

ORIGINAL ARTICLE

On the Death Penalty for Drug-Related Crime in China

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ABSTRACT

This article analyses the death penalty for drug-related crime in China. It considers the basis upon which China applies the death penalty for drug-related offences, and the debates surrounding the imposition of the death penalty for drug-related offences from the perspective of both penology and human rights. Based on the evidence discerned about China's current situation, the article discusses the possibility of China abolishing the death penalty for drug-related crime in the future.

I. Grounds for Imposing the Death Penalty to Drug Related Offences in China

This section will examine some of the main factors that have led to a large number of individuals charged with drug offences being subjected to the death penalty in China, including the criminal legislation, the criminal justice system and the situation of drug-related crime in China.

Criminal Legislation

The handing down of death sentences is made possible by the stringent criminal legislation which has been put in place to punish drug-related crimes, namely drug trafficking. Offences and sanctions related to drug offences are prescribed under Section Seven of the *Criminal Law of the People's Republic of China*, Article 347 which states that,

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BI | On the Death Penalty for Drug-Related Crime in China

Whoever smuggles, traffics in, transports or manufactures narcotic drugs, and commits any of the following acts shall be sentenced to fixed-term imprisonment of fifteen years, life imprisonment or death, and concurrently be sentenced to confiscation of property:

- (1) smuggling, trafficking in, transporting or manufacturing opium of not less than 1,000 grams, or heroin or methyl Benzedrine of not less than 50 grams or other narcotic drugs of large quantities;*
- (2) being ringleaders of gangs engaged in smuggling, trafficking in, transporting or manufacturing of narcotic drugs;*
- (3) shielding with arms the smuggling, trafficking in, transporting or manufacturing of narcotic drugs;*
- (4) violently resisting inspection, detention or arrest with serious circumstances; or*
- (5) involved in organized international drug trafficking.¹*

According to the law, ‘persons who smuggle, traffic in, transport or manufacture opium of not less than 1,000 grams, heroin or methylaniline of not less than 50 grams or other narcotic drugs of large quantities’ can be sentenced to death.² Under the legislation, there are two specific elements that make a sentence of death more likely to be imposed for drug offences.

One of the elements of the legislation that prejudices the accused is its employment of a quantitative model when assessing whether the offence reaches the threshold of severity necessary to impose the death penalty. In practice, this means that the purity of the drug is not taken into consideration, but instead that all substances are treated the same regardless of their content or harmfulness. According to the law,

The term ‘narcotic drugs’ as used in this Law means opium, heroin, methylaniline (ice), morphine, marijuana, cocaine and other narcotic and psychotropic substances that can make people addicted to their use and are controlled under State regulations.

The quantity of narcotic drugs smuggled, trafficked in, transported, manufactured or illegally possessed shall be calculated on the basis of the verified amount and shall not be converted according to its purity.³

¹ *Criminal Law of People’s Republic of China 1997*, (adopted at the Second Session of the Fifth National People’s Congress on July 1, 1979, revised at the Fifth Session of the Eighth National People’s Congress on March 14, 1997 and promulgated by Order No.83 of the President of the People’s Republic of China on March 14, 1997), Section 7, art. 347, available online at http://www.npc.gov.cn/englishnpc/Law/2007-12/13/content_1384075.htm (date of last access 29 January 2012).

² *ibid.*, art. 347(1).

³ *ibid.*, art. 357.

Human Rights and Drugs (2012)

The second is that for the purposes of sentencing, penalties are calculated cumulatively. According to article 347:

With respect to persons who have repeatedly smuggled, trafficked in, transported or manufactured narcotic drugs and have not been dealt with, the quantity of narcotic drugs thus involved shall be computed cumulatively.⁴

This approach increases the possibility of the death penalty being imposed, as a series of minor drug convictions may together meet the quantity threshold necessary for capital punishment.

Further adding to the likelihood of a death sentence being imposed for drug crimes is the enacting of legislation that provides for the possibility of more severe punishment in the case of repeat offences. Article 65 of the *Criminal Law* already prescribes legislation allowing more severe punishment in cases of recidivism.⁵ However, Article 356 applies this concept specifically within the context of drug-related crimes, stating that,

Any person who was punished for the crime of smuggling, trafficking in, transporting, manufacturing or illegally possessing narcotic drugs commits again any of the crimes mentioned in this Section shall be given a heavier punishment.⁶

As a consequence of these factors, China's legislative framework creates comparatively high possibility for the imposition of the death penalty in cases of drug-related offences. China's continuance of the policy is regressive in light of the fact that many countries whose legislation at one time provided for the death penalty for drug-related crimes have subsequently abolished it. In others, the legitimacy of applying the death penalty for drug offences is a topic of hot debate. For instance, in countries such as Viet Nam, Bahrain and Libya, official proposals to abolish the death penalty for drug offences have been considered. The high courts of both Singapore and Indonesia have heard legal actions challenging the constitutionality of the death penalty in drug-related cases.⁷ Many other states whose legislation retains the death penalty for drug offences are either observing moratoria, decline to apply death penalty or seldom carry out executions.⁸ For example, in Cuba, 'there have been no reported executions for drug offences' since 2003.⁹ Also for some Asian countries,

4 *ibid.*, art. 347.

5 *ibid.*, art. 65.

6 *ibid.*, art. 356.

7 Patrick Gallahue and Rick Lines, *The Death Penalty for Drug Offences Global Overview 2010*, International Harm Reduction Association, 2010, p. 8.

8 *ibid.*, p. 18.

9 *ibid.*, p. 39.

like Sri Lanka, no judicial executions have been carried out since 1979.¹⁰

Criminal Justice System

In China, the Supreme Court's judicial interpretation plays a major role in guiding the District Court, which is usually the main court involved in the sentencing of drug-related crimes. For example, the Supreme Court has pronounced upon drug-related crimes in *The Seminar on Drug-related Crime for Part of the National Court (2008)*, the *National Court on the Seminar of Drug-related Crime (2000)* and *The Interpretation of the Standards Related to the Trial Issues for Conviction and Sentencing of Drug Cases (2000)*. In doing so, the Supreme Court has called upon the judicial system to adhere to a 'crackdown policy' for drug-related crimes. The Supreme Court has conveyed that the District Court should focus on combating the criminal 'kingpins' at the top of the drug trafficking industry. It has approved the sentencing to death of major drug traffickers, recidivists, repeat offenders, habitual offenders and those who were armed or whose offences included violence causing serious harm. All of these documents have paved the way for a system in favour of severe punishments for drug offenders.

In addition, some District Courts have developed their own standards for sentencing drug offenders, based on the local situation regarding drug crime. For example, one of the municipalities issued regulations imposing a sentence of death for the sale of 100 grams of ecstasy.¹¹ In addition, the District Court in the judicial process often functions in a dogmatic manner. For example, the judiciary has leaned towards applying the death penalty in cases in which the quantity of drugs has reached a level that has been determined to attract such a sentence, there are no mitigating circumstances and the defendant has not surrendered to the court. This problem has been further heightened by the fact that within the system, the judiciary has been quick to apply the death sentence to cases involving the smuggling, trafficking, transporting and manufacturing of drugs. For example, a recent survey found that 89.5% of judges among the respondents supported the imposition of the death penalty, while 92.6% of prosecutors, 93.7% of policemen and 94.7% of lawyers were also in favour of it.¹²

Since 1 January 2007 it has become mandatory for all death sentences to be reviewed by

¹⁰ Daniel Johnson D and Franklin Zimring, *The Next Frontier: National Development, Political Change and the Death Penalty in Asia*, Oxford University Press, 2009, p. 323.

¹¹ PENG Xuhui, LI Kun, 'On the death penalty application in drug crime cases', *Journal of Central South University of Technology*, vol. 12, no. 2, April 2006.

¹² 武汉大学刑事法研究中心与德国马普外国刑法与国际刑法研究所编辑。中国死刑态度调查报告 ('Opinion survey report on China's death penalty'). 中国台湾: 元照出版公司, 2010.6. p. 85 [Criminal Law Study Centre of Wu Han University and Max Planck Institute for Foreign and International Criminal Law Editor, 'Opinion survey report on China's death penalty', Taiwan China, YUANGZHAO Publication, June 2010].

Human Rights and Drugs (2012)

the Supreme People's Court. Namely, 'all the death penalty cases, which not sentenced by the Supreme People's Court, should submit to Supreme People's Court for approval.'¹³ This change was made in order to avoid inconsistent applications of the death penalty in various cases. This development is considered a major step towards securing procedural justice in death penalty cases and promoting human rights in China. One Chinese scholar has pointed out that, '[A]fter the right reverted to the Supreme Court to approve the death penalty, the number of death penalty in China will be significantly decreased, a decline of at least 20%.'¹⁴ It has been reported that Yunnan Province, well known for drug trafficking, observed a one-third reduction in death sentences following the implementation of the judicial review by the Supreme Court of death penalty cases.¹⁵ However, the degree to which these developments have or will affect the death penalty for drug-related crime in China is difficult to ascertain because for the past four years, no accurate official statistical information on executions has been made available.

Drug-related Crime

Also contributing to the application of severe punishments for drug-related crimes in China, such as the death penalty, are the large number of drug cases, and the increased trend of drug-related crime. Drug-related crime is considered to be a threat not only to the Chinese population, but also for the country's development and security. The belief that these threats are increasing has been used as the basis upon which to promote the 'crackdown' policy for drug-related crime. This policy is underpinned by the idea that the harsher the punishment for the crime, the more likely it is to deter individuals from engaging in it.

China also shares borders with two major areas of drug production, the so-called 'Golden Triangle' area in the southwest and Afghanistan. This results in multiple drug-related offences, in particular smuggling and trafficking. Studies show that the Golden Triangle produces up to 70—80 tons of heroin each year, and that the annual opium production in Afghanistan is more than 3,600 tons, much of which comes either into or through China.¹⁶ In addition to heroin, large amounts of methamphetamine are smuggled into China from the Golden Triangle area through the China-Burma border.¹⁷ In addition to smuggling and trafficking, the huge market for illicit drugs in China is also the source of a considerable

13 *Organic law of the People's Courts of the People's Republic of China*, available online at <http://www.china.org.cn/english/government/207253.htm> (date of last access 20 December 2011) art. 13.

14 死刑核准权自2007年1月1日起收归最高人民法院, available online at http://news.xinhuanet.com/legal/2006-10/31/content_5272293.htm (date of last access 20 December 2011) ['Death penalty reverted to the Supreme Court for approval from January 1st, 2007', XINHUA NEWS]. [Translated by the author].

15 Johnson and Zimring (n 10) p. 281. For a discussion on the decrease of executions in China, see also Jim Yardley, 'With new law, China reports drop in executions', *New York Times*, 9 June 2007.

16 PENG and LI (n 11).

17 *ibid.*

number of drug-related offences. The number of people using drugs in China is very large, and in 2004 there were a reported 791,000 drug users in the country. According to the 2009 *Annual Report on Drug Control in China*, in 2008 there were 1,126,700 registered drug users, of whom 900,000 were using heroin or other opioids.¹⁸

Data from the country suggest that the number of drug-related crime is increasing dramatically every year. According to the 2011 *Annual Report on Drug Control in China*, in 2010 Chinese authorities investigated 89,000 drug-related crimes, arresting 101,000 suspects. This represents increases of 14.5% and 10.8% respectively since the previous year's figures.¹⁹ It should be noted that these statistics do not reflect an accurate picture of drug-related crimes in China, and that the actual figures are very likely to be higher.

II. Debate on the Application of the Death Penalty for Drug-Related Offences

Despite the high rates of drug-related crime in China and the concerns this raises, the death penalty for drug-related crime is not justified. The following section will focus on debates both for and against the death penalty for drug-related offences.

Retentionist arguments on the death penalty for drug-related offences

Those who support the use of the death penalty for drug-related offences generally ground their position in consequentialist justifications.²⁰ This argument contends that drugs kill victims and cause unnecessary social harm that cannot be tolerated. In some communities, drugs are considered one of the most dangerous threats to society. This is particularly true amongst the Chinese population who, as a result of historical events, view trafficking in drugs as a grave crime. Drug-related crime is seen as heinous, grievous and odious, disrupting traditional values, affecting social stability and consuming a large amount of social wealth. Thus, even though drug-related offences are often non-violent crimes that do not result in direct death or severe injury, many still consider it appropriate to use death penalty in response.²¹

¹⁸ 2009 *Annual Report on Drug Control in China*, available online (in Chinese) on the website of Narcotics Control Bureau of the Ministry of Public Security of People's Republic of China, (Chinese) <http://www.mps.gov.cn/n16/n80209/n80481/n804535/1919823.html> (date of last access 16 January 2012). [Translated by the author].

¹⁹ 2011 *Annual Report on Drug Control in China*, available online (in Chinese) on the website of Narcotics Control Bureau of the Ministry of Public Security of People's Republic of China, (Chinese) <http://www.mps.gov.cn/n16/n80209/n80481/n804535/2804926.html> (date of last access 20 December 2011). [Translated by the author].

²⁰ *ibid.*, vol. 8, no. 4, 616–619.

²¹ Griffith Edwards, et al. 'Drug Trafficking: Time to Abolish the Death Penalty', *International Journal of Mental Health and Addiction*, vol. 8, no. 4, p. 617.; 莫关耀. 从死刑的存废谈毒品犯罪死刑的限制. 云南警官学院学报 2007年第一期 [MO Guangyao, 'Talk about the restriction of the death penalty for drug-related crimes from the perspective of retention or abolition', *Journal of Yunnan Police Officer Academy*].

In this context, it is important to note that the application of the death penalty for nonviolent offences is not unusual. As compared with other retentionist jurisdictions where the death penalty is not applied for nonviolent crimes, in China there are many nonviolent crimes, separate from those related to drug offences, also attracting the death penalty under criminal law. Under the 1997 Criminal Code, which was in force prior to the abolition of capital punishment for thirteen nonviolent offences in 2011, there were as many as forty-four non-violent crimes for which the statutory maximum penalty was death, accounting for 69% of all death penalty offences.²² These include provisions such as Article 170 (counterfeiting) and Article 383 (embezzlement).²³ Given this context, in which the law prescribes harsh punishments for even relatively minor offences, it is easy to avoid debate on the abolition of the death penalty for drug offences, given the public perception on the harmfulness of drugs.

Opposition to the use of the death penalty for the punishment of drug-related crimes

Despite the above, there are strong arguments in favour of abolishing the death penalty for drug-related crimes. These arguments derive largely from the perspectives of penology and human rights.

Penology perspective

During the 20th century, many penology and criminology scholars have analysed the death penalty through the lens of both its effectiveness in preventing crime, and the notion of retribution in punishment. Therefore, to determine whether it is reasonable to apply the death penalty for a certain crime, one must determine whether this punishment best meets the demands of retribution and plays an effective role in the prevention and deterrence of future offenses.

In simple terms, the retribution perspective reflects the notion of ‘an eye for an eye’, or that ‘the punishment must fit the crime’, the central idea being that there should be an equivalence between the severity of the punishment and the harmfulness of the criminal act. The penalty should adapt to the harm inflicted by the crime, but should not exceed it.²⁴ In 2006 the Malaysian Prime Minister argued that the death penalty is the ‘right kind of punishment’ for drug trafficking, as ‘[i]t is a threat to the well-being of our society’.²⁵

22 死刑之争：“民众向左，专家向右”。京师刑事法治网。（2010-11-13, available online at <http://www.deathpenalty.cn/criminal/Info/showpage.asp?showhead=S&ProgramID=1740&pkID=28863&keyword=> (date of last access 29 January 2012) [‘Debate on Death Penalty’, College for Criminal Law Science of Beijing Normal University].

23 *Criminal Law of People’s Republic of China* (n 1).

24 莫洪宪，陈金林，‘论毒品犯罪死刑限制适用’法学杂志，2010年第一期 [Mo Hongxian, Chen Jinlin, ‘On the application of the death penalty for drug-related crime’, *Law Science Magazine*, 2010].

25 ‘Abdullah defends death penalty for drug traffickers’, *Bernama—Malaysian National News Agency*, 22 February 2006, cited in Rick Lines, ‘The death penalty for drug offences: A violation of international human rights law’, *International Harm Reduction Association*, 2007, p. 12.

BI | On the Death Penalty for Drug-Related Crime in China

From a criminal law perspective, drug-related crime in and of itself is non violent, and does not directly endanger human life or cause injury. Absent any specific violent act associated with the drug offence, drug-related crimes are therefore not on a par with murder, terrorism or other acts resulting in death or serious injury. Even within the Chinese *Criminal Law*, drug-related offences are categorised under Chapter VI, which are ‘Crimes of Obstructing the Administration of Public Order’. Also included in this category are ‘Crimes of Impairing Judicial Activities’, ‘Crimes of Undermining Protection of Environmental Resources’, and six others that are all nonviolent.²⁶ Thus, it would seem that the punishment for drug-related crimes, if it is to reflect the gravity of the act, should be more lenient than that prescribed for crimes of murder or similar acts causing physical injury. Punishing drug crimes with the deprivation of life undermines the basic balance between crime and punishment. It does not meet the standards of equivalence and rationality.

Gravity is a necessary, but insufficient condition for the application of the death penalty. Determinations as to whether to apply the death penalty must consider the purpose of the penalty and analyse the necessity of prevention. Therefore further analysis must be undertaken as to the preventative value of the death penalty. There are numerous arguments that examine why the application of the death penalty for drug-related crime in China is not an effective instrument in relation to general or special deterrence. For example, the application of the death penalty to drug-related crime is intended by lawmakers to have the effect of deterring potential offenders from engaging in the drug trade. However, it can be argued that such efforts, if successful, will result in the reduced availability of drugs in the community, resulting in an increase in price and related profit margins. This situation, in turn, would create greater financial incentives for people to engage in this activity. Rather than creating a situation of deterrence, it instead creates one of encouragement. As Beccaria stated in the 19th century, ‘[a] proper sentence is a sentence that is just sufficient enough to deter crime.’²⁷ It is only when the penalty for an offence is tailored to meet the needs of prevention that the deterrent effect will be maximised and consistent with the rationality requirement of the penalty.

In addition, data on drugs offences in China in recent years do not reveal the type of decline in crime one would expect if the death penalty policy was an effective deterrent. According to the *Annual Report on Drug Control in China*, the number of criminal suspects in drug cases has increased from 73,400 in 2008, to 91,000 in 2009 and 101,000 in 2010.²⁸ Chinese

²⁶ *Criminal Law of People's Republic of China* (n 1).

²⁷ Cesare Bonesana, Marchese Beccaria, *Of Crime and Punishments*, translated by Edward D Ingraham, 2nd edn., Philadelphia, 1819, p. 26.

²⁸ *Annual Report on Drug Control in China (2009,2010,2011)*, available online (in Chinese) on the website of Narcotics Control Bureau of the Ministry of Public Security of People's Republic of China, (Chinese)<http://www.mps.gov.cn/n16/n80209/n80481/n804535/index.html> (date of last access 20 April 2012).

Human Rights and Drugs (2012)

authorities investigated 89,000 drug-related crimes in 2010, which represents an increase of 14.5% since the previous year's figures.²⁹ Imposing the death penalty to prevent and curb drug-related crime, in practice, to be ineffective.

Human rights perspective

There is a strong argument that judicial killings for drug-related crimes violate international human rights law.³⁰ Although capital punishment is not absolutely prohibited under international law, its lawful application is limited under Article 6(2) of the International Covenant on Civil and Political Rights to only 'the most serious crimes'.³¹ The UN Human Rights Committee has noted in its General Comment on the Right to Life that 'the expression "most serious crimes" must be read restrictively to mean that the death penalty should be a quite exceptional measure'.³² There is little evidence to suggest that drug-related offences meet this threshold.

The jurisprudence of the UN Human Rights Committee indicates that only crimes which directly result in death could be considered as 'most serious',³³ and, as pointed out by Manfred Nowak in his commentary on the Covenant, '[I]n no event was the death penalty to be provided for crimes of property, economic crimes, political crimes or in general for offenses not involving the use of force'.³⁴ The UN High Commissioner for Human Rights noted in a March 2009 statement that, '[T]he application of the death penalty to those convicted solely of drug-related offenses raises serious human rights concerns'.³⁵ In his 2010 report to the General Assembly, the UN Special Rapporteur on the Right to Health also affirmed that the death penalty for drug-related offences violates international human rights law.³⁶ The United Nations Office on Drugs and Crime (UNODC) also acknowledged in a 2010 report that, 'As an entity of the United Nations system, UNODC advocates the abolition of the death penalty and calls upon Member States to follow international standards concerning prohibition of the death penalty for offenses of a drug-related or purely economic nature'.³⁷

29 2011 *Annual Report on Drug Control in China* (n 19).

30 See, for example, Rick Lines, 'A "most serious crime"? – The death penalty for drug offences and international human rights law', *Amicus Law Journal*, issue 21, 2010, p 21–28.

31 International Covenant on Civil and Political Rights (adopted 16 December 1966) 999 UNTS 171 (ICCPR), art. 6(2).

32 UN Human Rights Committee, 'General Comment No. 06: The Right to Life (art.6)' (30 April 1982) (adopted at the Sixteenth Session of the Human Rights Committee), para. 7.

33 UN Human Rights Committee, 'Concluding Observations of the Human Rights Committee: Iran' (29 July 1993) Doc. No. CCPR/C/79/Add.25, para. 8.

34 Manfred Nowak, *UN Covenant on Civil Political Rights: CCPR Commentary*, N.P. Engel Verlag, Germany, p. 141.

35 UN High Commissioner for Human Rights, 'High Commissioner calls for focus on human rights and harm reduction in international drug policy' (10 March 2009).

36 UN General Assembly, 'Right of everyone to the enjoyment of the highest attainable standard of physical and mental health' (6 August 2010) UN Doc. No A/65/255, para. 17.

37 Commission on Narcotic Drugs, 'Drug control, crime prevention and criminal justice: A human rights perspective. Note by the Executive Director' (3 March 2010) UN Doc. E/CN.7/2010/CRP.6, para. 26.

III. The Way Forward

Although drugs kill, I don't believe we need to kill because of drugs...[T]oday I propose that Member States...give serious consideration to whether the imposition of capital punishment for drug-related crimes is a best practice. The recent General Assembly moratorium [on the death penalty] suggests a way forward.³⁸

Antonio Maria Costa, Executive Director, UNODC

The prospects for abolishing death penalty on drug related crimes in China

According to the 2011 Report from the Secretary-General of United Nations on the 'Question of the death penalty',³⁹ as of June 2011, 140 of the 192 Members of the United Nations are believed to have abolished the death penalty or introduced a moratorium either legally or in practice. Among the countries that retain the death penalty, there are thirty-two jurisdictions (this figure includes Taiwan and the Hamas-led government in Gaza) that currently have legislation prescribing capital punishment in drug cases, including five countries considered abolitionist in practice.⁴⁰ At least twelve of the thirty-two jurisdictions are known to have carried out an execution for drug offences in the past three years, and thirteen retain a mandatory death penalty for certain categories of drug offences.⁴¹

With this worldwide trend towards the abolition of the death penalty, and following the welcome news that China abolished thirteen capital offences in 2011—nearly one in five of all death penalty offences in China—it would be easy to argue that it is inevitable that the death penalty will be abolished for drug related crimes. However, this argument is undermined by the reality of the situation in China.

Typically, the abolition of the death penalty requires law reform and/or changes in state practice. Law reform could include new legislation abolishing or restricting its scope, or the ratification of international instruments that provide for the abolition of the death penalty. Practical changes might include the introduction of a new non-legislative practice limiting the use of the death penalty, such as announcing a moratorium on executions even while the death penalty is retained in law. In the case of China, it is not unrealistic to hope for any or all of these achievements, but significant uncertainty exists regarding if or when such changes will take place.

³⁸ Antonio Maria Costa, 'Address to the 51st session of the Commission on Narcotic Drugs' (10 March 2008).

³⁹ Human Rights Council, 'Question of the death penalty: Report of the Secretary-General' (4 July 2011) UN Doc. No. A/HRC/18.20, para. 4.

⁴⁰ Gallahue and Lines (n 7) p. 7.

⁴¹ *ibid.*

Human Rights and Drugs (2012)

First, it is necessary to look at the ratification of international instruments providing for the abolition of the death penalty, namely, the International Covenant on Civil and Political Rights. The government has made a public statement that it intends ratify the Covenant, and therefore one can reasonably predict that China will become a party to the treaty in the future.⁴² Such a move would also be advantageous to the government for other political reasons as well, such as staving off criticism and improving credibility within international human rights structures, particularly as the Chinese government seeks to increase public confidence in its understanding of, and interaction with, human rights issues. However, there are still significant obstacles both in law and practice that China must overcome before it can take this step.

One could argue that there are few countries whose legal system are in complete conformity with the Covenant. In fact, among those States that have abolished the death penalty, only seventy-three have ratified the Second Optional Protocol to the International Covenant on Civil and Political Rights, which abolishes executions for all crimes.⁴³ It is hard to believe that a country like China would ratify the instrument easily when dramatic differences between its domestic legal system and the Covenant's provisions exist, include, Article 6(2) on 'most serious crimes', Article 9 on arbitrary arrest and detention and Article 14 on the right to a fair trial. Even with recent reforms, China's criminal legal system is far from being in compliance with the provisions of the Covenant, which represents a significant hurdle to ratification.⁴⁴ Even if China were to ratify the Covenant, without the further ratification of Second Optional Protocol the death penalty for drug-related crimes could still remain if such offences were interpreted to be 'most serious crimes'.

The recent abolition of the death penalty for thirteen offences may raise hope for the removal of the death penalty for drug-related crimes in the form of a criminal law amendment. The committees that supported abolishing these offences believed them to be non violent, economic-related crimes. In practice, most of them did not attract the death penalty as a sanction, therefore abolishing the death penalty for those offences would not affect social stability and social order.⁴⁵ Drug-related offences were in fact included among the original list of crimes for which it was recommended that capital punishment should

42 For example, statements by President Hu Jintao during his visit to France, 27 January 2004.; Prime Minister Wen Jiabao during a visit to the European Commission, Brussels, 6 May 2004.; Legal Affairs Chief, Luo Gan at the 22nd Congress on the Law of the World held in Beijing, September 2005 .

43 Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, Adopted and proclaimed by General Assembly resolution 44/128 of 15 December 1989, UN Doc. No. A/RES/44/128.

44 Katie Lee, 'China and the International Covenant on Civil and Political Rights: Prospects and Challenges', *Chinese Journal of International Law*, 2007, vol. 6, no. 2, p. 465.

45 全国人大常委会组成人员聚集消减死刑罪名, available online at <http://news.qq.com/a/20100825/002306.htm> (date of last access 24 January 2012) ['National People's Congress Standing Committee members' discussion on abatement charges applicable to the Death Penalty', News qq.].

be eliminated.⁴⁶ However, concerns about drug-related crime coupled with the belief in the deterrent effect of the death penalty resulted in capital punishment being retained for drug-related crimes, generating serious doubts concerning whether or not this issue will ever be resolved. Unlike the thirteen offences for which the death penalty was eliminated, drug-related crime – in particular drug trafficking – is usually considered not only a severe crime but also a major threat to social stability and social order.

The judiciary also believes it important to ‘crackdown’ on cases involving drugs. For example, the Supreme Court’s 2010 publication, ‘Advice on the implementation of tempering justice with mercy (combining leniency with rigidity) Justice Policy’ stated that drug-related crime requires harsh punishment.⁴⁷ The document calls for the application of severe punishment to those serious crimes that pose great harm to society, and states that crimes which the criminal law provides death or severe punishment for should attract such severe sentences.⁴⁸

Given the current situation in China, it is unlikely the government will announce a moratorium application of the death penalty, especially for drug-related offences. As Mou Xinsheng, a member of the National People’s Congress Standing Committee, has said,

*It is the international trend to abolish death penalty. China, as a developing country, is in the period of social conflict prominent, with intense criminal offence, and some are serious crimes. It is not reality for China to abolish death penalty now, but to reduce the number of death penalty offences is suitable.*⁴⁹

During a seminar entitled ‘The strict application of death penalty to drug related crime’, held in China in March 2011, Ma Yukong, vice chairman of Intermediate People’s Court in Kunming, Yunnan province, stated that ‘[I]t is reckless to abolish death penalty for some drug-related crimes. Even though it is the international trend to abolish death penalty, China has to be cautious to take the step now, the reality of China should be considered.’⁵⁰ In addition, findings of ‘Professionals Attitude Towards Death Penalty’ in China shows significant

46 Southern Weekend Newspaper, ‘Interview with Tsinghua University Professor Zhou Guangquan’ (26 August 26, 2010), Translated by the Dui Hua Foundation’s Blog (1 September 2010), available online at <http://www.duihuahrjournal.org/search?updated-min=2010-01-01T00:00:00-08:00&updated-max=2011-01-01T00:00:00-08:00&max-results=28> (date of last accessed 24 January 2012).

47 最高人民法院印发《关于贯彻宽严相济刑事政策的若干意见》的通知, available online at <http://www.chinalaw.gov.cn/article/fgkd/xfj/sfwj/201012/20101200330552.shtml> (date of last access 8 January 2012) [‘The Supreme People’s Court announcement of the issuing of the ‘Advice on the Implementation of Tempering Justice with Mercy (combining leniency with rigidity) Justice Policy’]. [Translated by the author].

48 *ibid.*

49 全国人大常委会组成人员聚集消滅死刑罪名 (n 45). [Translated by the author]

50 毒品犯罪死刑的限制适用. 马豫昆等, available online at <http://www.death-penalty.cn/criminal/Info/showpage.asp?showhead=S&pkID=30247> (date of last access 9 January 2012) [‘Restriction on the application of the death penalty for drug-related crime’, Global Centre on Death Penalty Study, Beijing Normal University]. [Translated by the author].

Human Rights and Drugs (2012)

support for death penalty for drug-related offences amongst professional groups.⁵¹ In all, 75.7% of the respondents believed that the death penalty needed to be applied to drug trafficking. By way of comparison, 90.1% supported the application of the death penalty to intentional homicide.⁵²

Support for the death penalty for drug-related offences is found among the general public. In 1995, the Law Institute of Chinese Academy of Social Science and the National Bureau of Statistics of China conducted a public opinion survey in three Chinese provinces on attitudes toward the death penalty. The survey found that over 95% of the respondents supported capital punishment.⁵³ A more recent survey conducted by the Research Center for Contemporary China at Peking University found that 57.8% of respondents were favour of death penalty.⁵⁴ Even though these figures suggest a decline in overall support for the death penalty, the support of death penalty for drug offences remains high, with 59.2% of respondents supporting the application of capital punishment for 'drug dealing'.⁵⁵ The survey found that the level of support for the death penalty for drug dealing was just below that for murder and for intentional injury resulting in death.⁵⁶

The widespread public support for capital punishment is one of the main barriers to abolishing the death penalty in China. For example, in response to the question, 'Which group's opinions mainly affect the death penalty system in China?', 62.6% considered public opinion to be a main reason for maintaining the death penalty.⁵⁷ Tian Wenchang, one of the most famous criminal defence lawyers in China, has also noted that the 'death penalty could play a role of balancing the mass emotion. Chinese people are not ready to tolerate murderers not be sentenced to death.'⁵⁸

51 The professionals mentioned in the survey include judges, prosecutors, police, officers from legal departments and criminal defence lawyers whose work is related to death penalty cases. See 武汉大学刑事法研究中心与德国马普外国刑法与国际刑法研究所编辑。中国死刑态度调查报告Opinion survey report on China's death penalty). 中国台湾: 元照出版公司 (2010), p. 63. [Criminal Law Study Centre of Wu Han University and Max Planck Institute for Foreign and International Criminal Law Editor, 'Opinion survey report on China's death penalty', Taiwan China, YUANGZHAO Publication]. [Translated by the author]

52 *ibid.*, p. 70.

53 Dietrich Oberwittler and Shenghui Qi, 'Public opinion on the Death Penalty in China: Results from a general population survey conducted in three province in 2007/2008', Max Planck Institute for Foreign and International Criminal Law, 2009, p. 4.

54 *ibid.*, p. 10.

55 For the Chinese version of the survey, 'drug dealing' can be translated as 'drug trafficking' as well, which the author believes to be the more appropriate translation, as trafficking is considered more severe than drug dealing, which usually is used to describe the sale of small quantities by individuals. See 武汉大学刑事法研究中心与德国马普外国刑法与国际刑法研究所编辑。中国死刑态度调查报告Opinion survey report on China's death penalty). 中国台湾: 元照出版公司 (2010), p. 13. [Criminal Law Study Centre of Wu Han University and Max Planck Institute for Foreign and International Criminal Law Editor, 'Opinion survey report on China's death penalty', Taiwan China, YUANGZHAO Publication]. [Translated by the author].

56 Oberwittler and Qi (n 53) p. 13.

57 武汉大学刑事法研究中心与德国马普外国刑法与国际刑法研究所编辑。中国死刑态度调查报告 (n 50) p. 63. [Criminal Law Study Centre of Wu Han University and Max Planck Institute for Foreign and International Criminal Law Editor, 'Opinion survey report on China's death penalty', Taiwan China, YUANGZHAO Publication]. [Translated by the author].

58 *ibid.*

Restricting the death penalty for drug-related offences

Although it is unlikely that China will abolish the death penalty for drug-related offences in the near future, there are possibilities for the continued restriction of its use in drug cases. If the trend towards restricting the use of the death penalty is to be continued, as evidenced by the recent removal of thirteen offences from the list of capital crimes, then safeguards for the protection of the rights of those facing the death penalty must be expanded and guaranteed.

As mentioned above, the judiciary often equates the degree of responsibility for a drug-related offence simply with the quantity of drugs seized, rather than the individual's involvement in the broader trafficking structure. In addition, the judicial system is both inclined to support 'crackdown' policies toward drug-related offences, as well as lean towards harsh punishments for drug offenders. This has resulted in an almost uniform application of the death penalty to drug-related offences. Yet this approach sits uneasily with Chinese justice policy, and is inconsistent with international safeguards.

According to Article (61) of the *Criminal Law of the People's Republic of China*, 'When sentencing a criminal, a punishment shall be imposed based on the facts, nature and circumstances of the crime, the degree of harm done to society and the relevant provisions of this Law.'⁵⁹ This provision offers scope for restricting the use of capital punishment, as under the law it is not only the social harm that should be considered in sentencing, but also the specific facts, nature and circumstances of the crime. In the case of drug offences, even though the quantity of drugs involved in the crime is one important manifestation of social harm, it should not be the sole basis for sentencing and should not be considered absent an analysis of other potentially mitigating factors.

Another option for limiting the application of the death penalty for drug offences can be found in Article 48 of *Criminal Law*,

[T]he death penalty shall only be applied to criminals who have committed the most heinous crimes. If the immediate execution of a criminal punishable by death is not deemed necessary, a two-year suspension of execution may be pronounced simultaneously with the imposition of the death sentence.⁶⁰

Article 48 provides an avenue through which the individual facing the death penalty may not be executed immediately. In drug-related cases, this offers an important safeguard as it requires the judge to fully examine the evidence and situation of the offender when making

⁵⁹ *Criminal Law of the People's Republic of China* (n 1) art. 61.

⁶⁰ *ibid.*, art. 48.

Human Rights and Drugs (2012)

a decision as to sentencing.

In death penalty cases, the strict application of fair trial guarantees is of the utmost importance. Adherence to fair trial rights is required not only by international standards, but also by China's own justice policy and regulations. The United Nations *Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty* state that, 'Capital punishment may be imposed only when the guilt of the person charged is based upon clear and convincing evidence leaving no room for an alternative explanation of the facts.'⁶¹ It further states that the death penalty,

*[M]ay only be carried out pursuant to a final judgment rendered by a competent court after legal process which gives all possible safeguards to ensure a fair trial, at least equal to those contained in article 14 [of the Covenant on Civil and Political Rights], including the right of anyone suspected of or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings.*⁶²

Related to these international safeguards, China has adopted a policy of 'less kills, cautious kills', which requires the application of high evidentiary standards and fair trial guarantees in capital cases. The so-called 'less kills' provision applies specifically to reducing executions, while the notion of 'cautious kills' means that the death penalty must be carefully used, that stringent evidentiary standards must be applied and that mistakes must not be made.⁶³

In February 2011, the Supreme People's Court, the Ministry of Public Security, National Security, and the Ministry of Justice together issued further regulations *On Issues of the Review Determining Evidence of Death Penalty Cases and Provisions of a number of issues on the Exclusion of Illegal Evidence in Criminal Cases*.⁶⁴ Both set stricter standards for death penalty cases. For example, *On Issues of the Review Determining Evidence of Death Penalty Cases*, the aim of which is 'to punish crime while protect[ing] human rights, handling death penalty cases according to law, with fairness, accuracy and discretion', states that '[I]nvestigators, prosecutors, judges should strictly comply with the statutory procedures, a comprehensive, objective collection, review, verification and identification of evidence.'⁶⁵

61 Economic and Social Council of the United Nations, 'Safeguards guaranteeing protection of the rights of those facing the death penalty' (25 May 1984) res. 1984/50, para. 4.

62 *ibid.*, para. 5.

63 袁林, 王力理, '毒品犯罪死刑配置的理性思考', 东岳论丛 [YUAN Lin, WANG lili, 'Rational thinking on the configuration of the death Penalty for drug-related crimes', Dong Yue Tribune, vol. 31, no. 2, Feb. 2010].

64 最高人民法院、最高人民检察院、公安部、国家安全部、司法部印发《关于办理死刑案件审查判断证据若干问题的规定》和《关于办理刑事案件排除非法证据若干问题的规定》的通知, available online at <http://www.chinalaw.gov.cn/article/fgkd/xfq/sfwj/201103/20110300336106.shtml> (In Chinese, date of last access 12 January 2012). [Supreme People's Court of the People's Republic of China, Supreme People's Procuratorate of the People's Republic of China, Ministry of Public Security of the People's Republic of China, Ministry of National Defense of People's Republic of China, Ministry of Justice of the People's Republic of China, announcement of the issuing of regulations 'On Issue of the Review Determining Evidence of Death Penalty Cases' and 'Provisions of a Number of Issues on the Exclusion of Illegal Evidence in Criminal Cases']. [Translated by the author]

65 *ibid.*

Thus, in practice, the judicial system should apply fair trial guarantees and follow the rules of evidence provided for in the justice policy and procedures law in China.

One issue that emerges from this is the extent to which Supreme Court cases involving the death penalty are open to public scrutiny. It has been argued that review of death sentences by the People's Supreme Court is an important reform that must be introduced in order to avoid unfair judgments and to reduce the number of such sentences. As it stands, however, the procedure is not transparent. Without openness, fairness cannot be guaranteed to the defendant. In cases involving the death penalty, affording the defendant all possible safeguards at every stage of the trial is necessary to ensure that the proceedings are fair.

Finally, according to the *Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty*, 'Anyone sentenced to death shall have the right to seek pardon, or commutation of sentence; pardon or commutation of sentence may be granted in all cases of capital punishment.'⁶⁶ However, there is no system in China whereby people who face the death penalty may seek pardon. The legal basis for pardons exists under Articles 67(17) and 80 of the *Constitution of People's Republic of China*.⁶⁷ However, the *Criminal Procedure Law* does not provide regulation or mechanism for the procedure of pardon. Thus, in practice there is no channel for people who face the death penalty to actually seek for pardon. Recently, proposals have been made by academic groups to the National People's Congress Standing Committee to amend the *Criminal Procedure Law* to 'add provisions in the draft amendment of the Criminal Procedure law, provide person sentenced to death has right to apply for pardon', in hopes that this will 'set the foundation and space for the further development of the pardon system in China.'⁶⁸

Before China abolishes the death penalty for drug offences, the trial process itself must scrupulously observe the international and domestic standards for the protection of the rights of people facing capital punishment. Proceedings leading to the imposition of death sentences must conform to the highest standards of independence, objectivity and impartiality. Competent defense counsel must be provided at every stage of the process. The gathering and assessment of evidence must meet the highest standards, and all mitigating factors must be taken into account in sentencing. Finally, it is necessary to work towards ensuring that people facing the death penalty are given the opportunity to seek pardons. Working to increase the human rights standards of the judicial system in death penalty cases is an important aspect of progress in restricting and abolishing capital punishment.

66 Economic and Social Council of the United Nations (n 60) para. 7.

67 Constitution of People's Republic of China, art. 67(17), available at: http://www.npc.gov.cn/englishnpc/Law/2007-12/05/content_1381903.htm (date of last access 20 April 2012), art. 80.

68 刑事诉讼法应赋予死刑犯申请特赦权, 2011-12-1, 法制网, available online at http://www.legaldaily.com.cn/index_article/content/2011-12/01/content_3146177.htm (date of last access 10 January 2012). ['Criminal Procedure Law should provide those facing the death penalty the right to apply for pardon', Legal Daily]. [Translated by the author]