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ARTICLE

Right to Life and Capital Punishment in Transnational Judicial Dialogue

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Abstract

In this article, I bring the constitutional jurisprudence of major East Asian courts into reconstructive dialogue with that of the United States, South Africa, and several former Soviet-bloc countries, on *per se* review of capital punishment. This fills in a gap in the literature, which has failed to reflect new developments in Asia. Besides analysing various review approaches, I extrapolate recurrent analytical issues and reconstruct dialogues among these court decisions. Moreover, I place the analysis in historical perspective by periodising the jurisprudential trajectory of the right to life. The contextualised reconstructive dialogues offer multilayered understanding of my central analytical argument: for any court that may conduct *per se* review of capital punishment in the future, the highly influential South African *Makwanyane* case does not settle the lesson. The transnational debate has been kept open by the Korean Constitutional Court's decisions, as well as retrospectively by the US cases of *Furman* and *Gregg*. This argument has two major points. First, the crucial part of the reasoning in *Makwanyane*, namely that capital punishment cannot be proven to pass the necessity test under the proportionality review, is analytically inconclusive. The Korean Constitutional Court's decision offers a direct contrast to this point. Second, the exercise of proportionality review of the *Makwanyane* Court does not attest to the neutrality and objectivity of proportionality review. Rather, what is really dispositive of the outcome are certain value choices inhering in *per se* review of capital punishment.

Introduction

Capital punishment has declined significantly for the past half a century. As Roger Hood and Carolyn Hoyle aptly remarked, what happened is nothing short of a 'revolution in the discourse on and practice of capital punishment'.[1] This revolution was driven largely by the development of international human rights law and the political movement that reframed a penal policy issue

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[1]Roger Hood & Carolyn Hoyle, *The Death Penalty: A Worldwide Perspective* (5th edn, Oxford University Press 2015) 16.

into one concerning human rights.[2] It paved way for judicial intervention that led to moratorium or total abolition of capital punishment by domestic courts in the post-communist era. In 1990, the newly established Constitutional Court of Hungary declared capital punishment unconstitutional *per se*.[3] In 1995, the new South African Constitutional Court invalidated capital punishment in the highly acclaimed *the State v Makwanyane*.[4] The Constitutional Court of Lithuania reached a decision to the same effect in 1998,[5] followed by the Constitutional Courts of Ukraine and Albania in 1999.[6] The Constitutional Court of Russia implemented a moratorium first in 1999 and then extended it in 2009.[7]

Against this trend of judicial abolition, the United States Supreme Court appears increasingly isolated in the West. The Court delivered a conditional abolition decision in *Furman v Georgia* in 1972,[8] which triggered a wave of state legislative reforms to reinstate capital punishment. The Court responded in *Gregg v Georgia*[9] by declaring capital punishment not invariably 'cruel and unusual' under the Eighth Amendment. As is well-known, *Gregg* has stood to this day. However, it is far from the truth that the United States Supreme Court, as well as the legal profession and the society at large, has not been affected by the world trend of abolition. In 2009, the American Law Institute withdrew the death-penalty provisions from the Model Penal Code.[10] In those states that have not abolished capital punishment, execution has been steadily declining, while in some others the penalty has gone into hiatus.[11] Over the past decades the US Supreme Court has placed ever more regulation on capital punishment, to the point where it is predicted that the Court may be 'regulating the death penalty to death'.[12]

Observers in the West have often stressed how the courts around the 'world' is overwhelmingly rejecting the death penalty.[13] However, a wider survey reveals a more complex picture. What has received less attention is East and South Asia, a vast region that hosts enduring democracies, such as India and Japan, as well as third-wave new democracies, such as South Korea, Taiwan and Indonesia. The Supreme Court of Japan has repeatedly affirmed its seminal decision in 1947 that upheld capital punishment.[14] The Supreme Court of India has affirmed a series of decisions in the 1970s and 1980s to the same effect.[15] After its founding in the new 1987 Constitution, the

[2]ibid 22–24.

[3]Alkotmánybíróság (AB)(Constitutional Court) Oct 31, 1990, Decision 23. I rely on the official English translation of the Court's decisions, which does not contain corresponding pages in the Hungarian Gazette. I use the page numbers of the English translation rather than the gazette number.

[4]*The State v T Makwanyane and M Mchunu* [1995] 3 SA 391 (CC) (South Africa).

[5]The Constitutional Court of Lithuania, Case No 2/98, 9 Dec 1998.

[6]The Constitutional Court of Urkaine, Case No 1-33/99, 11-rp/99, 29 Dec 1999; The Constitutional Court of Albania, Decision No 65, Tirana, 10 Dec 1999.

[7]Russia (Constitutional Court) [VKS RF][Postanovleniye Konstitutsionnogo Suda RF (1999) No 3-P ot 2 fevrale] [Decree of the Constitutional Court of the Russian Federation No 3 of Feb 2]1999, No 3, 12–24. Russia (Constitutional Court). [Opredeleniye Konstitutsionnogo Suda Rossiyskoy Federatsii ot 19 noyabrya 2009 No 1344-O-P] [Ruling of the Constitutional Court of the Russian Federation of Nov 19, 2009, No 1344-O-P] 2009.

[8]*Furman v Georgia* 408 US 238 (1972) (hereinafter '*Furman*').

[9]*Gregg v Georgia* 428 US 153 (1976) (hereinafter '*Gregg*').

[10]American Law Institute, 'Report of the Council to the Membership of The American Law Institute' (15 Apr 2009).

[11]Death Penalty Information Center, 'Death Penalty in 2019: Year End Report' <https://deathpenaltyinfo.org/facts-and-research/dpic-reports/dpic-year-end-reports/the-death-penalty-in-2019-year-end-report> accessed 20 Feb 2020.

[12]Carol S Steiker & Jordan M Steiker, *Courting Death: The Supreme Court and Capital Punishment* (Harvard University Press 2016) 1–5.

[13]For example, see Kevin M Barry, 'The Death Penalty & the Dignity Clauses' (2017) 102 Iowa Law Review 383, 421–422; Bharat Malkani, 'Dignity and the Death Penalty in the United States Supreme Court' (2017) 44 Hastings Constitutional Law Quarterly 145, 149–153.

[14]See infra text accompanying nn 51–67.

[15]*Bachan Singh vs State of Punjab*, AIR 1980 SC 898 (delivered on 9 May 1980). See Anup Surendranath, 'Life and Personal Liberty', in Sujit Choudhry et al (eds), *The Oxford Handbook of the Indian Constitution* (Oxford University Press 2016) 763–764.

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Korean Constitutional Court has delivered retention decisions first in 1996 and again in 2010, despite an executive moratorium since 1997.[16] A decade into democratic transition, the Taiwan Constitutional Court upheld capital punishment on drug trafficking crimes in 1997, affirming two previous decisions made in the 1980s.[17] Likewise, in a series of decisions, the Indonesian Constitutional Court has found capital punishment not *per se* unconstitutional under its new Bill of Rights, which was part of the democratic constitutional reform in the wake the Asian financial crisis.[18]

In an age when a global '*ius commune*'[19] on human rights is emerging, this significant body of Asian constitutional jurisprudence should not be neglected. In this article, I bring it into reconstructive dialogue with jurisdictions such as South Africa, the United States, and several former Soviet-bloc jurisdictions. By 'reconstructive', I mean the dialogue did not necessarily take place among the courts in real life, but in hindsight these decisions have spoken to common concerns and could be placed in meaningful dialogue. There are two major types of *per se* review of capital punishment. The first is based on 'cruel punishment' and comparable provisions, such as the Eighth Amendment of the US Constitution, Article 36 of the Japanese Constitution, and Article 12(1)(e) of the South African Constitution. The second is based on the 'right to life' provision in its varied formulations. For reasons to be explicated later, before the early 90s, the cruel-punishment review played a weightier role, only to be matched by the right-to-life review in the 90s. As the former has already received extensive analysis,[20] in this article I aim at the latter.

In this article, first, I put the dialogue about the *per se* unconstitutionality of capital punishment in historical perspective. I demonstrate that the jurisprudential trajectory of the right to life should be divided by World War Two (herein, WWII) into the first and second generations, and the second generation further divided roughly by the 1970s into the early and late periods. It will be shown that contemporary transnational judicial debate takes place mainly between the early and the late second-generation views of the right to life. The early view treats capital punishment as exceptional yet permissible, and the late view considers it completely unjustifiable. Next, I compare and analyze representative judicial decisions, including the Japanese Supreme Court, the US Supreme Court, and the South African Constitutional Court. All three constitutions encompass both a cruel-punishment provision and a right-to-life provision. The relationship between the two provisions varies. The Japanese Court conducted parallel reviews; the US Supreme Court used the cruel-punishment provision alone and avoided the right-to-life provision (due process clause); the South African Constitutional Court incorporated the right-to-life review into the cruel-punishment review. A survey of these courts' decisions reveals how the two reviews differ and how the rich debates conducted under the cruel-punishment review would eventually be carried over to right-to-life review in subsequent cases. Lastly, I analyse those courts that focus exclusively on the right to life, which I divide into two main types. The first is employed mainly by post-Soviet bloc courts, which absolutise the right to life. The second uses the proportionality principle to evaluate whether the death penalty unjustifiably encroaches on the right to life. For this approach, I select the Korean Constitutional Court cases to demonstrate how it can be regarded, in hindsight, as addressing unsolved analytical issues left over by preceding debates.

This article serves several purposes. First, it fills in a gap in the literature on comparative *per se* review of capital punishment, which has failed to reflect new developments in Asia. Second, it systematically introduces various analytical approaches to the *per se* review of capital punishment

[16]See infra text accompanying nn 138–155.

[17]See infra text accompanying nn 135–137.

[18]Indonesian Constitutional Court Decision Number 2-3/PUU-V/2007.

[19]Paolo G Carozza, '"My Friend Is a Stranger": The Death Penalty and the Global *Ius Commune* of Human Rights' (2003) 81 Texas Law Review 1031, 1036–1042.

[20]William A Schabas, *The Death Penalty as Cruel punishment and Torture: Capital Punishment Challenged in the World's Courts* (Northeastern University Press 1996).

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review. Third, it extrapolates recurrent analytical issues and reconstructs dialogues among the court decisions. This approach engages those court decisions with an analytical rigor that has not been conducted before. Fourth, it illuminates the historical contexts of the dialogues. The multiple purposes served by the article offer multilayered understanding of my central analytical argument. That is, regarding *per se* review of capital punishment, the highly influential South African *Makwanyane* case does not settle the lesson. The transnational debate has been kept open by the Korean Constitutional Court's decisions, as well as retrospectively by the US cases of *Furman* and *Gregg*. This argument has two major points. First, the crucial part of the reasoning in *Makwanyane*, namely that capital punishment cannot be proven to pass the necessity test under the proportionality review, is analytically inconclusive. The Korean Constitutional Court's decision offers a direct contrast to this point. Second, the exercise of proportionality review of the *Makwanyane* Court does not attest to the neutrality and objectivity of proportionality review. Rather, what is really dispositive of the outcome are certain value choices inhering in *per se* review of capital punishment.

A Brief History of the two Rights

Early origins of the right to life and the prohibition of cruel punishment

In this Part, I present a succinct historical bird's-eye view of the right to life and the right to be free from cruel punishment, in view of their relation to capital punishment. The two rights are rooted in the history of rule of law and human rights. The right to life as a constitutional right germinated in Chapter 39 of Magna Carta in 1215, which proclaims:

> No freeman shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed, or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.[21]

This norm was further entrenched in the so-called 'Liberty of Subject Act' of 1354 under Edward III, in which the phrase 'due process of law' emerged.[22] In Magna Carta, we can also find the origin of prohibition of excessive punishment, as Chapter 20 provides, '*A freeman shall not be amerced for a slight offense, except in accordance with the degree of the offense*'. Further, as Lord Bingham indicates, no later than the fifteenth century, the common law of England already developed an aversion to torture and the admission of evidence procured by torture.[23] The sentiment against torture-procured evidence carried over into punishment in the following centuries and culminated in the 1689 English Bill of Rights, which provided 'That excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted'. Both rights progressed through the Enlightenment to find their early modern expressions in the American and French Revolutions. The American Declaration of Independence famously proclaimed, 'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are Life, Liberty and the pursuit of Happiness'. Article VIII of the French Declaration of the Rights of Man and of the Citizen states, 'The law should establish only penalties that are strictly and evidently necessary'. These ideas were then substantiated in the US Bill of Rights in the Fifth Amendment, 'No person shall be … deprived of life, liberty, or property, without due process of law' and the Eighth Amendment, 'Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted', both of which were made applicable to the several states through the Fourteenth Amendment and

[21]Tom Bingham, *The Rule of Law* (Penguin Books 2010) 10.

[22]Keith Jurow, 'Untimely Thoughts: A Reconsideration of the Origins of Due Process of Law' (1975) 19 American Journal of Legal History 265, 266.

[23]Bingham (n 21) 15.

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subsequent process of incorporation. The American formulations of both rights proved highly influential in the following centuries as constitutionalism spread around the world.

The first-generation right to life and the due-process model

The early origins of the right to life and prohibition of cruel punishment, especially in the US Bill of Rights, means that they originated from a time when capital punishment was widely accepted. If the original meaning alone determines constitutional interpretation, there is little room for *per se* challenges of capital punishment under early constitutional prohibition of cruel punishment. Moreover, the text of the due process clause strongly suggests that once certain requirements are met, the state is allowed to deprive a person of life. Current literature on the right to life typically narrates the history of the right to life as continuous from the early modern period to the present.[24] I take a different view. The history of this right needs to be periodised in order to accurately capture its jurisprudential trajectory. I call the right to life that originated from the early modern period 'the first generation' of the right to life. Typically, the first-generation right to life does not stand on its own; it is part and parcel of the 'due process' clause that restrains arbitrary exercise of state power; life is protected alongside personal security interests such as liberty and property; it is presumed that the right to life is less than absolute. The terms of 'due process of law', 'law', or 'procedure established by law', especially under the principle of parliamentary sovereignty, could be given a highly formal understanding which would authorise whatever legislation the parliament has duly passed.[25] Where the English common law tradition is influential, it could be construed to include rigorous procedural requirements.[26] Nonetheless, without a more dynamic interpretation that imports postwar view of the right to life, it is not easy to raise *per se* challenges to capital punishment under the first-generation right to life provisions. The thickening of 'due process of law' and comparable terms has occurred in the past by tracing its origins to the English common law tradition. But this method has not made *per se* challenges to capital punishment easier, precisely because abolitionism became a phenomenon only in the last quarter of the twentieth century. An illustrious example is the Singaporean judicial decision of *Ong Ah Chuan v Public Prosecutor*.[27] The judgment was delivered by the British Judicial Committee of the Privy Council acting as the court of last resort for Singapore.[28] In this decision, the appellant challenged the mandatory death penalty in the *1973 Misuse of Drug Act* under Article 9(1) of the *1965 Constitution of the Republic of Singapore*, which reads 'No person shall be deprived of his life or personal liberty save in accordance with law'. On the one hand, Lord Diplock rejected the government's formal interpretation of Article 9(1) and opined that the concept of 'law' incorporated 'fundamental rules of natural justice'. On the other hand, he dismissed any challenge that capital punishment is unconstitutional *per se,* because it is 'foreclosed by the recognition in Article 9(1) of the Constitution that a person may be deprived of life "in accordance with law"'.[29]

The early second-generation right to life

As modern constitutionalism developed in tandem with the rise of nation-states into an age of fierce ideological struggle in the nineteenth and twentieth century, the threat to human life from state

[24]For example, Elizabeth Wicks, *The Right to Life and Conflicting Interests* (Oxford University Press 2010) 35–46; Thomas Desch, 'The Concept and Dimensions of the Right to Life' (1985) 36 Österreichische Zeitschrift für Öffentliches Recht und Völkerrecht 77, 78–79; Micheline R Ishay, *The History of Human Rights: From Ancient Times to the Globalization Era* (University of California Press 2004) 84–91.

[25]Victor V Ramraj, 'Four Models of Due Process' (2004) 2 International Journal of Constitutional Law 492, 496–497.

[26]ibid 497–500.

[27]*Ong Ah Chuan v Public Prosecutor* [1981] AC 648 (hereinafter '*Ong Ah Chuan*'). For in-depth discussion, see David Pannick, *Judicial Review of the Death Penalty* (Duckbacks 1983).

[28]The jurisdiction of the Privy Council over Singapore was completely abolished in 1994, to be superseded by the Court of Appeal of the Republic of Singapore.

[29]*Ong Ah Chuan* (n 27) 672.

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power escalated to new levels and culminated in the atrocities of the Nazi regime. In view of the Nazi 'destruction of life unworthy of life' and other state brutalities, the first-generation right to life came to be regarded as an insufficient safeguard.[30] As William Schabas remarked, in hindsight it was 'in reality more of a license to the State to execute, providing that procedural guarantees were observed'.[31] In response, the second generation of the right to life is formulated to heighten substantive and procedural safeguards of human life. It can be seen in Article 3 of the *Universal Declaration of Human Rights* and Article 2, Paragraph 2, Section 1 of the German *Basic Law*, Article 15 of the *1947 Constitution of the Republic of China*, and Article 21 of the *1949 Costa Rica Constitution*. In the following decades, the enhanced right to life is codified into major international human rights instruments, such as the *European Convention on Human Rights* (ECHR),[32] the *American Convention on Human Rights* (ACHR),[33] the *International Covenant on the Civil and Political Rights* (ICCPR).[34] Despite the varied formulations, it is common for the second-generation right to life to be formulated with the following features: it breaks from the due-process model and becomes a freestanding right; it is asserted in the positive; it has an elevated status among human rights; it involves strong substantive limits in addition to procedural safeguards.

The late second generation and right-to-life absolutism

Despite stronger substantive protection, in the early postwar period the right to life was not regarded as so absolute as to completely delegitimise capital punishment. West Germany and Italy abolished capital punishment in their postwar constitutions in large part to forge a new constitutional identity discontinuous from their Fascist past.[35] In other countries, capital punishment was still widely acknowledged, though not without increasing controversy, as an exception to the right to life, such as in ECHR,[36] ACHR,[37] and ICCPR.[38] It was not until the last quarter of the twentieth century that the right to life began to substantially increase in stringency toward what I call 'right-to-life absolutism'. By this I mean the position that, save from the context of war, the right to life of a person can be deprived only to avoid severe threats to the life or physical integrity of another person in an imminent timeframe. Beginning roughly in the late 1960s and 1970s, and culminating in the 1990s, the advancement of right-to-life absolutism was achieved through domestic legislation or regional and international human rights treaties such as Protocol 6 of ECHR (1983), Protocol 2 of ICCPR (1989), the 1990 Protocol of ACHR, and Protocol 13 of ECHR (2002). To account for this trend, I consider it helpful to divide the second generation into the early period and the late period. In the early period, capital punishment was typically permitted as an exception to the right to life. This is the reason why most early challenges to capital punishment were raised through cruel-punishment review, instead of right-to-life review.[39] It was not until the late period that *per se* challenges through right-to-life review became feasible.

[30]Desch (n 24) 104.

[31]Schabas (n 20) 9.

[32]European Court of Human Rights, art 2(1): 'Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law'.

[33]American Convention on Human Rights, art 4(1): 'Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life'.

[34]International Covenant on Civil and Political Rights (adopted 16 Dec 1966, entered into force 23 Mar 1976), art 6(1): 'Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life'.

[35]James Q Whitman, 'On Nazi "Honour" and the New European "Dignity"', in Christian Joerges & Navraj Singh Ghaleigh (ed), *Darker Legacies of Law in Europe* (Hart Publishing 2003) 243, 244.

[36]ECHR, art 2(1).

[37]ACHR, art 4(2).

[38]ICCPR, arts 6(2)–(6).

[39]Schabas (n 20) 8–9.

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It should be noted that right-to-life absolutism in the context of the death penalty has complex relations with the controversy on other right-to-life issues. As exemplified in the United States, in response to abortion rights movement and the US Supreme Court's recognition of that right in 1973,[40] an anti-abortion movement took up the cause in the rubric of 'the right to life' of the unborn.[41] A 'consistent ethic of life' was advocated by Catholic thinkers such as Cardinal Joseph Bernardin to oppose abortion and capital punishment, as well as assisted suicide and euthanasia.[42] It took several decades for the Catholic Church to bring itself around to this position by gradually turning away from its traditional support for the death penalty.[43] In view of the diverging development in right-to-life absolutism, I call the Catholic Church's position, and similar positions, 'comprehensive right-to-life absolutism'. This is to be contrasted with 'partial right-to-life absolutism', which does not require such absolute protection for the right of the unborn, or against assisted suicide and euthanasia. Nonetheless, for the purpose of this article, it is not necessary to distinguish these two types of right-to-life absolutism, since they converge on opposition to the death penalty.

Per se challenges to the death penalty grounded on the right to life have been greatly aided by the concomitant wave of constitution-making in the third-wave democratization. Some new democracies adopted constitutional provisions that abolished capital punishment, such as Cambodia and the Philippines.[44] Some adopted a right-to-life provision in a postwar, freestanding-right model without specifying exceptions, such as Hungary[45] and South Africa.[46] The exception-free provision of the right to life leaves room for the courts to decide on exceptions later. The most challenging case happens in jurisdictions in which the right-to-life provision, which was textually framed in the due process model and historically rooted in the first generation, comes to interact with a changing culture[47] that is moving toward right-to-life absolutism, and yet has not progressed far enough to be free from cultural conflicts. The United States is a case in point. Put in terms of normative stringency, the legal norm of right-to-life protection evolved from being subject to balancing (first generation), to a categorical but defeasible (allowing exceptions) norm (early second generation), and then in significant parts of the world to a categorical and nearly indefeasible norm (late second generation). Lastly, it should be noted that the generational evolution of the right to life did not happen simultaneously around the globe nor evenly across regions. The post-war second generation of the right to life emerged alongside post-war constitutions that still used the first-generation due-process model, such as Article 21 of the *1950 Constitution of India*, Article 31 of the *1947 Constitution of Japan*, or Article 9 of the *1965 Constitution of the Republic of Singapore*. The late second-generation right to life has been pioneered mainly by Western Europe and spread only gradually in the following decades. Generally Asian jurisdictions have in varying degrees been resistant to right-to-life absolutism.[48]

[40] *Roe v Wade*, 410 US 113 (1973).

[41] Prudence Flowers, *The Right-to-life Movement, The Reagan Administration, and the Politics of Abortion* (Palgrave 2019) 16.

[42] Joseph Cardinal Bernardin, *A Consistent Ethics of Life* (Sheed & Ward 1988).

[43] Nicole Winfield, 'Pope Francis Rules Out Death Penalty in Change to Church Teaching' *Chicago Tribune* (2 Aug 2018) <https://www.chicagotribune.com/nation-world/ct-pope-death-penalty-inadmissible-20180802-story.html> accessed 17 Mar 2020. For an introduction to the Catholic Church's teaching on capital punishment before Pope Francis's turn, see Edward Feser & Joseph M Bessette, *By Man Shall His Blood Be Shed: A Catholic Defense of Capital Punishment* (Ignatius Press 2017) 111–211.

[44] 1993 Constitution of the Kingdom of Cambodia, art 32: 'Everybody shall have the rights to life, freedom, and personal security. Capital punishment is prohibited.' The Constitution of the Republic of the Philippines, s 19(1): 'Excessive fines shall not be imposed, nor cruel, degrading or inhuman punishment inflicted. Neither shall death penalty be imposed, unless, for compelling reasons involving heinous crimes, the Congress hereafter provides for it'.

[45] 1949 Constitution of Hungary, art 54(1): 'In the Republic of Hungary everyone has the inherent right to life and to human dignity. No one shall be arbitrarily denied of these rights'.

[46] 1993 Interim Constitution of South Africa, art 9: 'Every person shall have the right to life'.

[47] Robert C Post, 'Fashioning the Legal Constitution: Culture, Courts, and Law' (2003) 117 Harvard Law Review 4, 8.

[48] See David Johnson & Franklin Zimring, *The Next Frontier: National Development, Political change, and the Death Penalty in Asia* (Oxford University Press 2009); Jimmy Chia-Shin Hsu, 'Right to Life', in David Law, Holning Lau & Alex

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Double Provisions Under Cruel-Punishment Review

In this Part, I discuss representative cases of the Japanese Supreme Court, the United States Supreme Court, and the South African Constitutional Court. The constitutions of all three countries contain both right-to-life and cruel-punishment provisions. Yet, for all three courts, cruel punishment serves as the principal ground of review. As William Schabas noted, the cultural dimension in cruel-punishment review is 'inescapable'.[49] And the cultural dimension in the concept of cruelty tends to orient the court toward a positive (ascertaining what the people/society think or feel) and deferential (to the legislature) approach to its interpretation, for which the Japanese Court is the prime example. However, for more active courts, the positive approach is mixed with (the US) or supplanted by (South Africa) a normative approach, in which the court makes its own interpretive judgment. As will be explicated in the following discussion of the US Supreme Court and the South African Constitutional Court, the normative approach gave rise to important substantive and methodological debates that would be carried over into the subsequent development of right-to-life review.

The Supreme Court of Japan: The Positive Approach

Japan, alongside the United States, has been one of the few liberal democracies and OECD countries that retains capital punishment. Popular support has consistently hovered around 80 per cent of the population.[50] Even though a strong voice for abolition is emerging from the civil society,[51] there is no clear sign that abolition will happen in the near future. In fact, opposition to the use of capital punishment was not totally unknown in the history of Japan. The death penalty was stayed from the ninth century to mid-twelfth century during the relatively peaceful Heian period by emperors under the influence of Buddhism.[52] However, after executions were resumed in 1156 CE in the wake of the *Hogen-no-Ran* rebellion, capital punishment has grown so deeply rooted in Japan's penal system that it was impossible to imagine its abolition until the end of *Tokugawa* period in the mid-nineteenth century, when western debates on capital punishment were introduced into Japan.[53] It took WWII and the new postwar 1947 Constitution to open the window for a reconsideration of the issue. This time it was considered by the Supreme Court, whose authority to exercise judicial review was newly granted by the postwar 1947 Constitution.

The seminal decision was delivered by the Supreme Court of Japan on March 12, 1948 under the postwar 1947 Constitution.[54] The case involved a defendant who murdered his mother and sister after a domestic strife and disposed of their bodies by throwing them into a well.[55] The defense attorney appealed to the Supreme Court against the imposition of death sentence on his client. He argued that Articles 199 and 200 of the Penal Code, which made murders punishable by

Schwartz (eds), *Oxford Handbook of Constitutional Law in Asia* (Oxford University Press, forthcoming). Available at SSRN: <https://ssrn.com/abstract=3752240> accessed 20 May 2021.

[49]Schabas (n 20) 6.

[50]The most recent government poll announced in January 2020 shows 80.8% of the public in support of Japan's capital punishment system and only 9% against it. Takakazu Murakami, 'Over 80% Accept Death Penalty in Japan as "Inevitable": Government Poll' *The Mainichi* (18 Jan 2020) <https://mainichi.jp/english/articles/20200118/p2a/00m/0na/010000c> accessed 21 Feb 2020. For a critical assessment of the apparently consistent and robust public support for retention in Japan, see Mai Sato, *The Death Penalty in Japan: Will the Public Tolerate Abolition* (Springer 2014).

[51]Justin McCurry, 'Calls to Abolish Death Penalty Grow Louder in Japan' *The Guardian* (21 Sep 2016) <https://www.theguardian.com/world/2016/sep/21/calls-abolish-death-penalty-grow-louder-japan> accessed 20 Aug 2021.

[52]Petra Schmidt, *Capital Punishment in Japan* (Brill 2002) 10–11.

[53]ibid 88–90.

[54]最高裁判所昭和 23 年 3 月 12 日大法庭判決 (刑事判例集 2 巻 3 号191頁) [Judgment of the Grand Bench of the Supreme Court on 12 Mar 1948 (Keiji Hanreishu, vol 2, no 3, 191)]. I use the translation of the judgment collected in John M Maki, *Court and Constitution in Japan: Selected Supreme Court Decisions 1948–60* (University of Washington Press 1964) 156–164.

[55]Maki (n 54) 156.

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death, are unconstitutional, because capital punishment is 'absolutely prohibited by the new constitution and automatically null and void'.[56]

The postwar Japanese Constitution includes two right-to-life provisions and a cruel-punishment provision. Article 13 (the 'supreme consideration clause') reads:[57]

> All of the people shall be respected as individuals. Their right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and other governmental affairs.

The second right-to-life provision is found in Article 31, 'No person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, except according to procedure established by law'. The Court found capital punishment consistent with right-to-life protection in the supreme consideration clause (Article 13), because it serves significant public welfare. The Court read it alongside the procedural due process clause (Article 31), and indicated that the public welfare was served by capital punishment:

> the threat of the death penalty itself may be a general preventive measure, the execution of the death penalty may be a means of cutting off at the root special social evils, and both may be used to protect society. Again, this [approval of the death penalty] must be interpreted as giving supremacy to the concept of humanity as a whole rather than to the concept of humanity as individuals; and continuation of the death penalty must ultimately be recognized as necessary for the public welfare.[58]

The Court also reasoned that Article 31 'must be interpreted to assume and approve the retention of the death penalty as a form of punishment'.[59]

The positive approach to the cruel punishment clause

Most weight of the reasoning falls on Article 36, 'The infliction of torture by any public officer and cruel punishments are absolutely forbidden'. (The cruel punishment clause) The Court granted that capital punishment is 'both the ultimate and the grimmest of punishments', and that certain execution methods, such as 'burning, gibbetting, crucifixion or boiling', would certainly be regarded as violating Article 36.[60] However, the Court opined that capital punishment is not 'generally regarded' as cruel punishment referred to in Article 36.[61] The Court did not labor to explicate what 'generally regarded' means. It was as if it was so obvious that it required no further explanation. Justice Shima Tamotsu, in a concurring opinion joined by three other Justices, indicated that the ruling reflects 'the people's feelings at the time that the Constitution was enacted'.[62] Further, he considered the Court's approach legitimate, because whether certain punishments are cruel is 'a question that should be decided according to the feelings of the people'.[63] However, Justice Shima went on to argue that 'the feelings of the people cannot escape changing with the times', and that:

[56]ibid 157.
[57]1947 Constitution of Japan, art 13.
[58]ibid 158.
[59]ibid.
[60]ibid 159. The primary method of execution, namely hanging, was later challenged but upheld by the Court. See 最高裁判所昭和36年7月19日大法庭判決（刑事判例集15巻7号1106頁）[Judgment of the Grand Bench of the Supreme Court on 19 Jul 1961 (Keiji Hanreishu, vol 15, no 7, 1106)].
[61]Maki (n 54) 159.
[62]ibid 161.
[63]ibid.

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> as a nation's culture develops to a high degree, and as a peaceful society is realized on the basis of justice and order, and if a time is reached when it is not felt to be necessary for the public welfare to prevent crime by the menace of the death penalty, then both the death penalty and cruel punishments will certainly be eliminated because of the feelings of the people.[64]

Justice Shima Tomatsu, on the one hand, accepted that it was unlikely at the time of the decision for the Court to interpret Article 36 otherwise; on the other hand, he intended to prevent Article 36 from being locked into the framers' intent or its original meaning. By doing so he tried to preserve the possibility of finding capital punishment unconstitutionally cruel in the future. This interpretation, however, invited Justice Inouye Nobori's objection in his concurring opinion. He argued that the meanings of all three Articles construed together are clearly permissive of capital punishment, and this meaning should not change over time. If the time comes when the society desires abolition, it can be done by the National Diet, since the Constitution does not mandate retention either.[65]

The Court affirmed the seminal ruling the next year in another decision,[66] and further articulated the rationales behind punishment. The Court denied that capital punishment is a cruel and torturous penalty, nor is it considered a historical relic. The Court adopted a retributive, at times even purgative rationale[67] by stating that punishment is the poison to cure poison, analogisable to medicine to be administered to counter diseases, that the gravity of punishment should measure up to the gravity of the crime, that one should respect the life and personality of others, while respecting one's own, and that if one does not respect the life of other people and invade it intently, then they should bear the responsibility by rendering their own life deprivable. These seminal rulings have stood to this day.

The case of Japan is one where the right to life is framed textually in the due-process model, embedded in a constitutional culture that is breaking away from statism and moving toward early second-generation view of the right to life. While the right-to-life provisions carried significant weight, the life of an individual has not been elevated to a level that makes right-to-life absolutism acceptable. Article 13 is circumscribed by 'public welfare', and the Court articulated a primarily retributive penal philosophy that would be echoed by the Korean Constitutional Court decades later. Further, the text of the Japanese procedural due process clause in Article 31 makes it difficult to argue against the Constitution's permissiveness of capital punishment. It is hence no wonder that a serious challenge to capital punishment can only be raised from the cruel punishment clause in Article 36. Especially noteworthy about the Court's interpretation of Article 36 is that the Court recognises the inherent cultural element of the concept of cruelty. And such a cultural element is determinable not by the perceptions of the Justices but by ascertaining the feeling or sentiment of the people. To the extent that the Court determines the meaning of cruel punishment mainly by discovering the 'feeling or sentiment of the people' as social facts, I call it the 'positive approach' to the cruel-punishment review.[68]

The United States Supreme Court: The Mixed (Positive-Normative) Approach

The Japanese Supreme Court's positive approach substantially limits the Court's role, since the legislature is in a better position to reflect the 'feeling of the people'. This approach is consistent

[64]ibid.

[65]ibid 164.

[66]最高裁判所昭和24年8月18日大法庭判決（刑事判例集3巻9号1478頁）[Judgment of the Grand Bench of the Supreme Court on 18 Aug 1949 (Keiji Hanreishu, vol 3, no 9, 1478)].

[67]Matthew H Kramer, *The Ethics of Capital Punishment: A Philosophical Investigation of Evil and Its Consequences* (Oxford University Press 2011) 179–266.

[68] This contrast of approaches, namely the positive approach versus the normative approach, is inspired by Margaret Radin's seminal article. Margaret Jane Radin, 'The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishments Clause' (1978) 126 University of Pennsylvania Law Review 989, 1034.

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with the well-known judicial passivism of the Court.[69] For a more active court, however, this approach may not be appropriate. Such a court would have to find a balance between an active role and the cultural dimension of the cruel-punishment review. For this we turn to the United States Supreme Court.

The emergence of 'evolving standards of decency' of the Eighth Amendment

The Eighth and Fourteenth Amendments were enacted respectively in the late eighteenth and the mid-nineteenth century. In face of unforeseen challenges regarding criminal punishments, early on the Court had to consider whether the cultural dimension of cruel and unusual punishment is locked in its origin. In *Weems v United States*,[70] a case involving the fifteen-year imprisonment and hard labor of an officer in the Philippine government for falsifying a public document, the Court indicated that the Eighth Amendment is 'progressive and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice'.[71] Later in *Trop v Dulles*,[72] which involved depriving a soldier of citizenship for desertion in war-time, the Court found the sentence 'cruel and unusual' under the Eighth Amendment, and Chief Justice Warren's dictum has over time become entrenched: 'The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society'.[73]

These two significant cases paved the way for *Furman* and *Gregg* by unlocking the meaning of cruel and unusual punishment from its origin. In fact, the two cases did more than that. As *Weems* involved punishments that are arguably not inherently cruel, it gave rise to a possible interpretation that subtly transformed the meaning of cruel punishments. As Justice Marshall said in his concurring opinion in *Furman*, *Weems* stands for the proposition that 'excessive punishments were as objectionable as those that were inherently cruel'.[74] Further, since the punishment reviewed in *Trop* is deprivation of citizenship, which did not involve physical pain and suffering, Chief Justice Warren relied primarily on a normative, rather than positive, approach to the 'evolving standards of decency'. To underpin his analysis of the nature and impact of citizenship deprivation, Chief Justice Warren stated, 'The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment assures that this power be exercised within the limits of civilized standards'.[75]

From Furman and Gregg to Coker: formation of the mixed approach

All these issues in their various orientations were further developed by the several Justices in their opinions in *Furman*. For all the richness of these opinions, I highlight four issues that have been contested. The first is the degree of judicial deference to the legislature. On one end stood Justice Brennan and Justice Marshall, who advocate for active judicial intervention even on the broad issue of *per se* constitutionality of capital punishment. On the opposite end stood Chief Justice Burger, Justice Blackmun, Justice Powell, and Justice Rehnquist, who urged deference. The second is how to interpret 'evolving standards of decency'. While Justice Brennan and Justice Marshall adopted a primarily normative approach by laying out relevant principles, other Justices adopted a more deferential stance and favoured positive indexes to ascertain the evolving social standards. Thirdly, among the normative standards set out by Justice Brennan and Justice Marshall were that

[69]Shigenori Matsui, 'Why is the Japanese Supreme Court so Conservative?' (2011) 88 Washington University Law Review 1375; David S Law, 'Why Has Judicial Review Failed in Japan?' (2011) 88 Washington University Law Review 1425, 1426.

[70]217 US 349 (1910).

[71]ibid 378.

[72]356 US 86 (1958).

[73]ibid 101.

[74]*Furman* (n 8) 325. Note, however, that this reading is forcefully contested by Chief Justice Warren Burger, see *Furman* (n 8) 376–379.

[75]*Trop v Dulles* 356 US 86, 100 (1958).

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punishment shall not be excessive. By 'excessive', Justice Brennan meant 'the punishment serves no penal purpose more effectively than a less severe punishment'.[76] This standard is forcefully contested by Chief Justice Burger when the penal purpose to be served is deterrence.[77] The Chief Justice's contention will be discussed in more detail in the following. Fourth, the permissibility of retribution as a rationale for criminal punishment. Justice Marshall regarded retribution as no different from retaliation and vengeance, and all are 'intolerable aspirations for a government in a free society',[78] while no other Justices went this far.

In *Gregg*, a 7-2 decision, Justice Stewart delivered the plurality opinion of the Court, which struck delicate balances on all these issues. First, the plurality made it clear that 'the requirement of the Eighth Amendment must be applied with an awareness of the limited role to be played by the courts'.[79] This is partly because the test of 'evolving standards of decency' is 'intertwined with an assessment of contemporary standards and legislative judgment weighs heavily in ascertaining such standards'.[80] Proper judicial self-restraint demands that 'in assessing a punishment selected by a democratically elected legislature against the constitutional measure, we presume its validity',[81] and that 'a heavy burden rests on those who would attack the judgment of the representatives of the people'.[82] Second, to ascertain the contemporary standards of decency, the plurality avoided subjective judgment and looked for objective indicia that reflected the public attitude toward a given sanction. Third, public perceptions of standards of decency are not conclusive. The plurality continued Chief Justice Warren's legacy and accepted 'the dignity of man' as 'the basic concept underlying the Eighth Amendment'. It mandates that a penalty should not be 'excessive', which entails that the punishment must not involve unnecessary and wanton infliction of pain, and that the punishment must not be grossly out of proportion to the severity of the crime.[83] Fourth, the plurality rejected Justice Brennan's necessity test, and held, 'We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved'.[84] Lastly, the plurality found retribution a permissible objective neither forbidden nor inconsistent with respect for the dignity of men.[85]

One year after *Gregg*, in *Coker v Georgia*[86] the Court addressed the narrower question of whether capital punishment as applied to the rape of an adult woman is constitutional. Justice White delivered the plurality opinion of the Court and struck down the state statute in question. *Coker* is significant in that it affirmed and refined the doctrine of excessiveness or disproportionateness in *Gregg*. It encompasses two grounds, which include (1) whether a punishment makes measurable contribution to acceptable goals and whether it is more than a purposeless and needless imposition of pain and suffering; or (2) whether it is grossly out of proportion to the severity of the crime.[87] Further, *Coker* established the framework of scrutiny, which requires the Court first 'to be informed by objective factors to the maximum possible extent',[88] and then upon the objective findings to bring 'our own judgment' to bear.[89] In contrast to the simple positive approach of the Japanese Supreme Court, the US Supreme Court's positive approach to 'evolving standards of decency'

[76] *Furman* (n 8) 280.
[77] ibid 392–395.
[78] ibid 343.
[79] *Gregg* (n 9) 174.
[80] ibid.
[81] ibid 175.
[82] ibid.
[83] ibid 173.
[84] ibid 175.
[85] ibid 183.
[86] 433 US 584 (1977).
[87] ibid 592.
[88] ibid.
[89] ibid 597.

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has since become quite sophisticated and non-deferential in the following decades. The objective factors the Court used to measure national consensus include practices of legislatures and sentencing juries, foreign law and international law, opinions of professional societies, and even trends of general opinions of the public.[90] Moreover, the positive approach is mixed with a normative approach, in that the Court brings 'our own judgment' to bear on whether a penalty is grossly disproportionate. Through proportionality analysis, the Court scrutinises whether a penalty serves penal purposes in meaningful ways. The mixed approach gave the Court flexibility to calibrate its deference to the legislature. On the broad issue of *per se* constitutionality of capital punishment, the Court gave the legislature more deference. On narrower issues regarding capital punishment, the mixed approach gave the Court sufficient tools to carve out types of crimes (rape and aiding and abetting without intention of murder) and categories of defendants (age under eighteen and intellectually disabled) and declare the death penalty disproportionate in particular contexts. As American constitutional culture continues to shift, some observers have regarded proportionality analysis as the most attractive and promising judicial abolition strategy.[91]

South African Constitutional Court: The Normative Approach

The 1993 interim constitution of the post-apartheid South Africa encompasses a right to life provision which bears every mark of the late second generation. Section 9 reads, '*Every person shall have the right to life*'. Other relevant provisions include Section 10, which reads, '*Every person shall have the right to respect for and protection of his or her dignity*' and Section 11(2), '*No person shall be subject to torture of any kind, whether physical, mental or emotional, nor shall any person be subject to cruel, inhuman or degrading treatment or punishment*'. Like the US Supreme Court, the South African Constitutional Court in *State v Makwanyane*[92] reviewed the constitutionality of capital punishment *per se* under the 'cruel, inhuman or degrading punishment' clause. Yet unlike its American counterpart, the South African Constitutional Court did not sidestep other provisions in its analysis. Instead, it integrated the right to life and right to dignity into cruel-punishment review by treating them as sub-issues. This may be partly because the South African interim constitution encompasses a general limitation provision in Section 33(1). Since most of the rights are subject to a similar structure of review, there is little difficulty integrating them. For the South African Court, the review framework is the so-called 'two-stage approach', which means 'a broad rather than a narrow interpretation is given to the fundamental rights enshrined in Chapter Three, and limitations have to be justified through the application of section 33'.[93]

The normative approach and sidestepping of public opinion

In his leading judgment, Chief Justice Chaskalson indicated that, during the multi-party negotiation and the constitution-making process, the death penalty was a highly controversial issue. In a working paper of the South African Law Commission, written during the preparation of its interim report on Group and Human Rights, the right to life was recognised, but subject to the proviso that the death sentence be allowed for the most serious crimes. The proviso was later discarded. It is the Court's understanding that the silence of the Constitution on the death penalty was deliberate, and the issue was intentionally left for the Court to decide.[94] The Court then minimised the relevance of public opinion to the interpretation of the cruel punishment clause. Justice Chaskalson said, 'Public opinion may have some relevance to the enquiry, but in itself, it is no substitute for the

[90]Matthew Matusiak et al, 'The Progression of 'Evolving Standards of Decency' in U.S. Supreme Court Decisions' (2014) 39 Criminal Justice Review 253, 256–257.

[91]Steiker & Steiker (n 12) 275.

[92]*State v Makwanyane* (CCT3/94) [1995] (hereinafter '*Makwanyane*').

[93]ibid para 100.

[94]ibid para 22.

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duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favour'.[95] Despite his acknowledgement of 'some relevance' of public opinion, he premised his reasoning on the assumption that the majority of the South African public favoured the death penalty to be imposed in extreme cases of murder.[96] The Chief Justice's presumption was correct. In fact, in 1995, even after *Makwanyane* was decided, nearly 75 per cent of South Africans still favored reintroduction of the death penalty.[97] The Chief Justice opined, 'If public opinion were to be decisive there would be no need for constitutional adjudication. The protection of rights could then be left to the Parliament which has a mandate from the public and is answerable to the public for the way its mandate is exercised, but this would be a return to parliamentary sovereignty, and retreat from the new legal order established by the 1993 Constitution'.[98] In three short paragraphs, the Chief Justice sidestepped the positive approach and adopted a highly normative one.

First stage of review: whether capital punishment is cruel punishment

The Court's normative approach to cruel-punishment review has three primary components: (1) references to international and foreign law, (2) the right to dignity, and (3) the right to life. Theunis Roux observes that Justice Chaskalson replaced substantive reasoning with lengthy, exhaustive, and perhaps somewhat confusing commentary on international law and foreign case law, to be followed by an under-reasoned assertion that the death penalty constitutes cruel punishment.[99] Roux's argument is that the Justices' heavily legal and technical style of reasoning is a successful exercise of judicial politics.[100] I agree, in that the Court resolved a highly controversial issue in a way that is disfavoured by the public, and yet continued to entrench its authority and reputation domestically and internationally. But, unlike Roux, I do not think Chief Justice Chaskalson's lengthy commentary on transnational law is purely technical and devoid of substantive reasoning. Rather, my reading towards the end of the commentary already points to a conclusion of the first stage of review that is hardly surprising. Chief Justice Chaskalson did not fail to exercise substantive reasoning mandated by Section 35(1). He deftly clothed his substantive reasoning in the apparently technical legal commentary on transnational law.

First, Chief Justice Chaskalson conducted substantial discussion of the American cases. Yet he dwelt cursorily on the plurality's intricate reasoning in *Gregg* and attributed the US Supreme Court's upholding of capital punishment almost entirely to the text of the due process clauses that recognised the death penalty. The intricate balance between competing concerns struck by Justice Stewart in *Gregg* was given little attention. Instead, he devoted most of his discussion to: (1) the arbitrariness and capricious nature of death sentences found by the American Court in *Furman*, (2) the subsequent series of super due process cases, (3) the negative consequences arising from heightened procedural protection that resulted in considerable expense, interminable delays, and the 'death row phenomenon', (4) poverty and race may continue to plague the death penalty system despite guided sentencing discretion.[101] Second, he construed the unqualified phrasing of the right to life in Section 9 of the interim constitution not toward early but late second generation view of the right to life, and used it to distinguish the South African Constitution from India (right to life in due process model), ICCPR (death penalty as an exception specified), and ECHR (death

[95]ibid para. 88.
[96]ibid.
[97]Max du Plessis, 'Between Apology and Utopia-The Constitutional Court and Public Opinion' (2002) 18 South African Journal of Human Rights 1, 5–6.
[98]*Makwanyane* (n 92) para 88.
[99]Theunis Roux, *The Politics of Principle: The First South African Constitutional Court 1995–2005* (Cambridge University Press 2013) 243.
[100]ibid 246.
[101]*Makwanyane* (n 92) paras 40–56.

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penalty as an exception).[102] Third, regarding the right to dignity, he ignored the principle of dignity in Justice Stewart's opinion in *Gregg*. Instead, he focused on Justice Brennan's *Gregg* dissent and argued that the death penalty violated dignity, along with other sources to similar effects.[103]

Second stage of review: whether capital punishment can be justified

For the Court to find the death penalty a cruel punishment only concludes the first stage of proportionality review. In the second stage, Chief Justice Chaskalson discusses whether such infringement could be justified under the limitation clause. Invoking the Canadian Supreme Court's *R v Oakes* decision, Chief Justice Chaskalson lays out three sub-tests of the proportionality principle, which include: (1) rational connection between the end and the measure, (2) the requirement of least invasiveness, and (3) proportionality between the right invasion and the importance of the objective.[104] The most important element in this case is the second, namely the least restrictive test or the necessity test.[105] The Court used it to require capital punishment be evaluated against a lesser alternative, namely life imprisonment. Under the two-stage approach, once it is recognised that a fundamental right is infringed, the burden of persuasion is shifted to the government to establish that the measure in question passes the proportionality review. Accordingly, the Court placed the burden of persuasion on the government, instead of the petitioner, to establish that capital punishment is a more effective penalty than life imprisonment with respect to legitimate penal purposes.[106]

It should be noted that the proportionality analysis under the Eighth Amendment to the US Constitution should not be confused with the proportionality principle as used by the South African Court and many courts around the world. The former is mixed with normative and positive inquiries, with varying degrees of weight of the two aspects in different contexts, such as in capital and non-capital cases. In contrast, the latter is in principle normative, and requires the court to inquire into the legitimacy of the state purpose, the suitability of the government measure to achieve the purpose, the necessity of such a measure, and the overall balancing between the rights infringed and the benefits gained by the measure.[107]

With regard to penal purposes, the South African Court stressed that retribution 'carries less weight', and 'ought not to be given undue weight in the balancing process'.[108] This value choice is shaped by the spirit of *ubuntu,* the African spirit of peace and harmony through reconciliation,[109] in the context of South Africa's democratic transition. In a time when the democratic prospect was still uncertain, political reconciliation between the races was made a supreme goal in order to prevent violent retaliation and civil strife. The South African Court shares the belief and values with most African National Congress elites. This is clearly manifested by Chief Justice Chalskalson's invocation of 'National Unity and Reconciliation' provision in the interim Constitution:

> The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge. These can now be addressed on the basis that there is a need for

[102]ibid para 39.
[103]ibid paras 57–62.
[104]ibid para 105.
[105]ibid para 97.
[106]ibid paras 102, 106.
[107]For in-depth discussion of proportionality in the US in comparison with that used in courts of other jurisdictions, see Vicki Jackson, 'Constitutional Law in an Age of Proportionality' (2015) 124 Yale Law Journal 3094.
[108]*Makwanyane* (n 92) paras 129, 130.
[109]ibid para 130.

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> understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation.[110]

For the Chief Justice, such normative expectation spills over to criminal justice.[111] By equating retribution with retaliation or revenge, the South African Court effectively downgraded retribution as a penal purpose. As a result, the primary weight will be carried by deterrence as a penal purpose in the proportionality review.

Reconstructed dialogue I: The necessity test and the severest penalty

With regard to deterrence, the South African Court required the government to produce convincing evidence that capital punishment can deter potential murderers to an extent that is not achievable by life imprisonment. Here, the Court quoted the attorney general who defended the statute in question:

> there is no proof that the death sentence is in fact a greater deterrent than life imprisonment for a long period. It is, he said, a proposition that is not capable of proof, because one never knows about those who have been deterred; we know only about those who have not been deterred, and who have committed terrible crimes.[112]

To this the Court responded that the mission impossible is a mission imperative nonetheless, because 'a punishment as extreme and as irrevocable as death cannot be predicated upon speculation as to what the deterrent effect might be'.[113] The Court required that the government 'has to satisfy us that the penalty is reasonable and necessary, and the doubt which exists in regard to the deterrent effect of the sentence must weigh heavily against his argument'.[114]

The South African Court's approach echoes Justice Brennan's necessity test in his *Furman* opinion. It is hence noteworthy that the debate between Justice Brennan and Chief Justice Burger in *Furman* can be carried over into *Makwanyane*. As mentioned, Justice Brennan takes 'excessiveness' to mean 'the punishment serves no penal purpose more effectively than a less severe punishment'. When applied to capital punishment, it means the question to be asked is whether capital punishment serves any legitimate purpose more effectively than a less severe punishment, such as life imprisonment. And this is exactly the test that the South African Court used in *Makwanyane*. To this test, Chief Justice Burger objected with a powerful rebuttal in his dissenting opinion in *Furman*,

> Comparative deterrence is not a matter that lends itself to precise measurement; to shift the burden to the States is to provide an illusory solution to an enormously complex problem. If it were proper to put the States to the test of demonstrating the deterrent value of capital punishment, we could just as well ask them to prove the need for life imprisonment or any other punishment. Yet I know of no convincing evidence that life imprisonment is a more effective deterrent than 20 years' imprisonment, or even that a $10 parking ticket is a more effective deterrent than a $5 parking ticket. In fact, there are some who go so far as to challenge the notion that any punishments deter crime. If the States are unable to adduce convincing proof rebutting such assertions, does it then follow that all punishments are suspect as

[110] ibid para. 130.
[111] ibid para 131.
[112] *Makwanyane* (n 92) para 127. Note that this attorney general who defends the statute in question is not an official of the national government, since the ruling African National Congress supported abolition. He was the attorney general of Witwatersrand, an independent official: Roux (n 99) 240.
[113] *Makwanyane* (n 92) para 127.
[114] ibid.

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> being "cruel and unusual" within the meaning of the Constitution? On the contrary, I submit that the questions raised by the necessity approach are beyond the pale of judicial inquiry under the Eighth Amendment.[115]

Chief Justice Burger's argument is multilayered. It involves at least three issues. The first is the court's role in a highly complex and general factual inquiry. Chief Justice Burger's argument influenced Justice Stewart's plurality opinion in *Gregg*, who considered the overall deterrence effect of capital punishment 'a complex factual issue the resolution of which properly rests with the legislatures, which can evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts'.[116] It is beyond the scope of this article to assess whether the factual issue has been resolved by empirical and statistical research. Since Isaac Ehrlich published his seminal works in 1970s,[117] the deterrence effect of the death penalty has been hotly debated by economists and criminologists, and the literature both *pro* and *con* have been booming for the past two decades. A recent review of the literature on the deterrence effect observes the continuing contestation in terms of both methodology and substantive conclusions.[118] It entails that the deterrence effect of capital punishment can neither be definitively proven nor disproven, which is a state of affairs not quite different from that in the 1970s. Even if such an assessment of the literature can still be contested, the complex and fluid nature of the factual inquiry legitimises the US Supreme Court's concern about the court's limited role. Second, if the court decides to address the factual inquiry, how should the court allocate the burden of persuasion, which, given the uncertain state of affairs, is dispositive of the case outcome? Third, the factual inquiry is entangled with a further issue: whether the marginal ineffectiveness is sui generis to capital punishment, or whether it is just a particular instance of a generic problem with the deterrence effect of severe punishment. If it is not a problem peculiar to capital punishment, would the court be ready to face similar challenges to whatever penalty remaining on top of the penal system, be it death, life without or with parole, or, say, thirty years of imprisonment?[119]

Chief Justice Burger's argument raises concerns about proposals in the American context for the Court to review capital punishment *per se* under the substantive due process doctrine. In light of his argument, if it cannot be proven that the marginal ineffectiveness of capital punishment is sui generis, once long-term imprisonment is put to the same test, it may lead to substantial reduction of penal choices meant to measure up to the most heinous of crimes. Margaret Jane Radin saw this clearly when she pondered on how to address this concern: '[t]o avoid such a result, the death penalty must be placed on the upper tier of scrutiny, and imprisonment on the lower; but what are the principles which dictate that placement?'[120] The question hence is not merely whether the right to life should be recognised as a fundamental right, the infringement of which should be given strict scrutiny. The related difficulty lies in how the liberty interest infringed by long-term incarceration should not be subject to strict scrutiny. To this end, it may require the Court to refuse to recognise the liberty interests infringed by long-term imprisonment as a fundamental right. But is that

[115] *Furman* (n 8) 395.

[116] *Gregg* (n 9) 186.

[117] See Isaac Ehrlich, 'The Deterrent Effect of Capital Punishment: a Question of Life and Death' (1975) 65 American Economic Review 397, 397–417; Isaac Ehrlich, 'Capital Punishment and Deterrence: Some further Thoughts and Additional Evidence' (1977) 85 Journal of Political Economy 741, 741–788; Isaac Ehrlich & Joel Gibbons, 'On the Measurement of the Deterrent Effect of Capital Punishment and the Theory of Deterrence' (1977) 6 Journal of Legal Studies 35, 35–50.

[118] Aaron Chalfin & Justin McCrary, 'Criminal Deterrence: A Review of the Literature' (2017) 55 Journal of Economic Literature 5, 28–29.

[119] In fact, in addition to the already controversial status of life imprisonment without possibility of parole (LWOP), arguments have been made to challenge long-term incarceration in general. See Jacob Bronsther, 'Long-term Incarceration and the Moral Limits of Punishment' (2020) 41 Cardozo Law Review 2369.

[120] Radin (n 68) 1014.

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plausible? Radin is correct again to point out that 'a satisfactory answer to the life/liberty criticism must recognise that certain liberty interests are indeed fundamental'.[121] To solve the problem, Radin chooses not to resort to the substantive due process doctrine, which focuses on identifying fundamental rights. Instead, she resorts to 'the principle of risk of error', which separates the death penalty from long-term imprisonment by the former's irrevocability and enormity in the case of wrongful conviction or sentencing.[122] For her, the principle of risk of error should operate under the Eighth Amendment jurisprudence established in *Gregg* and *Coker*. This principle serves to heighten the level of scrutiny for capital punishment in an otherwise less stringent test in the 'our own judgment' prong of the proportionality test. Whether Radin's proposal is overall plausible would depend on whether the principle of risk of error alone could justify targeting capital punishment for strict scrutiny, and this issue is beyond the scope of our discussion. Nevertheless, I consider her approach meaningful at least in trying to meet Chief Justice Burger's concern.

For the South African Court, however, Chief Justice Burger's critique may not be easily met. There are three reasons. First, the proportionality principle is a set of comprehensive review standards applicable to all fundamental rights. The necessity test is a settled sub-test of this principle and is applicable to all fundamental rights. Second, both the right to life (Article 11) and the 'right to freedom and security of the person' (Article 12) are recognised as fundamental rights in the South African Constitution. It would be far-fetched to argue that the freedom deprived by long-term incarceration does not come within the purview of Article 12. Given the equal status of the two rights, it is difficult to argue how capital punishment and long-term incarceration should receive different levels of scrutiny. Third, for the South African Court, the difficulty would be sharpened. For the US Supreme Court, retribution is a permissible penal purpose on equal footing with deterrence. Therefore, if the US Court's analysis with regard to deterrence is flawed, its analysis with regard to retribution may still bear out the result. For the South African Court, however, its relegation of retribution leaves unsettled how much weight this penal purpose can still carry in future challenges of the severest penalty. In any event, its analysis of deterrence will still have to bear the sharpest critique. Practically, *Makwanyane* succeeded in realizing the abolition ideal of the ruling elite, by putting off the analytical hurdle until future cases arise to challenge the severest penalty, which may or may not come.

Right-To-Life Review

Right-to-life absolutism: The former Soviet-bloc Courts

The collapse of communism in Central and Eastern Europe gave a significant boost to the world abolition trend. Awaiting the former Soviet-bloc states was an expanding world cultural environment in which sacralisation of individuals was ascending as a powerful ideology.[123] Growing international human rights regimes institutionalised that ideology. Leading states, especially the Council of Europe and the European Union, were willing to exercise political clout to pressure fledgling democracies to join their rank.[124] It is hence no surprise for us to find in the former Soviet-bloc states the most aggressive forms of right-to-life review, which embody right-to-life absolutism.

In 1990, the year following the change of regime, the newly established Hungarian Constitutional Court delivered *Decision 23 of 1990*,[125] and ruled capital punishment unconstitutional *per se*. The

[121]ibid 1015.

[122]ibid 1017–1030.

[123]Matthew D Mathias, 'The Sacralization of the Individual: Human Rights and the Abolition of the Death Penalty' (2013) 118 American Journal of Sociology 1246, 1255–1257.

[124]Agata Fijalkowski, 'Abolition of the Death Penalty in Central and Eastern Europe' (2001) 9 Tilburg Foreign Law Review 62.

[125]Alkotmánybíróság (AB)[1990] (Constitutional Court) 31 October, Decision 23. The decisions of the Hungarian Constitutional Court in English are available from the website of the Court. The Constitutional Court of Hungary, 'Decision 23 (1990)' <http://public.mkab.hu/dev/dontesek.nsf/0/179297164CE96B8DC1258382003C36D7?OpenDocument&english.>

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Court mainly dealt with Article 54(1) of the 1949 Hungarian Constitution, which reads, '*In the Republic of Hungary everyone has the inherent right to life and to human dignity. No one shall be arbitrarily denied of these rights*'. The wordings in Article 54(1) do not necessarily rule out limitation on the right to life, since what is prohibited is 'arbitrary denial' rather than any denial. However, the Court found this reading inconsistent with Article 8(2), which states, 'In the Republic of Hungary regulations pertaining to fundamental rights and duties are determined by law; such law, however, may not restrict the basic meaning and contents of fundamental rights'. Essentially, the Court regards the right to life as the 'basic meaning and contents of fundamental rights' that cannot be restricted at all.[126]

There are three reasons for such a reading. First, as the Court emphasises, 'The rights to human life and human dignity form an indivisible and unrestrainable fundamental right'.[127] Second, the right to life and human dignity taken together is 'the source of and the condition for several additional fundamental rights'.[128] Third, such a reading is congruent with relevant international treaties such as the spirit of Article 6 of ICCPR and European Convention on the Protection of Human Rights and Fundamental Freedoms and its 1983 Protocol 6, which abolishes capital punishment for peacetime.[129] Accordingly, the Court found capital punishment unconstitutional *per se*. This reading is premised on the absolute protection of human dignity and its inseparability from the right to life. The absolute protection accorded by the Court to the right to life made it unnecessary to ask whether capital punishment is necessary for penal purposes, and so proportionality analysis was not needed. In their concurring opinion, Justice Lábady and Justice Tersztyánszky said emphatically,

> Human dignity, as the unity of personality along with human life, means the essence of man. Dignity is an elevated and absolutely respected quality of our human life and values: it is a standard of our human essence. It is an *a priori* value in the same way as life, and expresses the human dimension of life. Being a human and human dignity are inseparable from one another. Both are inalienable, imminent, essential properties of man. To be worthy of life means dignity as a human being, and that is why human life and human dignity may not really be handled separately.[130]

In a similar vein, both the Lithuanian Constitutional Court and the Albanian Constitutional Court ruled capital punishment unconstitutional *per se* for violating the right to life and human dignity. As a corollary, it is unnecessary to conduct proportionality analysis. In *Case No 2/98* delivered on December 9, 1998, the Lithuanian Constitutional Court adopted an approach that is highly similar to that of the Hungarian Constitutional Court.[131] In *Decision No 65, 1999*, the Albanian Constitutional Court first used a lengthy section to explain that Albania is under international pressure to abolish the death penalty so as to meet the condition for membership to the Council of Europe,[132] and then judged that the death penalty violates the essence of the right to life and human dignity.[133] This series of judicial decisions from former Soviet-bloc courts captures the right-to-life absolutism that came of age in the 1990s. Several Hungarian Court Justices, including

accessed 5 Mar 2020. The PDF document is neither paginated nor paragraphed. Hereinafter I reference the decision in accord with the page number indicated in the PDF page indicator.

[126]ibid 10.

[127]ibid 10.

[128]ibid.

[129]ibid 11.

[130]ibid 13 (Justice Lábady and Justice Tersztyánszky concurring).

[131]The Constitutional Court of the Republic of Lithuania, Case No 2/98, Vilnius, 9 Dec 1998, s 4.

[132]ALB-1999-3-008, Decision No 65, 10 Dec 1999.

[133]ibid.

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Justice Lábady, Justice Tersztyánszky, and Justice Sólyom went so far as to claim in their concurring opinions that the indivisible union of human dignity and the right to life is an *a priori* value that is 'beyond the reach of law'.[134]

Reconstructed dialogue II: Exceptions to the right to life

Despite such absolute discourse, Justice Sólyom, who was then the President of the Court, realised that there is an analytical hurdle. In his concurring opinion, Justice Sólyom indicated that justifiable self-defense presents a difficulty for the Court. He opined that if the state does not have any authority to take any human life in the first place, due to the *a priori* quality of the value, self-defense cannot be justified. The state does not have the authority to take the accused's life; nor does it have the authority to ask the victim to sustain an attack that is to deprive them of their life.[135] The victim is hence placed in a 'natural condition' in the absence of civil authority.[136] Essentially, Justice Sólyom argued that self-defense happens out of a necessary 'distribution of death' in a state of nature without the presence of civil authority. Since it happened outside of the Hungarian constitutional and legal order, technically speaking, there remains no exception to the right to life within the legal order.

Five years after the Hungarian Court decision, in *Makwanyane*, the South African Constitutional Court addressed the same question. It was responding to the attorney general's argument that 'the right to life and the right to human dignity were not absolute concepts', and that if the law recognises self-defense as justifiable, 'why should the law not recognize the state's power to take the life of a convicted murderer in order to deter other murderers?'[137] Unlike the Hungarian Court, the South African Court did not consider the right to life as absolute; nor did it regard self-defense as happening in 'natural condition' or 'beyond the reach of law'. It recognised the legitimate place of justifiable self-defense within the legal order. While Justice Sólyom of the Hungarian Court denied the state authority over the 'redistribution of death', Chief Justice Chaskalson of the South African Court made it clear that 'where a choice has to be made between the lives of two or more people, the life of the innocent is given preference over the life of the aggressor'.[138] Even though the aggressor's right to life can be justifiably infringed, the justification of self-defense does not contravene the state's duty to protect the right to life, because this is a choice to be made in the conflict of the right to life of the victim and that of the aggressor. It should be noted that the South African Court referenced the Hungarian decision in *Makwanyane*.[139] It is reasonable to infer that the South African Court was aware of the Hungarian Court's absolutist approach. By refusing to attribute the right to life to the 'essential content' clause, the South African Court consciously rejected this approach to avoid the analytical difficulties. Moreover, the South African Court did not stop at self-defense in its discussion of exceptions to the right to life. It recognised justifiable necessity as in a life-threatening hostage situation, war and rebellion, and police shooting at an escaping criminal.[140] The Court recognised the legitimacy of these exceptions and emphasised that even in these exceptional circumstances the state remains under constraint from unnecessary use of lethal force.

The Proportionality Review: East Asian Courts

Unlike the former Soviet-bloc courts, East Asian new democracies such as Taiwan and South Korea, along with Japan, harbor a different view of the right to life. Both Taiwan and Korean Constitutional Courts conducted right-to-life review to address challenges to capital punishment. In 1999, Taiwan

[134]'Decision 23 (1990)' (n 125) 13, 32.
[135]ibid 32.
[136]ibid.
[137]*Makwanyane* (n 92) para 136.
[138]ibid para 138.
[139]ibid para 83.
[140]ibid paras 138–140.

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Constitutional Court upheld the Narcotics Hazard Prevention Act in *JY Interpretation No 476*, which made the sale, manufacturing, and trafficking of narcotics punishable by death.[141] The Court held that the right to life in Article 15 of the Taiwan Constitution shall be protected, but the statute in question is justifiable through proportionality analysis: since fighting drugs is a legitimate state purpose, the measure is necessary and the restriction of rights is balanced.[142] The Court's proportionality analysis is cursory. It spent the most ink explaining the significance of the historical fight against narcotics in Chinese history since the nineteenth century and explaining how such crimes caused wide and deep harm to society.[143] To this day the Court has not admitted new challenges to capital punishment.

The Korean Constitutional Court's proportionality review

In this section, I focus on the Korean Constitutional Court's decision in 2010 that rejected a *per se* challenge to capital punishment.[144] The Korean Court adopted a proportionality principle similar to that used by the South African Court. In fact, this is not the first time the South Korean Court upheld capital punishment. It delivered a decision in 1996 to the same effect.[145] But the 2010 decision is especially significant, because it was issued at a time when South Korea had consolidated its democracy and its constitutional jurisprudence has reached a higher degree of maturity. The Korean Constitutional Court's retention ruling hence defied the democratic optimism of abolitionists.[146] Moreover, it is delivered against the background of a moratorium on executions since 1998,[147] which has led Amnesty International to classify South Korea as a country of *de facto* abolition.[148] The Korean Court's ruling extended the ambiguous status of capital punishment, for there is still a lack of consensus among the Korean legal professionals and political elites on official abolition. The Korean National Human Rights Commission recommended abolition.[149] Yet legislative initiatives to abolish the death penalty have failed three times since 1999,[150] and the Ministry of Justice has been hesitant to follow the recommendation of the National Human Rights Commission.[151]

It should be noted at the outset that Article 110(4) of the Korean Constitution states that even in the case of a military trial under martial law, the criminal defendant sentenced to death must be guaranteed the right to appeal in the judicial system. It means that the death penalty cannot be ruled out across the board. Nevertheless, this does not settle the issue of the death penalty under the Criminal Code. The Court first recognised that the right to life is 'the most fundamental right and precondition to all the basic rights set forth in the Constitution', and that it has to be

[141]JY Interpretation No 476. English translation of the Court's Interpretations are available on the Court's website: Constitutional Court, Judicial Yuan of the ROC, 'Interpretations' <http://cons.judicial.gov.tw/jcc/en-us/jep03> accessed 21 Feb 2020.

[142]ibid para 4 ('Reasoning').

[143]ibid para 2.

[144]22-1(A) KCCR 36, 2008 Hun-Ka 23, February 25, 2010 (hereinafter 'KCC 2008 Hun-Ka 23'). The official English translation of decisions of the Constitutional Court of Korea can be downloaded from the Court's website <https://english.ccourt.go.kr/site/eng/decisions/casesearch/caseSearch.do> accessed 7 Sep 2021. Citations in the following are based on the pagination of the downloaded official English translation in pdf form.

[145]Kuk Cho, 'Death Penalty in Korea: From Unofficial Moratorium to Abolition?' (2008) 3 Asian Journal of Comparative Law 1, 18–20.

[146]See eg, Eric Neumayer, 'Death Penalty: The Political Foundations of the Global Trend Towards Abolition' (2008) 9 Human Rights Review 241.

[147]David Johnson & Franklin Zimring, *The Next Frontier: National Development, Political change, and the Death Penalty in Asia* (Oxford University Press 2009) 174–188.

[148]Amnesty International, 'Death Sentences and Executions Report (2015)' <https://www.amnesty.org/en/latest/research/2016/04/death-sentences-executions-2015/> accessed 14 May 2016.

[149]Cho (n 145) 2.

[150]Byung-Sun Cho, 'South Korea's Changing Capital Punishment Policy: The Road from de facto to Formal Abolition' (2008) 10 Punishment and Society 171, 191.

[151]Cho (n 145) 26.

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'respected as highly as possible'.[152] The balancing then should be conducted according to the general limitations clause of Article 37(2). The Court sharpened the issue by noting that if it were to strike down capital punishment *per se*, this penalty cannot be applied even to offenders who commit the most atrocious crimes such as a serial killer, a terrorist who takes many lives, someone who took the lead in a massacre, or a premeditated murderer.[153] Much like the South African Court and many other jurisdictions, the Korean Court understands the proportionality principle to include: (1) rational connection between the end and the measure, (2) the requirement of least restrictiveness or the necessity test, and (3) proportionality between the right invasion and the importance of the objective.

The systemic approach vs marginal effectiveness approach to the necessity test

The major challenge to capital punishment comes from the necessity test. Recall that it is under this test that the South African Court invalidated capital punishment *per se*, by requiring the government to prove capital punishment marginally more effective in deterrence over life imprisonment. By contrast, the Korean Court adopted what I call a 'systemic approach' to the necessity test. The systemic approach differs from the South African 'marginal effectiveness approach', in that the former test is mediated through a mid-level principle organizing penal sentencing. The South African Court reviewed the death penalty as one particular governmental act infringing fundamental rights, while the systemic approach viewed the penalty as one part of a system governed by an intermediary principle of 'letting the punishment fit the crime'. This would then shift focus of review from the particular type of penalty to the organizing principle and how the penalty is subsumed under the principle. The Korean Court recognised that the criminal law system is built on the reasonable assumption that 'the more severe the penalty imposed on the offender, the more likely it is that he or she gives up the plan to commit the crime because, in his or her view, the disadvantage of receiving that penalty outweighs the advantage of committing the crime'.[154] Further, the Court reasoned,

> a death sentence, which deprives a person of life, the most precious thing for a human being, more severely infringe[s] on the criminal's legal interest than [a] life sentence without possibility of parole. In addition, considering people's instinct for survival and their fundamental fear of death, capital punishment shall be deemed to be a form of penalty having the strongest crime deterrent effect, because it threatens all the general public including prospective criminals much more than the penalty of life imprisonment or [a] life sentence without the possibility of parole does.[155]

The reasonableness of this penal sentencing principle led the Court to give deference to the legislature in that 'when the legislature decides that capital punishment should be recognized as a kind of penalty by considering its nature and relations to the crime, penalty, and human instinct, the decision must be respected'.[156] The result is a shift of burden of persuasion to the petitioner to prove otherwise. The Court said, 'in the absence of clear evidence, we are not persuaded that the penalty of life imprisonment or life sentence without possibility of parole has rather the same or better effect in deterring crimes than capital punishment'.[157]

Retributive justice

Besides deterrence, retribution is another penal purpose to be reckoned with under the necessity test. And it is not difficult to see how retribution can provide a firm ground for capital punishment.

[152]KCC 2008 Hun-Ka 23, 18.
[153]ibid 19.
[154]ibid 23.
[155]ibid 24.
[156]ibid.
[157]ibid.

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Recall also that one of the critical moves taken by the South African Court to strike down capital punishment is to play down the weight of retribution as a penal rationale. In contrast, the Korean Court accorded equal weight to deterrence and retribution. Especially noteworthy is that the Court phrased retribution as 'just retribution' rather than simple 'retribution' or 'retaliation'.[158] This phrase connects the idea of retribution to a long tradition of penal philosophy that deems retribution as a matter of just desert and retributive justice,[159] which is distinguishable from crude revenge.[160] The Court then elaborated richly on how capital punishment serves the purpose of just retribution,

> As for the most heinous crime such as killing of many people by cruel means, the degree of infringement on the victims' legal interest and the offender's responsibility on that crime are so enormous that it goes beyond what we can measure. Considering the indescribable sorrow, pain, and anger of the victim's family and the apprehension, fear, and resentment that the general public feels because of the heinous crimes, the imposition of a strong punishment corresponding to the extent of illegality and responsibility that the constitutional order allows is necessary in order to bring justice. Thus, for those crimes, the strongest penalty, the death sentence, is deemed a proper means to achieve justice through just retribution.[161]

The Court then reasoned that in terms of just retribution, life imprisonment without possibility of parole does not strike a balance when it is applied to 'the most atrocious crimes such as killing of many people by cruel means', because 'the criminal's legal interest infringed by the punishment does not raise to the level of legal interest infringed by the crime and the criminal's responsibility'.[162]

Reconstructed dialogue III: Human dignity and the right to life

The last issue in the Korean Court decision is whether capital punishment is consistent with human worth and dignity, prescribed in Article 10 of the Korean Constitution, '[a]ll citizens shall be assured of human worth and dignity and have the right to pursue happiness. It shall be the duty of the State to confirm and guarantee the fundamental and inviolable human rights of individuals'. To begin with, unlike the former Soviet-bloc courts, the Korean Court denied that the taking of the criminal's life automatically violates human dignity. The reason can be seen in the foregoing analysis regarding justifiable exceptions to the right to life. Further, in order to address the argument that capital punishment treats the offender as a 'mere instrument' for public safety, the Court argued that by ignoring advance warning of the criminal law, the criminal offenders decided to commit heinous crimes, and received the death sentence in accordance with the degree of criminal culpability assessed by the court. The penalty did not treat the offender as a 'mere instrument'.[163] Rather, the penalty is of the offender's own choosing, and results from his/her exercise of autonomy. The Court's reasoning here is hasty. Prior warning alone is not sufficient to make the death penalty a just response to crimes. Were it the case, no cruel and inhuman penalties could violate human dignity,

[158]In this decision, 'just retribution' appears twice. KCC 2008 Hun-Ka 23, 23, 25.

[159]For classic elaboration of retributive justice, see Immanuel Kant, 'The Metaphysics of Morals', in Mary J Gregor (ed), *The Cambridge Edition of the Works of Immanuel Kant: Practical Philosophy* (first published 1797, Cambridge University Press 1996) 472–477; GHW Hegel, *Hegel's Philosophy of Right* (Thomas Knox tr, first published 1821, Oxford University Press 1942) 246. See generally Michael S Moore, *Placing Blame: A Theory of the Criminal Law* (Oxford University Press 1997).

[160]For the conceptual difference between retribution and revenge, see Robert Nozick, *Philosophical Explanations* (Harvard University Press 1981) 366–368; Dan Markel, 'State, Be Not Proud: A Retributivist Defense of the Commutation of Death Row and the Abolition of the Death Penalty' (2005) 40 Harvard Civil Rights-Civil Liberties Law Review 407, 438.

[161]KCC 2008 Hun-Ka 23, 23.

[162]ibid 24–25.

[163]ibid 28.

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as long as it is stipulated in prospective criminal law properly promulgated. Nevertheless, this argument can be given a sympathetic reading by associating it with the Court's 'just retribution' rationale. So construed, a justly given death sentence can be deemed the offender's own choice, not just because of the prior warning, but mainly because it accords with the principle of 'fitting the punishment with the crime', which is underpinned by the Court's rationale of 'just retribution'. Next, the Court opined that insofar as capital punishment does not exceed the general limitation clause and passes the proportionality test, it does not violate human dignity and worth as prescribed in Article 10 of the Constitution.[164]

Obviously, the Korean Court's view of human dignity in relation to capital punishment is in stark contrast with the views of the South African and former Soviet-bloc courts. A critical analysis of these views cannot be undertaken here. At present I only make some observations. First, there are thin and thick views of human dignity in relation to capital punishment. The thin views are not self-defining. The specific content of human dignity is substantiated by other settled standards of review. The representative view is the US Supreme Court's plurality opinion in *Gregg*. The Court amalgamated crucial elements in the precedents into a 'dignity' principle underlying the Eighth Amendment, which requires that a penalty not be 'excessive'. 'Not excessiveness' means that the punishment must not involve unnecessary and wanton infliction of pain, and that the punishment must not be grossly out of proportion to the severity of the crime. In other words, human dignity is defined by proportionality of penalty. In this respect, this view is echoed by the Korean Court, because it also used proportionality review as one criterion of dignity violation.

The thick view, in contrast, deemed human dignity as so rich in content that it could directly delegitimise capital punishment. What is in the content? First, there is very close relationship between human dignity and the right to life. The post-Soviet European Courts maintained an indivisible conceptual union of two concepts that demands absolute protection. Even though this view may run into analytical hurdles, it does not mean the two concepts are not closely related. Given the extraordinary weight carried by right to life, any governmental measure exceeding an exceptionally narrow category would not be paying due respect to human dignity. The question then is how exceptional is sufficiently exceptional? Can the right to life only be overridden by itself? Only by imminent threat? By the need to save lives of potential victims in the future at a less than imminent causal chain? By other interests of exceptional magnitude, such as in a war against foreign intrusion? By the social need of 'cutting off at the root special social evil',[165] as the Japanese Supreme Court said, or by 'just retribution'? As discussed, this approach entails these further questions. And these questions do not lend themselves to answers clearly derivable from rational arguments. They are infused with value judgments expressive of a society's traditions, culture, or aspirations.

Second, treating the offender as 'mere instrument'. The South African Court referenced powerful quotes to mark this point. For instance, the US Justice Brennan's dissent in *Gregg*:

> The fatal constitutional infirmity in the punishment of death is that it treats 'members of the human race as nonhumans, as objects to be toyed with and discarded.' [It is] thus inconsistent with the fundamental premise of the Clause that even the vilest criminal remains a human being possessed of common human dignity.[166]

Then, the German Constitutional Court in the Life Imprisonment Case: 'Respect for human dignity especially requires the prohibition of cruel, inhuman, and degrading punishments. The state cannot turn the offender into an object of crime prevention to the detriment of his constitutionally protected right to social worth and respect'.[167] The 'mere instrument' critique harks back to,

[164]ibid 27–28.
[165]Maki (n 54) 158.
[166]*Makwanyane* (n 92) paras 57–59.
[167]*Makwanyane* (n 92) paras 57–59, citing 45 BVerfGE 187, 1977.

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again, Immanuel Kant's condemnation of utilitarian penal theory.[168] It speaks more forcefully to deterrence effect than to the retributive justice rationale, as held also by Kant[169] and the South Korean Court. The South African Court did not have to address this issue, because it downplayed the importance of retributive justice. For courts permissive of both retribution and deterrence, however, this argument requires further discussion.

Third, cruel, inhuman and degrading treatment. The South African Court quoted the dissent of Justice Cory of the Canadian Supreme Court in *Kindler v Canada*, '[capital punishment] is the supreme indignity to the individual, the ultimate corporal punishment, the final and complete lobotomy and the absolute and irrevocable castration. [It is] the ultimate desecration of human dignity'.[170] This critique would then hinge on cruel-punishment review. Even though more discussion may be required, the thick view of human dignity in capital punishment review is expressive of ideas and sentiments of the ascending right-to-life absolutism.

Conclusion

In this concluding section, I summarise the extensive argument that is embedded in this multilayered analysis, and I offer prospects for future studies. I have placed major judicial decisions around the globe into a reconstructed dialogical forum. My central analytical argument contains two points. First, the crucial part of the reasoning in *Makwanyane*, namely that capital punishment cannot be proven to pass the necessity test under the proportionality review, is analytically inconclusive. On the issue of deterrence, the South African Court adopted a 'marginal effectiveness' approach to the necessity test for the review of a particular type of penalty. With this approach, the Court successfully invalidated capital punishment *per se*, since it cannot be proven to be marginally more effective than, say, life imprisonment. However, through reconstructive dialogue with the US *Furman* case and the Korean 2010 case, I reveal that the marginal effectiveness approach may lead to inconclusive results, which is that no penalty could be legitimised, if the difficulty to prove marginal effectiveness is not a problem sui generis to capital punishment. Moreover, the complexity and fluidity of the factual inquiry – whether the death penalty or any severest penalty has more deterrence effect than the next severe penalty – raises legitimate concerns about proper judicial roles in a democracy. The Korean Constitutional Court, in contrast, adopted a 'systemic' approach to the necessity test under the proportionality principle. The Court treated the penalty type in question as part of a penal system that is justifiably organised around the legislative principle of commensurate sentencing. This approach addresses the concern about proper judicial function under proportionality review and successfully circumvents the analytical problem in *Makwanyane*. Note that this does not mean that a penalty justifiable under the systemic approach cannot be further reviewed on other grounds, such as prohibition of cruel punishment or violation of human dignity.

Second, the brilliant exercise of proportionality review of the *Makwanyane* Court does not attest to the neutrality and objectivity of proportionality review. Rather, what is really dispositive of the outcome are certain value choices inhering in *per se* review of capital punishment. Proponents for proportionality have pointed to its merits of neutrality, objectivity, and rationality.[171] David Beatty, for example, specifically considers *Makwanyane* a successful exercise of proportionality review and a display of its merits. For Beatty, with the principle of proportionality, 'judges, often from very different backgrounds, have been able to come to a conclusion on which they can all agree', even 'on what are regarded as some of the most complicated and controversial issues of

[168]Kant (n 159) 473.
[169]ibid 473–474.
[170]*Makwanyane* (n 92) para 60.
[171]David M Beatty, *The Ultimate Rule of Law* (Oxford University Press 2004) 166–171.

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modern politics'.[172] My analysis, however, leads to a different assessment. *Makwanyane* actually builds on value choices that may not be deducible by neutral and objective reasoning. A critical step of the *Makwanyane* Court is the downplay of retribution. This step is a clear value choice that expresses the constitutional value shared by the mainstream ANC elites. And this step is not necessarily replicable by courts situated in a different society where such a consensus may be lacking. Contrast that to the Korean Court's positive view of retributive justice. A further value choice is human dignity in relation to the right to life. The Korean Court adopted a relatively thin conception of human dignity in relation to the right to life; the former Soviet-bloc courts adopted a very thick one, thick enough for the courts to bypass proportionality review altogether and directly strike down capital punishment. The conceptions adopted by the US Court and the South African Court lie somewhere in between.

The reconstructive dialogical method deliberately veils the historical contexts of the judicial decisions, in order to bring them into ahistorical engagement with one another. However, once the complex, value-laden nature of the issues is revealed, it is now time to narrate the story from a historical perspective. Most of the constitutions investigated in this study are enacted after WWII and hence are expressive of the second-generation right to life. The US Constitution is the only one framed to express the first-generation view in its relevant provisions. Yet, the US Supreme Court freed itself from this view through the doctrine of 'evolving standards of decency' in the Eighth Amendment jurisprudence. The trajectory of the US Supreme Court's jurisprudence attests to the importance of the timing of seminal judicial precedents. At a critical juncture in the 70s when right-to-life absolutism was emerging, the US Supreme Court delivered *Gregg* and *Coker*, and thus established a framework that entrenched the early second-generation view, even though the framework has been kept flexible enough for the Court to incrementally instill values of the late second-generation view in the following decades. Another example is Japan. The Japanese Constitution was enacted in the immediate wake of WWII and the seminal decision was delivered by the Japanese Court within one year after the Constitution went into force. In terms of the judicial role in constitutional democracy, for these two courts, the obvious cultural dimension of cruel-punishment review orients toward the positive interpretive approach, or at least the mixed approach to its interpretation.

The late second-generation right-to-life absolutism began to gather momentum in the 1970s and 1980s, and the right to life became a viable ground upon which *per se* challenges to capital punishment can be raised. By the 1990s right-to-life absolutism was rising in full throttle along with the international human rights movement. Regional or international influence on domestic judicial decisions has grown stronger in the form of judicial reference to comparative jurisprudential sources, such as in *Makwanyane*, or in the form of direct consultation, such as that offered by the Venice Commission of the Council of Europe to the Albanian Constitutional Court. New constitutions are typically expressive of the late second-generation view of the right to life. Even as the constitutional right-to-life provision is falling short of according absolute protection, for example, the Hungarian Constitutional Court was enabled by the prevalent regional normative expectation to read right-to-life absolutism into it. The former Soviet-bloc courts' absolutist approach to the right to life, though analytically flawed, was nevertheless successful in effecting change. The activism of these courts was made possible by the following factors: strategically, the courts acted in congruence with the consensus of the mainstream governing elites based on ideological and/or pragmatic reasons, despite unfavourable public opinion; ideologically, the majority of judges held values and beliefs aligned with the late second-generation view, or they consider abolition instrumental for the greater good of the nation. For a court situated in a different regional environment, the South African Court adopted the more sophisticated review standard of proportionality, to handle

[172]David M Beatty, 'In Praise of Casuistry: Making Hard Cases Easier', in Vicki Jackson & Mark Tushnet (eds), *Proportionality: New Frontiers, New Challenges* (Cambridge University Press 2017) 274–275.

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a potentially combustible issue in a direction that ran against public opinion. The success of *Makwanyane* was attributable in part to its alignment with the beliefs and values of the mainstream ANC elites, and in part to the Court's forceful reasoning in the decision. In contrast to the Japanese and US Courts, the South African Court couched its reasoning in the apparently neutral and objective proportionality review, which enabled a highly normative approach to cruel-punishment review. However, as I argued, inescapable value choices remain in the proportionality review of *per se* constitutionality of capital punishment. This brings back the relevance of the positive interpretive approach. The Korean Court's decision offers valuable lessons, precisely because its 'systemic' approach inserts a positive element into the normative proportionality framework.

Lastly, what really drives the development of the right to life is not so much watertight arguments as social, political, and cultural changes of particular societies and their regional or world cultural environments. The sociologist Matthew D Mathias forcefully argues that the abolition trend of capital punishment is explainable in good part by a world-cultural change toward the 'sacralization of the individual'. As he remarks, 'complete abolition of the death penalty implies a case wherein individual sovereignty trumps state sovereignty'.[173] This is echoed by the social theorist Hans Joas's idea of 'the sacralization of the person' that characterises human rights development.[174] However, all Asian courts investigated in this study stopped short at right-to-life absolutism. May it be the case that despite significant enhancement of right-to-life protection in democratic Asia, individuals cannot be made the sole lodestar in Asian political imaginations, and can be imagined only in a reciprocal relation to society? This is a theme that awaits future study.

[173]Mathias (n 123) 1257.

[174]Hans Joas, *The Sacredness of the Person: A New Genealogy of Human Rights* (Georgetown University Press 2013).

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