Asia Different and Why?* in *CONFRONTING CAPITAL PUNISHMENT IN ASIA* 13, 13-22 (R. Hood & S. Deva eds., Oxford University Press, 2012).

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Introduction

Most, if not all, retentionist countries that retain capital punishment—both those that continue to enforce it by carrying out executions and those that maintain it on their statute books but do not enforce it—are parties to the International Covenant on Civil and Political Rights (ICCPR), Article 6(1) of which protects the right of every human being not to be arbitrarily deprived of life, and Article 7 protects everyone from torture or “cruel, inhuman or degrading treatment or punishment.” Certain restraints in Article 6 are intended to try to ensure that those countries that still retain the death penalty confine its use to “the most serious crimes;” to adults over the age of 18 at the time of committing the capital offence; and to women who are not pregnant. Further safeguards were introduced from 1984 to protect new mothers, the insane, and those who are not mentally competent, and to ensure that procedural safeguards guarantee a fair trial and access to appeal and clemency.³ However, nothing in the ICCPR or the UN Safeguards was meant to legitimize the continuance of the use of the death penalty, whether enforced by executions or not. Article 6(6) makes it clear that “Nothing in this article [All of Article 6] shall be invoked to delay or to prevent the abolition of capital punishment.”

Nevertheless, many (but a diminishing number) of the countries which continue to support the use of the death penalty, whether they have ratified the ICCPR or not, reject the claim that it is a violation of human rights. They maintain that it is “first and foremost an issue of the criminal justice system and an important deterring element vis-à-vis the most serious crimes”... to be “determined by each State, taking fully into account the sentiments of its own people, the state of crime and criminal

³ Economic and Social Council Res. 1984/50, Safeguards Guaranteeing the Protection of the Rights of Those Facing the Death Penalty (May 25, 1984).

policy.”⁴ It is clear that “sentiments” encompass and are usually indicated by what is more often referred to as public opinion. To take a few examples: in December 2012, the Justice Minister of the Liberal Democratic Party of Japan, Sadakazu Tanigaki, was reported to have said; “The death penalty has strong support among victims’ relatives and the public . . . I think the death penalty is necessary.”⁵ In October 2014, Taiwan’s Justice Minister, Luo Ying-shay, was reported to have voiced her personal support, as a Buddhist, for abolition at a meeting of the Judiciary and Organic Laws and Statutes Committee, but asserted that because about 70 percent of the public approve of capital punishment, “one should listen to the public’s opinion instead of acting on one’s own opinions.”⁶ In September 2016, Dr. Balakrishnan, the Foreign Minister of Singapore, in a moderate speech at the UN emphasized his country’s view that: “Every State has the sovereign right, indeed a sovereign duty, to decide for itself what works, and to take into account its own circumstances. In Singapore, there are very high levels of support on the part of our people for the death penalty to remain on our books.” However, he went on to say: “But we do not take this support for granted and from time to time, we will continue to review our legislation and make changes

⁴ This is the justification of states which have recorded their “persistent objection to any attempt to impose a moratorium on the use of the death penalty or its abolition,” in a *Note Verbale* sent to the UN Secretary-general after each occasion since December 2007 that the General Assembly has passed by a majority a resolution entitled “Moratorium on the use of the death penalty.” For the latest *Note Verbale*, see *Promotion and Protection of Human Rights: Human Rights Questions, Including Alternative Approaches for Improving the Effective Enjoyment of Human Rights and Fundamental Freedoms*, in *Note Verbale* dated Sept. 7, 2017 from the Permanent Mission of Egypt to the United Nations addressed to the Secretary-General, U.N. Doc. A/71/1047 (Sept. 13, 2017), 3-4. It should be noted that 58 countries signed the *Note Verbale* after the initial vote on the moratorium resolution in December 2007, but only 32 did so after the vote on the resolution in December 2016. For information on whether a country that retains the death penalty has signed the *Note Verbale* see www.deathpenaltyworldwide.org.

⁵ “More Prisoners on Death Row Than at Any Time Since 1949,” *The Asahi Shimbun*, 31 Dec. 2012. See also MAI SATO & PAUL BACON, THE DEATH PENALTY PROJECT, THE PUBLIC OPINION MYTH: WHY JAPAN RETAINS THE DEATH PENALTY 15 (2015) (“The Japanese government . . . makes a theoretical claim that the decision to retain or abolish should depend on public opinion, based on the idea of popular sovereignty and the importance of maintaining the legitimacy of criminal justice agencies and criminal law”).

⁶ *Taiwan: Justice Minister voices support for the death penalty to be repealed, unless the majority opinion*, HANDS OFF CAIN (Oct. 9, 2014) available at <http://www.handsoffcain.info/notizia/taiwan-justice-minister-voices-support-for-the-death-penalty-to-be-repealed-unless-the-majority-opinion-18308487>.

according to our circumstances.”⁷

In contrast, those who support abolition maintain that although public opinion is to be respected, it cannot be regarded as crucial in deciding this issue. Although the majority of citizens may support the death penalty, this may simply be because they have become socialized and conditioned to accept it as a legal and cultural norm, the justification for which they have barely considered further. Indeed, they may base their views on misinformation and misconceptions about the administration of the death penalty. In particular, they may be unaware of evidence relating to whether it can be enforced without uncorrected error leading to its infliction on innocent or undeserving persons; on whether it can be administered equitably, proportionately and without discrimination; and on whether there is valid evidence that it has a uniquely effective general deterrent effect beyond that of any lesser threatened punishment. Thus, views might change as people become more able to make an informed appraisal of the evidence.

As is well known, the great increase in the number of countries that have abolished the death penalty since the end of the 1980s has not been achieved as a result of the majority of the general public in these countries *demanding* abolition, or even supporting abolition at the time. Political will and judicial support— what Frank Zimring has characterized as “leading from the front”— have been the keys to abolition.⁸ Abolitionist nations hold steadfastly to the view that popular sentiment alone should not determine penal policy. They believe that the issue should be determined by political leaders who can exercise their judgment based on an informed and rational appreciation of the case for abolition, judged in the light of contemporary human rights standards. Thus, even though the South African Constitutional Court accepted, in the case of *State v. Makwanyane* in 1995, that the majority of South Africans were in favor of the death penalty in extreme cases of murder it nevertheless held it to be unconstitutional.⁹ As William Schabas pointed

⁷ Press Release, Sing. Ministry of Foreign Aff., Transcript of Minister Vivian Balakrishnan’s Intervention at the High-Level Side Event at UNGA – “Moving Away from the Death Penalty: Victims and the Death Penalty” (Sept. 22, 2016), <https://www1.mfa.gov.sg/Newsroom/Press-Statements-Transcripts-and-Photos/2016/09/MFA-Press-Release-Transcript-of-Minister-Vivian-Balakrishnans-Intervention-at-the-HighLevel-Side-Eve>.

⁸ ZIMRING & HAWKINS, *supra* note 1, at 22. *See also* HOOD & HOYLE, *supra* note 2, at 428-29 (providing some examples of political leadership).

⁹ *S v Makwanyane and Another* (CCT 3/94) [1995] ZACC 3 at para 88.

out, to make human rights guarantees “contingent on public opinion, one of the very forces it is aimed at counteracting or neutralizing,” would “contradict the *raison d’être* of human rights law.”¹⁰ Abolitionists hold that it is the duty of the State not to respond to the vengeful sentiments and demands of a vociferous majority so as to satisfy and reinforce such emotions. Rather, it is to ensure that even those who commit the very worst of crimes must have their right not to be treated inhumanely protected by the State and its organs of criminal justice. In fact, public opinion is shaped by the use made of capital punishment, not vice-versa, as demonstrated when executions become no longer legitimated by the state. As Franklin Zimring and Gordon Hawkins put it in 1986, illustrating their argument with convincing data on the decline in public support for the death penalty in Germany from 74% in 1948 prior to abolition in 1949, to 26% thirty years later in 1980: “...once abolition is accomplished, the death penalty, although previously the subject of wide-spread debate, ceases to be a pressing public issue.”¹¹

Empirical Evidence

The purpose of this article is to shed light on these issues from the findings of public opinion surveys carried out in eight retentionist countries (named below) which have continued to maintain that abolition is not feasible because of the depth of public opposition to it. Building on previous research, mostly in the USA,¹² these surveys have attempted to assess not only the size but also the strength of public opinion in favor of the death penalty and the level of actual opposition to its abolition; to what extent opinion is based on sound knowledge about the use and administration of the death penalty; whether citizens are “in general” supportive of capital punishment or their support is conditional on the gravity of the particular circumstances of the offence, including both aggravating and mitigating factors; and what level of support there is for a mandatory rather than discretionary infliction of the death penalty.

The surveys also investigated the extent to which respondents were steadfast in their views or prepared to change them when confronted with new information about the effectiveness of the death penalty and its

¹⁰ WILLIAM A. SCHABAS, *Public Opinion and the Death Penalty*, in CAPITAL PUNISHMENT: STRATEGIES FOR ABOLITION 309, 328 (Peter Hodgkinson & William A. Schabas eds., 2014); HOOD & HOYLE, *supra* note 2, at 467-68.

¹¹ ZIMRING & HAWKINS, *supra* note 1, at 13.

¹² See also HOOD & HOYLE, *supra* note 2, at 426-486 (providing a broader review of public opinion literature).

administration: such as scientific evidence on the general deterrent effects of executions; the availability of satisfactory alternative punishment or social and criminal justice policies; the existence of the possibility of error leading to execution of innocent persons; and the extent to which opinion is affected by awareness of international trends towards abolition in other countries.

In particular, several of the surveys attempted to compare immediate opinion, in response to being asked whether they favor the death penalty or not, with decisions made when they were faced with practical examples of capital cases and asked to decide whether or not they merit the death penalty. This method enables us to test whether or not citizens living in different retentionist countries do make substantially different judgments as regards their level of support for the implementation of capital punishment, such as may constitute, as their governments proclaim, a barrier to its abolition.

The eight public opinion polls from which evidence is drawn all employed a very similar methodology, often asked exactly the same questions and were all carried out within the past decade. The author was responsible for the design, analysis and reporting on two of them and acted as a consultant to the authors of four others. Thus, it was possible to a substantial degree to compare the findings. The countries, and the size of the samples from which evidence is drawn, were: The People's Republic of China,¹³ Trinidad,¹⁴ Malaysia,¹⁵ Singapore,¹⁶ Taiwan,¹⁷ and

¹³ DIETRICH OBERWITTLER & SHENGHUI QI, MAX PLANCK INST. FOR FOREIGN AND INT'L CRIM. L., PUBLIC OPINIONS ON THE DEATH PENALTY IN CHINA: RESULTS FROM A GENERAL POPULATION SURVEY CONDUCTED IN THREE PROVINCES IN 2007/8 (2009) (Sample size: 4,462). See also FRANKLIN ZIMRING & DAVID JOHNSON, *Public Opinion and Death Penalty Reform in the People's Republic of China*, 3 CITY U.H.K.L. REV. 189 (2012) (discussing the study).

¹⁴ ROGER HOOD & FLORENCE SEEMUNGAL, THE DEATH PENALTY PROJECT, PUBLIC OPINION ON THE MANDATORY DEATH PENALTY IN TRINIDAD (2011) (Sample size: 1,000).

¹⁵ ROGER HOOD, THE DEATH PENALTY PROJECT, THE DEATH PENALTY IN MALAYSIA: PUBLIC OPINION ON THE MANDATORY DEATH PENALTY FOR DRUG TRAFFICKING, MURDER AND FIREARMS OFFENCES (2013) (Sample size: 1,500).

¹⁶ Wing-Cheon CHAN ET AL., *How Strong is Public Support for the Death Penalty in Singapore?* 13 ASIAN J. CRIMINOLOGY 91 (2018) (Sample size: 1,500). For the full report see

https://www.researchgate.net/publication/323142951_Public_Opinion_On_The_Death_Penalty_In_Singapore_Survey_Findings

¹⁷ TAIWAN ALLIANCE TO END THE DEATH PENALTY, SURVEY OF TAIWANESE ATTITUDES TOWARD THE DEATH PENALTY AND RELATED SOCIAL VALUES (2014) (Sample size: 2,039). To be published by THE DEATH PENALTY PROJECT in March 2019. See

Ghana,¹⁸ plus two in which the author had no role: Japan¹⁹ and Belarus.²⁰

On What Knowledge are Opinions on Capital Punishment Based?

The salience of the issue

The surveys reviewed here all challenge the assumption made by retentionist governments that it is necessary to retain the death penalty because public opinion reflects a high level of interest in and concern about the issue. Yet this claim was not supported by the surveys. In China, for example, where the State insists that public support for the death penalty is very high, the survey of almost 4,500 citizens, gathered from three provinces, revealed that only three percent said that they were *very interested* in the issue, and only a quarter were interested at all.²¹ Also, in Malaysia in 2012 and in Singapore in 2016, very few respondents said they were “*very interested or concerned*”: only eight percent in Malaysia and five percent in Singapore.²² Indeed, 36% of Malaysian and 40% of Singaporean respondents said they were *not very interested* or at all concerned.²³ In Accra, Ghana, where the death penalty remains the mandatory punishment for murder, a mere nine percent of the respondents said they were *very interested* and a third were not interested at all.²⁴

This certainly helps to explain why most members of the public whose opinions were surveyed in these countries admitted that they possessed limited knowledge about the scope of capital punishment legislation, whether mandatory or discretionary, and how often it is enforced. In China, Japan and Malaysia, for instance, where various levels of secrecy surrounds the use of the death penalty, it was found that the proportion of those interviewed who claimed that they have a good knowledge of the system is exceptionally low: in China only 1.3 percent said they had “a lot” of knowledge and less than a third that they possessed

www.deathpenaltyproject.org

¹⁸ JUSTICE TANKEBE ET AL., CTR. FOR CRIMINOLOGY & CRIM. JUST., PUBLIC OPINION ON THE DEATH PENALTY IN GHANA (2015) (Sample size: 2,448).

¹⁹ MAI SATO, THE DEATH PENALTY IN JAPAN. WILL THE PUBLIC TOLERATE ABOLITION? (2014) (Sample size: 21,000); SATO ET AL., *supra* note 5 (Sample size: 1,545).

²⁰ PENAL REFORM INT’L, CRIME AND PUNISHMENT: PUBLIC PERCEPTION, JUDGEMENT, AND OPINION (2013) (Sample size: 1,000).

²¹ See OBERWITTLER ET AL., *supra* note 13, at 10.

²² See HOOD, *supra* note 15, at 8-9; CHAN ET AL., *supra* note 16, at Table 1.

²³ See OBERWITTLER ET AL., *supra* note 13; HOOD, *supra* note 15.

²⁴ TANKEBE ET AL., *supra* note 18, at 3.

“some knowledge,” in Malaysia a mere six percent felt they were “very well informed” about the death penalty in their country and around a half (53%) said that they were not well informed at all. In fact, only 40% knew that the death penalty was mandatory (the only penalty that can be imposed by the judge following conviction) for drug trafficking and murder, despite the public warnings issued by the authorities.

In Japan also, Mai Sato found that when she presented her respondents with seven items of factual information about the use of the death penalty and asked them to rank their prior knowledge of these facts on a four-point scale, ranging from “I knew all about it” to “It was new information to me,” only two (both abolitionists) of 535 respondents selected “I knew all about it” for all seven items.²⁵ In a second survey carried out in 2014, Sato and Bacon found that that only nine of 1,542 respondents correctly answered all five factual questions about the death penalty put to them. They concluded that they were “misinformed or ignorant.”²⁶ In Taiwan too, only four out of 2,039 persons interviewed knew the answers to all four factual questions put to them and 55% knew the answer to none of them.²⁷

It was not surprising to find that in Trinidad, a country with an exceptionally high rate of homicide,²⁸ 82% of those surveyed said that they were very interested or interested in the subject of the death penalty. Yet, interest had not been due to, nor did it produce, a more knowledgeable citizenry. Only one in six (17%) said that they felt “very well informed or knew a great deal” about it, and almost half (47%) knew “little or nothing.”²⁹ This was also the case in Ghana, where Justice Tankebe and his colleagues found that eight out of ten of the 2,448 citizens interviewed in Accra said that they knew “nothing” or “little” about the death penalty. In fact, only 2.7 percent knew “a great deal,” despite the high incidence of homicide in that city.³⁰ A survey in 2013 of 1,000 people in Belarus, the only European country where executions continue to be carried out, found that a third of the respondents were not

²⁵ SATO, *supra* note 19, at 147-51.

²⁶ See SATO & BACON, *supra* note 5, at 35-36.

²⁷ See TAIWAN ALLIANCE TO END THE DEATH PENALTY, *supra* note 17, at 29.

²⁸ Roger Hood and Florence Seemungal, *A Rare and Arbitrary Fate. Conviction for Murder, the Mandatory Death Penalty and the Reality of Homicide in Trinidad and Tobago*, THE DEATH PENALTY PROJECT (2006) at 6-7.

²⁹ See HOOD & SEEMUNGAL, *supra* note 14, at 9.

³⁰ See TANKEBE ET AL., *supra* note 18, at 3.

even aware of this fact.³¹

These findings show clearly that public opinion in these retentionist countries is rarely based on a sound empirically accurate appreciation of the use and effectiveness of capital punishment in practice.

The impact of information

Beginning in the United States, empirical investigations have been made to assess the hypothesis which Justice Thurgood Marshall put forward in 1972 when declaring capital punishment unconstitutional in *Furman v. Georgia*. He had argued that if “the average citizen” had “knowledge of all the facts presently available regarding capital punishment” [he] “would . . . find it shocking to his conscience and sense of justice.” Marshall therefore believed that “it is imperative for constitutional purposes to attempt to discern the probable opinion of an *informed* electorate.”³²

In Japan, Mai Sato found evidence to support this hypothesis. She conducted an experiment, drawing two sub-samples from her initial large-scale survey. An experimental and a control group, both with 542 members, were selected, each containing equal proportions of retentionists, abolitionists, and those who had answered “cannot say.” The experimental group was provided with information about the operation of the death penalty system in Japan, which they read for 10 minutes. The controls, on the other hand, were not given such information.³³ The views of both groups on whether the death penalty should be kept or abolished were then sought again. This revealed that the proportion of respondents who said that the death penalty should definitely or probably be kept was 10 percentage points lower in the experimental group (36%) than in the control group (46%). Conversely, 30% of the experimental group thought

³¹ See PENAL REFORM INT’L, *supra* note 20, at 8, 40.

³² 408 U.S. 238, 362, n.145, 369 (1972) (Marshall, J., concurring). See also Robert M. Bohm, *American Death Penalty Opinion: Past, Present and Future*, in AMERICA’S EXPERIMENT WITH CAPITAL PUNISHMENT 27, 35-44 (J.R. Acker, R.M. Bohm & C.S. Lanier eds., 2d ed. 2003).

³³ The information provided concerned the following topics: international movement towards abolition; relationship between the death penalty and crime rates; possibility of miscarriages of justice in death penalty cases execution process; information disclosure concerning the death penalty; trends in murder rates; and possibility of parole for life-sentenced prisoners. See Mai Sato, *Public Attitudes to the Death Penalty in Japan*, in THE DEATH PENALTY PROJECT, THE DEATH PENALTY IN JAPAN 31, 41-42 (2013).

that it should be abolished, compared with 25% in the control group.³⁴

Furthermore, using another approach, very strong and consistent evidence has emerged from the countries surveyed to show that support for the death penalty was contingent upon a belief that it is administered without error. Respondents in China, Trinidad, Malaysia, and Singapore were asked whether they would still favor the death penalty “if it were proven to their satisfaction that innocent persons had sometimes been executed.” Support for capital punishment fell dramatically in all these countries: from 58% to 25% in China for the death penalty in general; and, for murder specifically, from nine out of ten respondents to only a third in Trinidad and Malaysia and about four in ten in Singapore.³⁵ Similar findings emerged from the surveys in Taiwan and Ghana.³⁶

There is also evidence that the level of support for the death penalty was affected by empirical evidence about its supposedly uniquely strong deterrent effect on criminality. Respondents were asked whether they would still support the death penalty if “new scientific evidence proved that the death penalty is not a better general deterrent than life imprisonment or very long-term imprisonment.” Of course, the size of the effect varied, depending on the proportion who had cited general deterrence as a reason for supporting the death penalty. For example, in Trinidad where very few respondents had mentioned general deterrence as a reason for supporting the death penalty, a mere 12% of the 89% of respondents who favored the death penalty had said that such information would lead them to change their mind.³⁷ However, in Singapore, where six out of ten of the 92% who were in favor of the death penalty for

³⁴ *Id.* at 45. See also SATO, *supra* note 19, at 127-56; also, Sato and Bacon’s “deliberative survey” which showed that 21% changed their views, but in both directions, when participants heard speakers both for and against their point of view, *supra* note 5, at 37.

³⁵ On China see OBERWITTLER & QI, *supra* note 13, at 15; on Trinidad HOOD & SEEMUNGAL, *supra* note 14, at 18; on Malaysia HOOD, *supra* note 15, at 30; and on Singapore CHAN et al., *supra* note 16, at 16. The figures for Trinidad, Malaysia and Singapore include those who were already opposed to the death penalty. The decline in support for the death penalty for drug trafficking and firearms offences fell from 75% to 26% and from 83% to 23% in Malaysia, respectively. They also fell from 87% to 33% and 89% to 36% for these offences in Singapore, respectively.

³⁶ In Taiwan the proportion who *strongly* agreed that the death penalty should be retained in these circumstances fell from 32% to only 6%.; see TAIWAN ALLIANCE TO END THE DEATH PENALTY, *supra* note 17, at 27. In Ghana the proportion fell from 41% in favor of the death penalty to 26%. See TANKEBE ET AL., *supra* note 18, at 26.

³⁷ See HOOD & SEEMUNGAL, *supra* note 14, at 13-14, 34. See also HOOD, *supra* note 15, at 3 (detailing findings from Malaysia, where the proportion in favor of the death penalty for murder dropped from 91% to 57%).

intentional murder believed in its uniquely powerful deterrent effect, only 57% of the total sample said they would *still* favor retaining the death penalty if it were proved that it is not more effective as a deterrent to murder than life or long-term imprisonment: a bare majority.³⁸

Thus, this is further evidence that surveys which do not test the knowledge basis on which opinion has been based will provide a very misleading assessment of the level of support that might be expected from a much better-informed general public.

Assessing strength of opinion

Another very salient consideration is how *strongly* people feel about their opinions: a quality often missed from opinion surveys and, in any case, rarely if even mentioned by governments.³⁹ For example, the Taiwan survey found that while 85% of respondents said they were opposed to abolition, only 32% said they were *strongly* opposed. The Taiwan report concluded: "It appears that the strength of opposition to abolition has been considerably exaggerated."⁴⁰ The survey in Ghana also found that the balance of opinions was greatly in favor of those who had strong feelings *against* capital punishment: while 48% were *intensely* opposed to it only nine percent of respondents "expressed *intense*" approval of capital punishment. In fact, only a quarter were completely opposed to the recommendation, put forward in 2012 by the Ghana Constitutional Review Committee and endorsed by the Government, to abolish the death penalty completely.⁴¹ Even more remarkable was the response in Singapore: while 70% said that they were generally in favor of the death penalty, only nine percent chose "I am strongly in favor of it." evidence quite contrary to the assessment of Singapore's Foreign Minister (see page 2 above).⁴²

³⁸ See CHAN ET AL., *supra* note 16, at 15 (noting that support for the death penalty for drug trafficking fell from 86% to 44%).

³⁹ See, e.g., J. Unnever, J.V. Roberts, & F. Cullen, *Not Everyone Strongly Supports the Death Penalty: Assessing Weakly-Held Attitudes About Capital Punishment*, 20 AM. J. CRIM. JUST. 187 (2005). See also HOOD & HOYLE, *supra* note 2, at 444-51.

⁴⁰ When Taiwanese respondents were asked near the beginning of the questionnaire whether they would support abolishing the death penalty and replacing it with life imprisonment without parole (LWOP), 34% said yes. But when asked again, after most of the other questions had been asked, 48% now said they would support this policy, and those against it had dropped from 63% to 49%. See TAIWAN ALLIANCE TO END THE DEATH PENALTY, *supra* note 17, at 23-24.

⁴¹ See TANKEBE ET AL., *supra* note 18, at 5-6, 14.

⁴² See CHAN ET AL., *supra* note 16, at 8 (providing full report). In Belarus in 2013, 64%

Does Support for the Status Quo Indicate Resistance to Reform?

In her studies of opinion in Japan, Mai Sato has shown that the “headline” figure of support for *retaining* the death penalty cannot be taken at face value by political decision-makers. It needs to be qualified. For instance, when she examined the responses to the Japanese government’s survey of 2009, she found that although 86% of the respondents had chosen “the death penalty is unavoidable in some cases,” a third had also agreed with the statement “the death penalty could be abolished in the future if conditions change.” This meant, Sato argued, that far from 86% being *resolutely* opposed to abolition, the proportion was really more like 52%. When the option “should *definitely* be kept” was introduced in her own online survey (N = 2,769) only 44% of respondents endorsed it.⁴³ Five years later, Sato and Bacon conducted a survey parallel to the government survey of that year. They found that 80% of respondents to both surveys had similarly endorsed the statement “The death penalty is unavoidable,” yet, when questioned in more detail in the parallel survey, only a quarter of respondents were firmly of the view that the death penalty should “*definitely* be kept.”⁴⁴ Furthermore, among the three-quarters who had said they agreed that the death penalty should “definitely” or “probably” be kept, as many as seven out of ten admitted “that they would ‘simply accept abolition as government policy’ if the government decided to exercise its leadership.”⁴⁵ Such was their commitment to capital punishment!

Other surveys have also revealed that the proportion of people who support the death penalty is not the same as the proportion who are resistant to reform. For example, although 64% of those surveyed in Belarus in 2013 said that they supported the death penalty, only 36% endorsed the policy of “leave it as it is.”⁴⁶ The poll conducted in 2007-08 by Oberwittler and Qi of almost 4,500 Chinese citizens also revealed that, when asked whether China should follow the practice of other countries and abolish the death penalty completely, between 14% and 20% agreed,

of the 1,100 respondents said that they supported the death penalty, but only 37% “definitely” supported it. A further 27% would do so “in certain conditions.” Only 31% “definitely” did not support it. 5% gave no answer. See PENAL REFORM INT’L, *supra* note 20, at 10.

⁴³ See SATO, *supra* note 19, at 64, 105-07.

⁴⁴ See SATO & BACON, *supra* note 5, at 20-21, 24-25.

⁴⁵ *Id.* at 27.

⁴⁶ See PENAL REFORM INT’L, *supra* note 20, at 12.

depending of the wording of the question. In fact, given facts of the international abolitionist movement, only between 53% and 55% said they were *definitely* opposed, plus a substantial minority (between a quarter and a third) who endorsed “I am not sure.”⁴⁷ A similar response was found in Malaysia, where 91% claimed to be in favor of the death penalty, yet only 59% said definitely “no” when asked whether Malaysia should follow world trends to abolish capital punishment for all crimes.⁴⁸ When Singaporean citizens were asked this question, 72% said they were not in favor of abolishing the death penalty for all crimes (the same proportion who had said they favored the death penalty in general), but this is considerably fewer than those who had said they supported it for intentional murder (92%), drug trafficking (87%), and non-lethal firearms offences (89%).⁴⁹ The impact was even more significant when respondents were told about the world trend to abolish the mandatory death penalty. The proportion of respondents in Malaysia and Singapore who had supported the mandatory death penalty for any crime fell from 70% to 46% and from 60% to 40% respectively.⁵⁰

The evidence clearly shows that knowledge of the international movement to abolish capital punishment can influence public opinion in retentionist countries.

Generality or Specificity

Responses to the question whether the respondent is “in general” in favor or opposed to the death penalty have been found to produce a lower proportion in favor than when the question is specifically about murder, the crime most associated with the cultural symbol of “a life for a life.” In China, 58% of respondents endorsed the statement “I am [generally] in favor” of the death penalty, 14% were opposed and 28% said they were “not sure.” Yet, when asked specifically about different capital offences, 78% said they were in favor of capital punishment for murder.⁵¹ In Singapore, where 72% said they were in favor “in general,”

⁴⁷ See OBERWITTLER & QI, *supra* note 13, at 11.

⁴⁸ See HOOD, *supra* note 15, at 32-33.

⁴⁹ See CHAN ET AL., *supra* note 16, at 17; see also Wing-Cheong Chan, *The Death Penalty in Singapore: In Decline but Still Too Soon for Optimism*, 11 ASIAN J. CRIMINOLOGY 179 (2016).

⁵⁰ See CHAN ET AL., *supra* note 16, at 17; HOOD, *supra* note 15, at 32-33.

⁵¹ See OBERWITTLER & QI, *supra* note 13, at 10-11. In a parallel survey of the opinions of criminal justice petitioners carried out at the same time in China, data showed a much higher level of support for the death penalty, suggesting that resistance to abolition is greater among enforcers than Chinese in general. See Børge Bakken, *Capital Punishment*

92% said they favored the death penalty when specifically asked about intentional murder.⁵² This suggests that mention of murder probably triggers an image of a particular grave, and rare, type of incident, rather than an appropriate response to the majority of instances of murder where mitigating circumstances may prevail.

In Abstract or in Practice?

Effects of case specificity: aggravating and mitigation factors

Respondents in China, Trinidad, Malaysia, and Singapore were asked to judge and select the appropriate punishment for three scenarios of murder cases. Each scenario had an example with aggravating factors and another example with mitigating circumstances.⁵³ This made it possible to compare across these four countries, the high level of support for the death penalty in the abstract with the willingness of respondents to enforce it in specific circumstances.⁵⁴ Table 1 shows the outcome from these surveys, in all of which the proportion of respondents who chose death as the appropriate punishment was considerably lower than the proportion who had said they were in favor of the death penalty, and always lower where there was a mitigating element.⁵⁵ In China, for

Reform, Public Opinion and Elitism in the People's Republic of China, in CONFRONTING CAPITAL PUNISHMENT IN ASIA: HUMAN RIGHTS, POLITICS AND PUBLIC OPINION 187, 202 (Roger Hood & Surya Deva eds., 2013); see also Roger Hood, *Abolition of the Death Penalty: China in World Perspective*, 1 CITY U.H.K.L. REV. 1 (2008); ZIMRING & JOHNSON, *supra* note 13.

⁵² See CHAN ET AL., *supra* note 16, at 8, 12.

⁵³ For example, in the Malaysia survey, the total sample of 1,535 interview respondents was divided in half, (A and B) to ensure a different ordering in which the aggravating and mitigating versions of the three scenarios were presented to them. Thus, sample A would receive first an aggravated example of case 1, then second a mitigation example of case 2. Sample B received a mitigating example of case 1 and then an aggravating example of case 2 etc. This meant that altogether six scenarios were judged, each by half the total sample. See HOOD, *supra* note 15, at 6.

⁵⁴ The same technique was used in Malaysia and Singapore in relation to case of drug trafficking and firearms offences for which the death penalty was the mandatory sentence on conviction for these crimes. There is not space here to review the findings. They did, however, follow the pattern for murder. For example, in Malaysia, 74% had said they were in favor of the death penalty for trafficking heroin, yet when asked what the most appropriate penalty would be for a case involving importation of 25 kg hidden in a boat, only 29% chose death. See HOOD, *supra* note 15, at 12.

⁵⁵ Some scenarios were also employed in the Taiwan and Ghana surveys. In Ghana, where 39% said they were in favor of the death penalty and 12% were not sure, the proportion who chose the death penalty for a robbery scenario with an aggravated circumstance was also 39%, but only 21% for an aggravated domestic murder. They were not asked to judge

example, even when presented with a case of a deliberate shooting and robbery by a man who had previously served prison sentences for robbery, slightly less than half of the respondents thought that the death penalty would be the appropriate punishment. If the offender had no prior convictions, almost two-thirds did not choose the death penalty. Indeed, while the pattern of findings was remarkably similar in all four jurisdictions, the proportion in favor of the death penalty was lowest in China for all the scenarios judged.

The findings from a survey carried out in 2013 in Taiwan, where the death penalty is discretionary for murder, also showed the strong effect of mitigating circumstances. Even though 85% of respondents said they were opposed to the abolition of the death penalty, only one-third thought that it would be the appropriate penalty when presented with the example of a young unemployed man who had killed a householder during a burglary. And while 83% said that the death penalty was the appropriate punishment when faced with a scenario of a very grave random murder and rape of a 10-year-old girl, the proportion favoring death fell to only a third when the same respondents were told that the defendant suffered from a mental disorder and had a long history of mental illness.⁵⁶

the drug dispute murders. The wording of these scenarios was the same as that used in the surveys in Malaysia and Singapore, where the words “sentence to death” were included to indicate that this was a capital offence for which the death penalty is mandatory. In Trinidad and Ghana, where the death penalty is also mandatory, it was simply stated that the person had been convicted of murder. In China, the wording did not include conviction for murder (but it would have been clear from the context).

⁵⁶ See TAIWAN ALLIANCE TO END THE DEATH PENALTY, *supra* note 17, at 19.

Table 1

Percentage of respondents choosing death for different scenarios of murder. The overall percentage of support for the death penalty for murder “in the abstract” is shown in brackets for each country.

TYPE OF MURDER	Trinidad (89%)	Malaysia (91%)	Singapore (92%)	China (77%)
AGGRAVATED ROBBERY MURDER A man robbed a local shop with a gun and shot the owner in the head. He took away with him \$300 in cash. He had previously been in prison twice for robbery. He was convicted of murder and sentenced to death.	70%	65%	64%	48%
MITIGATED ROBBERY MURDER A man robbed a local shop with a gun and shot the owner in the head. He took away with him \$300 in cash. He had not previously been convicted of any crime. He was convicted of murder and sentenced to death.	44%	57%	52%	37%
AGGRAVATED DOMESTIC MURDER A woman deliberately poisoned her husband who died, so that she could be free to live with her lover. She was convicted of murder and sentenced to death.	61%	43%	51%	27%
MITIGATED DOMESTIC	10%	14%	17%	13%

<p>MURDER A woman who had been abused by her husband for many years decided to kill him by deliberately poisoning his food. A neighbour discovered the death of the husband and reported it to the police. She was convicted of murder and sentenced to death.</p>				
<p>AGGRAVATED DRUG DISPUTE MURDER A man aged 35 with previous convictions for violence and drug possession deliberately shot dead a rival drug dealer who had failed to pay back a debt. He was convicted of murder and sentenced to death.</p>	71%	57%	57%	Not asked
<p>MITIGATED DRUG DISPUTE MURDER A young man aged 19 deliberately shot dead a drug dealer who had failed to pay a debt. He had no previous convictions for violence and had said that he killed the victim on the orders of an older man. He was convicted of murder and sentenced to death.</p>	37%	22%	28%	Not asked

Furthermore, as Table 2 shows, no more than half of the decisions made by respondents in Trinidad for *all three* of the examples of murder they “judged” favored the death penalty, and an even lower proportion in Singapore (45%) and Malaysia (43%). This gives a completely different picture compared to the nine out of ten respondents in all three of these countries had said that they were in favor of the death penalty for murder. As regards cases with an aggravating factor, in Trinidad no more than two-thirds of decisions favored death, and in Malaysia and Singapore the highest proportion was only 58% and 55% respectively. Only one third of *all* decisions in all three countries favored death where there was a mitigating factor.

Table 2

Percentage of decisions taken on scenario murder cases in which the death sentence was chosen by respondents in Singapore, Malaysia and Trinidad

Country and total decisions made	All murder scenarios judged % death	Aggravated murder case scenarios judged % death	Mitigated murder case scenarios judged % death
Singapore (4,500)	45%	58%	33%
Malaysia (4,600)	43%	55%	31%
Trinidad (3,000)	50%	67%	30%

Thus, there is convincing and remarkably similar evidence, found in these different jurisdictions, that members of the public react differently and less punitively when asked for their views on the death penalty in the “abstract” than they do when faced with a realistic depiction of what murder cases can look like and what it means to decide between life and death.

Support for the mandatory death penalty in practice

Another significant measure of the relationship between abstract and practical judgements, was to test in Malaysia, Singapore, and Trinidad (in each of which the death penalty is mandatory on conviction for murder) whether those who approved of this law actually would apply it in practice by choosing death as the punishment for *all three* murder

scenarios they were asked to judge, irrespective of the circumstances of the crime and the character of the offender—as required by law.

In Malaysia, where 56% of the sample said they were in favor of the mandatory death penalty for murder (88% of them being “strongly in favor”), only 14% of them actually chose to “impose” the death penalty in *all three* of the murder cases they judged, as required by the law. Thus, only eight percent of the total of over 1,500 respondents *both* said they favored it *and* they practiced it.⁵⁷ Similarly, about half of Singaporeans interviewed said they supported the mandatory penalty for intentional murder, yet only 12% of all 1500 respondents chose death in *all three* cases.⁵⁸ In Trinidad, a quarter of those interviewed said they favored the mandatory death penalty. But of this minority, only four out of ten chose to sentence to death *all three* murders they were asked to judge: accounting for only 12% of the 1,000 respondents to this survey.⁵⁹

Thus, support for the mandatory death penalty by members of the public in these three countries turned out to be very low indeed, and in line with international human rights norms.⁶⁰

The Most Appropriate Policy?

An alternative penalty?

It has been clear for many years that asking whether people favor the death penalty will reflect what proportion accepts it as *an* appropriate punishment but not whether they think it is the *only* appropriate, or even the *most* appropriate punishment. In Asia, as in the USA, the picture changes when polls have asked whether respondents would support the death penalty in preference to the alternative of life imprisonment, with or without the possibility of eventual parole.⁶¹

The findings are very similar from all the surveys reviewed in this paper. The large-scale study of public opinion in China found that that the

⁵⁷ See HOOD, *supra* note 15, at 20-21.

⁵⁸ See full report at note 16, at 40. Respondents in Singapore chose death as their preferred sentence in just over a third (37%) of all the decisions they made on scenario cases: in 45% of the murder scenarios; 29% of the drug trafficking scenarios; and 28% of the firearms scenarios - much lower proportions than the 92% who had said they favored the death penalty in general for murder, 86% for drug trafficking, and 88% for firearms offences. See CHAN ET AL, *supra* note 16, at 40.

⁵⁹ See HOOD & SEEMUNGAL, *supra* note 14, at 28-29.

⁶⁰ See HOOD & HOYLE, *supra* note 2, at 337-48 (providing a review of the development of international norms relating to the mandatory death penalty).

⁶¹ See *id.* at 448-50 (providing review of this literature).

proportion *favoring* death fell from 58% to 38%, if the alternative were to be life imprisonment with early release, and declined still further to 29% if it were to be life imprisonment without parole (LWOP), and even further to only 24% if it would be life imprisonment without parole plus restitution to the families of victims. Similarly, in Taiwan the proportion of respondents who said they would be *opposed* to abolition fell from 85% to 27% (with only eight percent *strongly opposed*) if the alternative were to be life imprisonment without parole plus compensation.⁶² Thus, the majority favored alternative punitive penalties that were, in their opinion, *sufficiently severe* to mark the gravity of the crime rather than *demanding* “a life for a life,” while at the same time giving the public greater protection from the most dangerous offenders. In Belarus, half the respondents said that they agreed or somewhat agreed that life sentences would be an acceptable alternative to the death penalty, while only 18% *strongly disagreed*.⁶³

When the 72% of Singaporeans who had said they were in favor of the death penalty were asked if they would continue to do so “if the government proposed to replace it by a discretionary maximum term of life imprisonment without the possibility of ever being released,” a third of them said they would be content with this alternative in cases of murder. If these respondents were added to those already not in favor of the death penalty in general, support for it would fall below half (46%). When all respondents were asked what their preferred sentence would be if the death penalty were to be abolished altogether and discretion given to the judges, two-thirds (69%) chose LWOP. But decisions made when judging the scenario cases showed that LWOP had not been so frequently chosen as the alternative to the death penalty when mitigating circumstances were present. For example, in a case of domestic murder with mitigation, 17% chose the death penalty and only 14% chose LWOP as the alternative, compared with 39% choosing life with the possibility of parole after 20 years and 27% a determinate prison sentence. Yet again,

⁶² See TAIWAN ALLIANCE TO END THE DEATH PENALTY, *supra* 17, at 26; see also COVENANTS WATCH, SHADOW REPORT 2016 ON THE IMPLEMENTATION OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 48-49, Sept. 4, 2016. The government interpreted the findings as showing that “56.5% remained *hesitant* about replacing the death penalty entirely with this new sentence” as one of the grounds for maintaining the death penalty, while reducing the use of it so as to “gradually eliminate it in the future.” See Republic of Taiwan, *Implementation of the International Covenant on Civil and Political Rights. Second Report Submitted under Article 40 of the Covenant*, April 2016, para 67.

⁶³ See TAIWAN ALLIANCE TO END THE DEATH PENALTY, *supra* note 17, at 18.

the findings reveal a large gap between opinions and judgements made in the abstract and the reality of choosing an appropriate punishment in particular circumstances.

Executions compared with other social and criminal justice policies

But, of course, punishment is not the only alternative policy. In order to test whether members of the public in Malaysia and, Singapore would choose a “greater number of executions of murderers” as the “most likely” policy to reduce very violent crime leading to death, the respondents were given four other policies to consider and asked to rank them. The ranking of these policies was remarkably similar: those that seek to promote prevention through social action and police effectiveness were regarded as much more likely to be regarded as effective than “greater number of executions,” which in both countries was ranked as the least likely to be effective (See Table 3).⁶⁴ The same was also the case in Trinidad.⁶⁵

⁶⁴ This was also the case as regards the trade in dangerous drugs in Singapore and Malaysia. Greater number of executions of people caught trafficking in illegal drugs was ranked first by only 6% of respondents in Singapore and 15% in Malaysia; but 52% and 38% respectively, ranked “better moral education of young people” first. In other words, policies aimed to reduce demand for illegal drugs were seven times more likely to be preferred by respondents in Singapore to the threat of execution. See CHAN ET AL., *supra* note 16, at 19 (providing data on Singapore); HOOD, *supra* note 15, at 31-32 (providing data on Malaysia).

⁶⁵ In Trinidad, we posed the same question. A higher proportion than in Malaysia and Singapore ranked “greater number of executions” first, but only 21% did so compared with 43% who ranked “better moral education of young people” first, as the most likely policy to reduce very violent crime leading to death. Altogether, as in Malaysia, half of those interviewed believed that more executions would be the *least* effective violence control policy. See HOOD & SEEMUNGAL, *supra* note 14, at 14-15.

Table 3

Ranking of policy most likely to reduce violent crime leading to death (%)

POLICY	MALAYSIA		SINGAPORE	
	Ranked First	Ranked Last	Ranked First	Ranked Last
Better moral education of young people	39	14	56	7
More effective policing to bring criminals to justice and make punishment more certain	25	9	27	4
More effective policies to control conflict between drug traffickers and dealers	13	13	7	6
More effective policies to control the possession of firearms	11	15	6	9
Greater number of executions of murderers	12	48	5	74

Social policies were also found to trump severe penalties as a means to prevent and reduce heinous crimes in Japan. Respondents to Sato and Bacon's survey ranked "focus on family discipline and education" first (63%), while "keep the death penalty" was only the fourth most frequently endorsed policy, and by only a quarter of them.⁶⁶

Concluding Remarks

Taken together, the findings of these surveys of public opinion, conducted in eight retentionist countries, do not support the claim of their governments that support for retention of the death penalty is so strong that it acts as a barrier to its abolition. Nor do the findings support the claim that attitudes towards capital punishment are so variable between states, depending on unique cultural and social influences, that governments are justified in regarding the question of capital punishment

⁶⁶ See SATO & BACON, *supra* note 5, at 35.

as a matter solely to be determined by considerations of the needs of its criminal justice policy after “taking fully into account the sentiments of its own people,” rather than an issue to be determined by adherence to international human rights norms.

In fact, all these surveys have revealed the very limited level of knowledge that most citizens possessed about the death penalty in law and practice when forming their opinion and that only a minority felt “strongly” in favor of it or opposed to its abolition. Opinions in favor were dependent on the belief that the death penalty is administered fairly, without the possibility of error leading to the execution of the innocent. When respondents were asked whether they would favor the death penalty if it were to be proven that innocent persons had been executed, support for it plummeted from nine out of ten to only a third. There was a remarkable degree of concordance between judgments, made by respondents from different countries, on the appropriateness of imposing a sentence of death when they were presented with scenarios of real cases. In every survey where this technique was employed only a minority favored the death penalty when mitigating circumstances were present. Even in cases with aggravating factors, the proportion choosing death was considerably lower than the proportion who had supported the death penalty “in the abstract.” In countries where the death penalty was the mandatory punishment, support for it proved to be very low when respondents were faced with judging cases with differing factual circumstances. They accepted that to treat all cases the same as if they were of equal culpability would amount to injustice.

The strength of opposition to abolition was also questioned when respondents were asked whether they would accept an alternative sentence of life imprisonment, varying in its severity and length, in place of capital punishment. This showed that although death had been regarded as *an* appropriate punishment in the abstract, it was not the *only* appropriate punishment that a majority of respondents would accept. In fact, one of the most remarkable findings was that, when asked to compare the likely effectiveness of five social and criminal justice policies aimed to reduce violent crimes leading to death, “greater number of executions” was ranked first by only a small minority and ranked last by the largest proportion of respondents.

Thus, the findings have revealed that the balance of views, values and judgments on the death penalty, made by respondents interviewed in retentionist countries drawn from the Caribbean, Asia, Africa and Eastern Europe, far from being country-specific and unique, were based on

commonly shared norms. Furthermore, in every country, opinions on the death penalty, whether in its favor or opposed to its abolition, were far more nuanced and moderate than governments apparently believed or were prepared to accept. It is not surprising therefore that Frank Zimring and David Johnson concluded, from their reflections on the public opinion survey in China, that:

... public opinion seems to tolerate substantial changes in execution policy notwithstanding general support for the death penalty as an abstraction. Changes in government death penalty policy are rarely inspired by public sentiment, and the efforts of government to shift policy are usually tolerated by the citizenry.⁶⁷

Certainly, public opinion should not be employed as a justification for maintaining a cruel, inhuman, and degrading punishment.

⁶⁷ ZIMRING & JOHNSON, *supra* note 13, at 191-92.