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Respect for Minimum Standards?

Report on the Death Penalty in China

October 2020

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Preface

Since the 1980s, there has been a global trend towards abolition of the death penalty. More than 140 member states of the United Nations have either abolished the death penalty or do not practice it. Over the past decade, the UN General Assembly has voted overwhelmingly, and across all regions, in support of a moratorium on executions with a view to abolishing the death penalty.

The *Safeguards guaranteeing protection of the rights of those facing the death penalty*, approved by the UN General Assembly, establish minimum standards where states still choose to use capital punishment. The Safeguards also provide a starting point for assessing how far states protect persons from the risk of arbitrary execution.

In this report we attempt to assess the use of the death penalty in China against these minimal international standards. The report is an updated and expanded version of an interim publication we produced for the World Congress Against the Death Penalty in 2019.

I first investigated the death penalty in China in 2003 at the start of a programme of cooperation with Chinese scholars, supported by the European Union. Since then, China has taken some significant steps to protect those facing the death penalty. However, politicised legal proceedings continue to undermine attempts to promote a fairer trial while the lack of transparency inhibits efforts to conduct research and hold the authorities to account for the use of the death penalty. We hope this report provides the general reader with an introduction to this important topic. We welcome updates and corrections.

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October, 2020

Abbreviations

CAT: United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

CL: Criminal Law

CPL: Criminal Procedure Law

ECOSOC: United Nations Economic and Social Council

ICCPR: International Covenant on Civil and Political Rights

MOJ: Ministry of Justice

MPS: Ministry of Public Security

NPC: National People's Congress

NPCSC: Standing Committee of the National People's Congress

RSDL: Residential Surveillance in a Designated Location

SPC: Supreme People's Court

SPP: Supreme People's Procuratorate

UDHR: Universal Declaration of Human Rights

UN: United Nations

China Death Penalty: Key Developments

- 1979: First Criminal Law and Criminal Procedure Law passed
 - 28 offences are eligible for the death penalty
 - SPC has authority to review all death penalty cases
- 1981: SPC authority to review and approve death penalty cases can now be delegated to provincial higher courts. 13 new offences are eligible for the death penalty
- 1982: 7 new offences eligible for the death penalty including drug trafficking
- 1983: 10 new offences eligible for the death penalty relating to public security
- 1990: Decree on Drug Control adopted by NPC
 - All narcotics offences now eligible for death penalty
- 1996: First amendment to the Criminal Procedure Law
 - All capital defendants must have legal representation
 - Lethal injection becomes one of the methods of official execution
- 1997: First amendment of Criminal Law
 - In total, 68 offences are eligible for the death penalty
- 2002: Notice on Utilising Lethal Injection in Executions issued by SPC
- 2006: SPC introduces 'balancing leniency and severity' policy
- 2007: SPC resumes its authority to review all cases of death penalty with immediate execution
- 2010: 'Two rules of evidence' introduced
- 2011: Eighth amendment to the Criminal Law
 - Number of capital crimes reduced by 13 to 55
 - Increased tariff for the two-year suspended death sentence and life imprisonment
- 2012: Second amendment to Criminal Procedure Law
 - New measures to strengthen criminal defence
- 2015: Opinions on Handling Domestic Violence Criminal Cases
- 2015: Ninth amendment to the Criminal Law
 - Number of capital crimes reduced by 9 to 46
 - Introduced two-year suspension of death sentence without possibility of any commutation
- 2018: Third amendment to Criminal Procedure Law
 - Introduction of expedited procedures, may include death penalty eligible crimes
 - Bar raised for execution where those given two-year suspended death sentence commit further offence

Introduction

This report addresses whether the use of the death penalty in China complies with international law, in particular, the United Nations *Safeguards guaranteeing protection of the rights of those facing the death penalty* issued in 1984 and strengthened in 1989 and 1996. These Safeguards (see Annex I), adopted by the UN General Assembly, apply to all countries that have not yet abolished the use of the death penalty regardless of whether they have ratified the International Covenant on Civil and Political Rights (ICCPR).

Article 6 of the ICCPR recognises and protects the right to life of all human beings. It provides that no one shall be arbitrarily deprived of life and that this right shall be protected by law. The Human Rights Committee is unambiguous, in General Comment 36, in concluding that the imposition of the death penalty would be arbitrary in nature where it is imposed in proceedings that violate the fair trial guarantees provided for in article 14 of the ICCPR. In the Safeguards, the rights set out in article 14 establish a minimum set of standards for proceedings that involve the death penalty.

China currently has 46 crimes for which the death penalty may be imposed. In this report we have attempted to describe key features of the use of the death penalty in China and the extent to which practice respects the UN Safeguards. Overall, we are forced to conclude that the application of the death penalty in China does not comply with the severe restrictions imposed by international law and is, therefore, tantamount to arbitrary execution. Our report acknowledges the progress that has been made with some improved procedural protections and a reduction in the number of capital crimes since the height of 1997. We also salute the efforts of many lawyers and legal scholars to challenge a flawed process and raise awareness of the problems inherent in the use of the death penalty.

Nevertheless, the situation we describe is not encouraging. We have seen, in recent years, what has been described as a retreat from the rule of law in China as the leadership emphasises stability. This trend amplifies the risk of arbitrary execution. Unfair trials, politicised sentencing and the use of the death penalty for drug crime and other offences which do not meet the threshold for “most serious crimes” illustrate what is wrong with the death penalty in China.

Statistics on death penalty cases are classified in China as a state secret. State secrets laws classify data regarding national-level approval and execution of death penalty sentences as top-secret, the highest possible level of secrecy.¹ Hundreds of documented death penalty cases are missing from the online court database. Secrecy in the use of the death penalty undermines efforts to hold the government to account and push for meaningful criminal justice reforms.

One of the challenges in producing this report has been to use a human rights framework to assess law and practice that operates under very different organising principles. To help readers understand the context, we begin the report with a brief introduction to Chinese law and the political environment in which it operates. This is followed by seven chapters that examine the Safeguards in more detail and the extent to which they are respected by proceedings in China. In the final chapter we summarise our key findings and offer some recommendations.

¹ Human Rights in China (HRIC). ‘State Secrets: China’s Legal Labyrinth’ Human Rights in China’. 2007. <https://www.hrichina.org/en/publications/hric-report/state-secrets-chinas-legal-labyrinth>.

Introduction to Chinese Criminal Law

To provide some context for understanding the application of the death penalty in China this introductory chapter provides a brief background to the criminal law. A short bibliography at the end of this report provides some additional reading.

China's criminal law cannot be understood outside the political environment in which it operates. Chinese law draws on imperial legal traditions, reforms introduced by early 20th century modernisers, post-1949 legislation and the political-legal role of the Chinese Communist Party. China is also a State Party to a number of international human rights treaties.

Chinese Communist Party (CCP) policy informs all aspects of governance in China, including the legal system. The death penalty in China, therefore, takes place within the context of a criminal justice system that is subject to the CCP's interests. The Party's overriding concern is to maintain the 'stability of society' and the environment for Party rule.

Chinese Communist Party (CCP) policy informs all aspects of governance in China, including the legal system.

Among the ways that the CCP furthers its interests are policy directives, appointments and political legal committees which oversee the functioning of the police, the prosecution and the courts. These three institutions are known collectively as the *gongjianfa* for the *gong'an* (police), *jianchayuan* (procuratorate) and the *fayuan* (court). They operate 'within the system' (*tizhinei*) and share privileged information among themselves. Lawyers are outside this system. In recent years, the Party has sought greater control over the legal profession, including the establishment of Party committees within law firms. Lawyers and law firms are subject to annual reregistration leaving them vulnerable to political pressure (see Chapter 5 for further discussion on the role of lawyers).

At the individual level, a performance management system keeps officials, including judges, in line. Perverse incentives in this system, however, can influence behaviour. Unrealistic targets for the police to secure convictions in homicide cases have been attributed to high rates of coerced confessions. Overall, there is a strong preference for 'substantive correctness' over 'procedural fairness' in criminal proceedings: ensuring the 'correct' outcome takes precedence over the right to a fair trial.

The 'strike hard' (*yanda*) anti-crime policy, beginning in the 1980s and in place, through periodic campaigns, until the mid-2000s, resulted in a high rate of executions from the death penalty throughout this period. The policy required offenders to be punished 'swiftly and severely' giving rise to many accusations of miscarriages of justice. Hu Jintao's 'harmonious society' reform agenda enabled a shift in the official rhetoric on sentencing. In 2006, the Supreme People's Court (SPC)

introduced a policy of ‘balancing leniency and severity’, paving the way for the police, prosecutors and lower courts to identify mitigating circumstances that would reduce the number of executions.²

Since Xi Jinping took over the leadership of the Party in 2012, there are, again, indications of a more politicised approach to sentencing, including of foreigners. This has been described as “China’s death-threat diplomacy.”³ The prominent case of Robert Schellenberg, a Canadian national sentenced to death in December 2018, along with a further three Canadians, appears to be in retaliation for the arrest of Huawei CFO Meng Wanzhou in Canada (see Chapter 1 on Most Serious Crimes for more details on Schellenberg’s case).

In May 2014, a ‘strike hard campaign against violent terrorism’ was initiated in the Xinjiang Uyghur Autonomous Region (XUAR) in response to several deadly attacks. A number of executions were announced that year in the far western region.⁴ Repressive measures in the XUAR have since escalated to the large-scale arbitrary detention of Uyghurs in so-called ‘vocational education and training centres’. Several prominent Uyghurs are reported to have been given two-year suspended death sentences for “separatism” in secret proceedings. These include the President of Xinjiang University, Tashpolat Tiyp. The Chinese authorities have since claimed that he was charged with corruption and had not been sentenced to death; his whereabouts, however, remain unknown (see Chapter 1 for further information on national security offences).⁵

Chinese legal traditions

The People’s Republic of China inherited legal thinking from imperial China as well as efforts by the Republican government, in the early 20th century, to modernise the legal system by importing ideas and practices from Germany, by way of Japan. In many respects, China shares similarities with civil law jurisdictions and has a primarily inquisitorial criminal procedure. Chinese legal scholars have called it a ‘super inquisitorial’ process due to the lack of protection for the suspect.⁶

The Chinese Constitution does not include the right to life for citizens; despite constitutional protection of a number of fundamental freedoms, including from unlawful detention, the constitution is not justiciable. Legislation is the primary source of law in China. There is no case law. The Supreme People’s Court passed regulations introducing Guiding Cases in 2010 to promote greater consistency in decision-making, but these cases provide limited precedent for the lower courts (see Additional Resources). This has been referred to as a legal precedent system with Chinese characteristics.⁷

² Trevaskes, Susan. “From ‘Killing Many’ to ‘Killing Fewer’” in Liang, Bin and Lu, Hong (eds) *The Death Penalty in China: Policy, Practice and Reform*, Columbia University Press, 2016.

³ Clarke, Donald. ‘China’s Death-Threat Diplomacy.’ China Collection, 14 January 2019. <https://thechinacollection.org/chinas-death-threat-diplomacy/>.

⁴ See, for example, Buckley, Chris. ‘China Says 8 Executed in Western Region; Charges Stem From Separatist Attacks’. The New York Times, 24 August 2014. <https://www.nytimes.com/2014/08/25/world/asia/8-people-executed-in-xinjiang-on-terrorism-charges-china-says.html>.

⁵ Amnesty International R ‘China: Further information: Fears for Uyghur academic demand answers: Tashpolat Tiyp’. ASA 17/2175/2020. <https://www.amnesty.org/en/documents/asa17/2175/2020/en/>

⁶ Lan Rongjie. ‘A False Promise of Fair Trials: A Case Study of China’s Malleable Criminal Procedure Law.’ *Pacific Basin Law Journal* Vol. 27. 2011.

⁷ Chen, Xingliang. “Guiding Cases for China’s Death Penalty” in Liang, Bin and Lu, Hong (eds) *The Death Penalty in China: Policy, Practice and Reform*, Columbia University Press, 2016.

Judicial interpretations are also issued by the Supreme People's Court, as guidelines, which are nationally enforceable.

As China opened up to Western experience after the Cultural Revolution, elements of a more adversarial criminal justice system were introduced through contacts with common law countries. Limited debate between the prosecution and defence is now allowed in court. The court is not, however, central to criminal proceedings.

Criminal law

The People's Republic of China first adopted a criminal law in the reform period following the end of the Cultural Revolution. The 1979 Criminal Law has since been revised ten times and the 1979 Criminal Procedure Law was revised in 1996, 2012 and 2018.

A criminal case begins with the investigation stage overseen by the police, at the local level. Following approval of arrest, the procuratorate oversees the prosecution phase which may entail requests for further investigations. Once the procuratorate is satisfied by the evidence, the case will enter the trial stage, including a court hearing. There are time limits for each stage of the proceedings, but the possibility of requesting further investigations or clarification can extend each stage by several months.

The Criminal Procedure Law is the principal legislation governing the treatment of persons who are subject to the criminal law and criminal penalties in China. Not all forms of deprivation of liberty are regulated by the criminal law. Under the Administrative Punishment Law, short term detention, usually up to fifteen days, is permitted for administrative offences. The use of compulsory isolation centres for drug rehabilitation is permitted under the Anti-Drug Law. Much of the large-scale detention of Uyghurs in XUAR is not legal under Chinese law.⁸

Anyone suspected of a crime in China may be detained by the police for further investigation. Detainees should be transferred within 24 hours to a detention centre (*kanshousuo*) where they will be held pre-trial. The police have a maximum of 30 days to submit a request to the procuratorate to approve the *daibu*, a term normally translated as 'arrest', but which corresponds more closely to charging in many jurisdictions. Arrest in Chinese criminal procedure is a 'compulsory measure' and includes deprivation of liberty. Pre-trial release remains the exception.

Anyone suspected of one of three categories of offence: terrorism, national security and corruption, all of which carry the risk of the death penalty, may be held for up to six months in unregulated facilities prior to being transferred to a detention centre and the formal criminal justice system. The Criminal Procedure Law authorises the use of 'residential surveillance in a designated location' (RSDL) for those being investigated for national security and terrorism offences while those suspected of corruption can be 'retained in custody' (*liuzhi*) for up to six months under the National Security Law.

⁸ Clarke, Donald. 'No, New Xinjiang Legislation Does Not Legalize Detention Centers.' Lawfare Blog, 11 October 2018. <https://www.lawfareblog.com/no-new-xinjiang-legislation-does-not-legalize-detention-centers>.

International Human Rights Obligations

In traditional Chinese thinking, the image of the country as the 'Middle Kingdom' contributed to a rejection of the idea of treaty-relationships on the basis of an equal legal status of states.⁹ China's concept of sovereignty has influenced its approach to international treaty obligations. Although China claims that the provisions in human rights treaties, to which it is a State Party, are part of domestic Chinese law, in practice there is no way to directly implement international law in Chinese courts. The relationship between international treaties and domestic law is not defined in the Constitution or the Legislation Law.

China is a State Party to a number of international human rights treaties. Most relevant to the death penalty is its ratification of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). The country has also signed, but not ratified, the International Covenant on Civil and Political Rights (ICCPR). A long-standing criticism of China's implementation of CAT, by UN experts, is the absence of any definition of torture in Chinese law, which conforms to article 1 of the Treaty.

China's human rights record is reviewed at the United Nations as part of the process of Universal Periodic Review (UPR). At the last UPR of China, in 2018, a significant number of countries urged China to work towards abolition of the death penalty through measures including the introduction of a moratorium and reducing the number of crimes punishable by the death penalty. Countries also called for transparency in the use of the death penalty, adequate legal representation and the right to a fair trial.

⁹ Ahl, Björn. 'Exploring Ways of Implementing International Human Rights Treaties in China.' *Netherlands Quarterly of Human Rights* 28(3):361-403. September 2010. DOI: 10.2139/ssrn.2830404

Chapter 1. Most Serious Crimes

This chapter considers the extent to which China respects Safeguards One and Two. This includes whether the use of the death penalty is restricted to “most serious crimes”, which are intentional and with “lethal or other extremely grave consequences”, and consistent with the evolving understanding of international law. We consider China’s sentencing and approach to most serious crime, including the increasing use of *sihuan*, two-year suspension of the death penalty, a sentence unique to China. We also outline some issues surrounding violent crime and intentional killing, national security and drug-related offences.

International Law

International and regional bodies are in agreement on the two requirements of Safeguard One. First, mandatory death sentences are not compatible with the Safeguard and sentencing must be assessed on a case-by-case basis. Secondly, “most serious crimes” is limited to those that involve intentional killing. Non-violent crimes such as drug offences do not fall under this.

According to the United Nations Economic and Social Council (ECOSOC) 2015 Report, a mandatory death sentence is incompatible with Safeguard One because it “fails to take into account the defendant’s personal circumstances and the circumstances of the offence” and therefore “does not permit distinctions to be made between degrees of seriousness of the particular crime for which the penalty is imposed.”

Safeguard One was the first attempt to provide a clearer definition of “most serious crimes” as stated in article 6 of the ICCPR. Article 6 states, “in countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes.” The final clause of “with lethal or other extremely grave consequences” was inserted into the safeguard following concerns from the United Nations Secretary-General that the phrase “most serious crimes,” by itself, would be too vague. The Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions has held that “most serious crimes” is capable of objective interpretation; to hold otherwise “would render the relevant international law standard meaningless.”¹⁰

General Comment No. 36 on the Right to Life, adopted by the Human Rights Committee in October 2018, explicitly states, in paragraph 35, that, “the term “the most serious crimes” must be read restrictively and appertain only to crimes of extreme gravity, involving intentional killing.” With respect to Safeguard One, “most serious crimes” should thus not encompass drug-related offences, other violent offences or killing that is non-intentional.

The Special Rapporteur on Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment has also clarified that the definition of “most serious crimes” does not include drug-related crimes. In the Special Rapporteur on Torture’s view, “the imposition of the death penalty on drug offenders amounts to a violation of the right to life, discriminatory treatment and possibly . . . also their right to

¹⁰ Alston, Philip. ‘Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions’. 29 January 2007. A/HRC/4/20. <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G07/105/00/PDF/G0710500.pdf?OpenElement>

human dignity.” The Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions has stated the same.

Chinese Law

The politics of punishment in China have influenced the use of the death penalty. The introduction of a policy of ‘balancing severity and leniency’ and the notion of ‘kill fewer, kill cautiously’ in the mid-2000s were important in reducing the number of executions. Led by a number of reformists, including the then SPC president Xiao Yang, the policy signalled a move away from previous ‘strike hard’ anti-crime campaigns and emphasised a more humane approach to criminal justice. Xiao Yang, and other SPC reformers, encouraged the lower courts to ‘kill fewer’ and strictly control the use of the death penalty. In a speech at the Fifth National Conference on Criminal Trial Work on 6 November, 2006, Xiao Yang emphasised that the death penalty should only be used as a last resort, in order to avoid wrongful executions.¹¹ He also encouraged the lower courts to use the alternative: the sentence of *sihuan*, two-year suspension of the death penalty, if there are relevant mitigating circumstances, and judicial discretion for cases originating in domestic, neighbourhood, or other similar disputes, and where the victim was at least partly at fault.

The politics of punishment in China have influenced the use of the death penalty.

In 2007, the SPC took back its power to review all death sentences with immediate execution, along with an order that stated that it should be reserved for only an extremely small number of serious offenders.¹² Certain crimes of passion, associated with family disputes, and economic crimes should not result in the death penalty. This has been widely seen as a significant factor in reducing the number of executions. Lawyers and legal scholars observe that, nowadays, death sentences are most likely to be given for intentional killing and drug-related offences.

Revisions to the criminal law have reduced the number of death penalty eligible crimes to 46 in total. In 2011, 13 capital crimes were removed, bringing the number from 68 to 55. In 2015, a further amendment reduced the number of capital crimes from 55 to 46. Many of the offences which no longer attract the death penalty are non-violent crimes, such as economic offences, for which the death penalty was rarely given. The removal of many non-violent offences from the list eligible for the death penalty in 2015 suggests not only an intention to reduce the scope of the death penalty, but also to reduce its use for non-violent crime. However, subsequent amendments to the Criminal Law in 2017 and another proposed in 2020, but not yet passed, do not make any changes to the number of crimes eligible for the death penalty or in relation to sentencing. China continues to have a number of non-violent capital offences, notably drug-related, as well as ‘white-collar’ crimes, including embezzlement and taking bribes.

¹¹ Shi, Ting. ‘Courts to ease up on death penalties.’ South China Morning Post. 10 November, 2006.
<https://www.scmp.com/article/571039/courts-ease-death-penalties>

¹² ‘Chief Justice Vows ‘Extreme Caution’ in Death Penalty Cases.’ China Daily. 15 March, 2007.
http://www.bjreview.com.cn/lianghui/txt/2007-03/15/content_59294.htm. Accessed 6 October, 2020.

Death penalty eligible crimes also include offences with violence that do not have lethal consequences such as rape, kidnapping and trafficking of women and children. Indeed, human trafficking (CL.17 Art.240) is one of the limited number of criminal offences where the death penalty is the mandatory sentence in circumstances that are “especially serious”. The other offences are hijacking causing serious injury or death (CL.17 Art.121) and leading a jailbreak (CL.17 Art.317). There is, however, some discretion for judges in determining whether the offence reaches the threshold of “especially serious” circumstances.

The understanding of ‘seriousness’ remains problematic in Chinese criminal law.

The understanding of ‘seriousness’ remains problematic in Chinese criminal law. Article 48 of the Criminal Law was amended in 1997 to include that the “death penalty shall only be applied to criminal elements who have committed extremely serious crimes”. Prior to this, the law stated that the death penalty should be applied to only the “most heinous crimes”. Some scholars argue that the new wording is more specific and gives a clearer understanding. However, what constitutes an “extremely serious crime” (*jìqì yánzhòngde fānzui*) is not clearly defined and is an issue of debate in China. The Chinese interpretation differs from the UN Safeguards’ “most serious crimes” because it is understood to relate to the “degree of harm” (*weihai chéngdù*) within any one category of crime.¹³ In other words, the phrase refers to the “extremely serious” examples of those offences which are death penalty eligible.

Three factors largely account for the number of executions in China today: the use of the suspended death sentence, the approach to violent crime, and the punishment of drug-related offences.

Sentencing

A death sentence in China will either be with immediate execution or with a two-year suspension (*sihuan*). The sentence of *sihuan*, unique to China, has been increasingly deployed by judges, since the 2000s, following the ‘kill fewer, kill cautiously’ policy, to simultaneously signal a harsh punishment while limiting the number of executions. At the time of sentencing, the judge can decide whether a death sentence should result in immediate execution or if it should be suspended. Both sentences are seen as belonging to the same category of the death penalty.

Chinese law is very ambiguous about the grounds for the court to decide whether a death sentence with immediate execution is warranted. Article 48 of the 2017 Criminal Law implies that execution will be “necessary” in some cases. The vagueness of the law and the lack of formal sentencing guidelines for death penalty cases leave the courts open to the influence of changing criminal justice policies and public opinion.

¹³ Trevaskes, Susan. *The Death Penalty in Contemporary China*. Palgrave Macmillan, 2012.

Chinese law is very ambiguous about the grounds for the court to decide whether a death sentence with immediate execution is warranted.

In a capital case, if the immediate execution of the defendant “is not necessary” the court may impose a suspended death sentence. The death sentence is suspended for two years after which the court will decide whether to commute the sentence to life imprisonment or carry out the execution. Under the criminal law a suspended death sentence will normally be commuted to either life imprisonment or a fixed term imprisonment of 25 years provided that the prisoner has not committed any intentional crimes in the two-year period (CL.17 Art.50). In the Ninth Amendment to the Criminal Law this was amended to specify that prisoners with suspended death sentences would only be subject to executions if they committed crimes in “heinous circumstances” (*qingjie e’lie*). In the most recent amendment to the Criminal Procedure Law, in October 2018, the revisions have raised the bar for execution where those given a two-year suspension of the death penalty commit a further offence. In future only intentional crimes, committed in the most heinous circumstances, will result in the enforcement of the death penalty (CPL.18 Art.261).

Once the suspended death sentence has been commuted the prisoner will, normally, be eligible for periodic sentence reductions or parole. As courts grapple, in individual cases, with deciding between the death penalty with immediate execution and the option of the suspended death sentence, the criminal law now allows the court to restrict the possibility of sentence reductions or parole in cases of recidivism and violent offences (CL.17 Art.50). The Eighth Amendment to the Criminal Law (2011) increased the minimum tariff for the suspended death sentence and life imprisonment. Prisoners who were given a suspended death sentence later commuted to life and then eligible for further commutation must now serve a minimum of 15 years. The Eighth Amendment also introduced the suspended death sentence with limited or restricted commutation. The revision was intended to address concerns that, in some cases, the suspended death sentence was too lenient while execution would have been too harsh. Under these new sentences a prisoner may not be released until after serving a minimum period of 20 or 25 years. The new sentence may be used for those convicted of violent crimes as well as some recidivists. This use of the suspended death sentence for murder, without the possibility of a sentence reduction, is cited approvingly in one of the Guiding Cases. Michelle Miao has noted that drug offenders are not the main target for these restrictions on the use of parole, although drug crime is understood to represent a large percentage of executions.¹⁴

The Ninth Amendment (2015) to the Criminal Law introduced a further restriction on the use of the suspended death sentence. This new sentence is a two-year suspension of execution without the possibility of any commutation. It is, Miao argues, a harsher sentence than Life Without Parole (LWOP) since the prisoner spends the first two years under the threat of execution. This sentence is currently restricted to corruption cases. There has been speculation in Chinese legal circles that this new sentencing option may signal interest in using life without parole as an alternative to the death penalty for other offences. An “Interpretation of Several Issues on the Application of Law for Restricting

¹⁴ Miao, Michelle. ‘Death-Eligible Drug Offenders in China.’ *American Journal of Comparative Law*. Volume 67, Issue 2, p.327–382. June 2019. <https://doi.org/10.1093/ajcl/avz017>

Commutation during the Reprieve Period for a Suspended Death Sentence” is expected before the end of 2020.¹⁵

In response to criticism of disparities in sentencing outcomes, from Chinese legal scholars, there have been efforts to constrain judicial discretion, and the potential for outside interference, through developing sentencing guidelines, Guiding Cases and judicial interpretations. In 1999, the courts issued guidance to mitigate the sentences in homicide cases where the victim was also at fault or when related to conflict with family or neighbours. 2014 SPC Sentencing Guidelines for Common Crimes include several offences for which the upper range of sentencing is the death penalty, however the guidelines do not offer specific guidance for sentencing of life imprisonment or the death penalty. The overall approach to using sentencing guidelines in China is to set a starting point for sentencing for an offence which can be adjusted by the court to reflect relevant mitigating and aggravating factors. Leaving the death penalty out of national sentencing guidelines gives the courts more latitude to respond to changing political objectives.

Aggravating factors for specific offences are set out in the criminal law and include social harm as well as prior convictions. Statutory mitigating factors include the expression of remorse, the restitution of property and compensation. Cooperation with the criminal justice system should also be taken into consideration, including confession, meritorious service following arrest such as self-surrender and providing information to assist in investigation of other crimes, and reconciliation with the victim or victim’s family.

Chinese legal scholars have criticised the weight placed on the social impact of the crime at the expense of greater attention to the offender’s intent or risk to society. There is little opportunity for the court to consider the whole of the defendant’s life in order to make an individualised sentencing decision. Nevertheless, some courts have considered discretionary mitigating circumstances, such as poverty, in cases of those accused of transporting drugs. The demands of victims’ families are also a key factor in sentencing in homicide cases (see Chapter 6). Greater transparency on sentencing decision making would facilitate the SPC review and the defence participation in the review.

Chinese legal scholars have criticised the weight placed on the social impact of the crime at the expense of greater attention to the offender’s intent or risk to society.

While the increased use of the suspended death sentence in China has undoubtedly contributed to a reduction in the number of executions its use raises two areas of concerns. First, suspended death sentences are subject to less rigorous review procedures than death sentences with immediate execution. There are risks that the sentence is associated with unsafe convictions. Research indicates that about 95% of the suspended death sentences are commuted leaving 5%, perhaps several hundred, of those sentenced facing execution. It is not clear what review procedures are in place. Second, the use of the suspended death sentence does not challenge the death penalty as a punishment.

¹⁵ Supreme People’s Court Monitor. ‘Supreme People’s Court’s 2020 judicial interpretation agenda.’ 2 April 2020. <https://supremepeoplescourtmonitor.com/2020/04/02/supreme-peoples-courts-2020-judicial-interpretation-agenda/>

Violent Crime and Intentional Killing

Recent years have seen a narrowing of the range of violent and lethal crimes that are likely to result in the death penalty. Article 232 of the Criminal Law states that whoever intentionally kills (*guyi sharen*) shall be sentenced to death, life imprisonment or fixed-term imprisonment of not less than 10 years. The Criminal Law, article 14 also states that “an intentional crime occurs where there is clear knowledge that the act will have socially harmful consequences, and there is an intention or indifference to the occurrence of those consequences. Criminal responsibility shall be borne for intentional crimes.” Thus, any person who is aware that his act may result in death is guilty of ‘intentional’ killing. (see Chapter 2 on vulnerable defendants for more on criminal responsibility in Chinese law.)

Article 234 of the criminal law, however, also stipulates that, “intentional injury” (*guyi shanghai*) resulting in death or, if by “especially cruel means, causes severe injury to the person, reducing the person to utter disability”, is also eligible for the death penalty. For this crime, the death penalty is placed in a different position in the list of available punishments from the article for intentional killing suggesting that it is not the recommended punishment. Article 234 lists the available punishments for “intentional injury resulting in death” as “fixed-term imprisonment of not less than 10 years, life imprisonment or death.” Whereas for “intentional killing” the punishments are listed as “death, life imprisonment or fixed-term imprisonment of not less than 10 years”.

Although the National People’s Congress does not state the reasoning behind the order of the punishments, it has been inferred that the recommended punishment is given first, and this is borne out in evidence of sentencing.¹⁶ In some cases, lawyers have pressed the court to revise a murder charge to “intentional injury resulting in death” in an attempt to mitigate the sentencing. Court judgments provide limited explanation of the sentencing decision and, often, there is no reasoning given about aggravation or mitigation. However, one forensic expert observed that while there may be multiple factors contributing to the death of a person, courts in China tend to hold the defendant responsible if they were involved. Although judges seem to show little interest in distinguishing between intentional killing and other violence with lethal consequences, courts may eventually reduce the sentence where the circumstances are complex and death sentences are most likely to be given for the crime of “intentional killing”.

In cases of domestic violence in which the victim has murdered the perpetrator, there has, however, been a move away from death sentences and a recognition of mitigating factors. This is a development from previous policy in which cases of battered wives accused of murdering their husbands were treated as intentional killing and many were sentenced to death with immediate execution. In March 2015, the SPC, the SPP, the Ministry of Public Security, and the Ministry of Justice jointly issued the “Opinions on Handling Domestic Violence Criminal Cases in accordance with the Law” (“Opinions”). This is China’s first criminal justice guidance document focused on comprehensively punishing and preventing domestic violence crimes, clarifying a series of issues in the application of the criminal law including considerations for sentencing, such as the fault of the victim. In December 2015, the Standing Committee of the National People’s Congress (NPCSC) also passed China’s Anti-Domestic Violence Law, which came into effect in March 2016. In judicial practice, there has been a trend

¹⁶ Bricker, Cary and Vitiello, Michael. ‘Chinese Homicide Law, Irrationality, and Incremental Change’, 27 Temp. Int’l & Comp. L.J. 43. 2013.

towards lighter sentences for such cases in recent years. Although such cases are, in the majority, still considered as intentional killing, sentencing now ranges from fixed-term imprisonment to a two-year suspension of the death penalty. According to Chinese legal scholars, in such cases the death penalty with immediate execution is no longer given and life sentences are rare.

Li Yan was sentenced to death with immediate execution in August 2011, after being found guilty of killing her husband Tan Yong in 2010. On appeal, in April 2015, Sichuan Higher People's Court ruled that she was to be sentenced to two-year suspended death penalty. The court upheld the intentional killing conviction, but recognised the domestic violence she had been subjected to by her husband was a mitigating factor. There had been significant public opposition to the original death sentence. Li had killed her husband by attacking him with an air rifle that she said he had threatened to shoot her with. She said that he had started to physically abuse, including cutting off part of a finger, as well as sexually abuse her, shortly after they had got married in 2009. The initial court had dismissed evidence of the abuse as not being sufficient to prove that she had been a victim of domestic violence.

Drug-Related Offences

Drug-related offences, along with intentional killing, account for a large proportion of death sentences in China. Drug crimes are considered to be a threat to social stability and China has continued to promote policies that encourage harsher punishments for this category of offences.

The Criminal Law, article 347 states that the death penalty is applicable to drug smuggling, selling, transporting and manufacturing. Harsh sentences, including the death penalty, may be imposed according to the amount of drugs involved (1000 or more grams of opium, or 50 or more grams of heroin or methamphetamine), being a "ringleader of gangs", using firearms, violently resisting inspection, detention or arrest, and being involved in international drug trafficking.

According to the law there are two main factors which make a death sentence more likely to be given for drug offences. One is the quantity of the drugs involved. This is the main factor for determining the severity of the offence and whether it meets the threshold for imposing a death sentence. The purity of the drug is not taken into account and all substances are considered to be the same regardless of potential harm caused (CL17. Art.357). For example, "drugs" in the law refers to opium, heroin, methamphetamine (ice), morphine, marijuana, cocaine, and other anaesthetics that are regulated by the state and can cause addiction. The other aggravating factor is that penalties are computed cumulatively and the law states that heavier punishments will be given if a person already punished for smuggling, trafficking in, transporting, manufacturing or illegally possessing drugs reoffends. So death sentences are more likely to be imposed for recidivists.

Some lawyers and legal experts observe that judges in recent years have increasingly used their discretion to impose death sentences only for crimes involving very high quantities of drugs. The amount of drugs that attracts the death penalty also varies across different provinces. Reports of death sentences and executions being imposed for drug-related offences significantly increase around the International Day Against Drug Abuse and Illicit Trafficking on 26 June each year. According to

domestic media reports, examined by Chinese researchers, there were between 160 and 200 executions on this day in 2018 and 2019.¹⁷

Lawyers specialising in defending drug crimes have observed that compared with other criminal cases, the standards for providing sufficient evidence are lower in cases involving drug crimes. This may be partly due to lack of forensic knowledge of both police and judges. For example, one lawyer specialising in taking drug crime cases in Yunnan recalls a case in which the police weighed more than a dozen packets of drugs, and claimed that the total weight of the packets was 18 grams. However, the lawyer found that the scale used by the police could only detect a minimum weight of 2 grams. Only 1 of the 12 packets weighed over 2 grams. The lawyer argued in court that the weights must be incorrect and should not be accepted by the court. The lawyer recalls another case in which the police mixed several different types of drug into different bags when weighing, contaminating the evidence.

They point to several other possible factors including the narrative promoted by the central government that drug control is a 'people's war on drugs', which is reflected in heavy sentences in the judicial system. Lawyers also allege that almost fifty percent of all drug crime cases will result in a death penalty sentence, including a two-year suspended death sentence.

Robert Schellenberg, Canadian citizen, was first detained early December 2014, first tried on 15 March 2016, and on 20 November 2018 he was sentenced to 15 years in prison after being found guilty of planning to smuggle almost 225 kilos of crystal methamphetamine from China to Australia. He appealed his conviction and sentence; on 29 December 2018 Liaoning Higher People's Court considered new evidence and ordered a re-trial on the grounds that the 15-year sentence was too lenient. On 15 January 2019, Dalian Intermediate People's Court held a retrial and announced a guilty verdict and death sentence on the same day. There were a number of unusual aspects to the case including the decision to send the case back for retrial, the speed in which the retrial was scheduled after such a long delay between originally being tried and sentenced, and the announcement of the death sentence at the trial. The harsher sentencing coincided with Chinese pressure on Canada to release Meng Wanzhou, CFO of Chinese telecommunications company, Huawei, detained in Vancouver pending extradition to the United States. Schellenberg has appealed the death sentence, but the court has still not announced a judgement. On 8 May 2020, an appeal hearing for Schellenberg was held and no sentence was given. This came a day after a hearing in Canada for Meng Wanzhou. Since Schellenberg's death sentence, there have been three further Canadians sentenced to death for drug offences in China, widely seen as retaliation for Meng Wanzhou's case.

National Security Offences

Offences that relate to endangering national security are broadly defined in Chinese criminal law. In 2015, China passed a new National Security Law and in 2016 a new Counter-terrorism Law, as part of a wider set of laws and regulations covering national security. The laws include wide-ranging provisions on the use of cyberspace, physical space and outer space. The lack of clarity in defining

¹⁷ Private communication shared with authors.

what constitutes a national security offence, along with a government emphasis on eradicating the “three evils” of terrorism, separatism (or splittism) and religious extremism, have been used to target a wide range of individuals deemed a threat to CCP control. The crime of “subversion of state power” (CL.17 Art.105) is often used to limit freedom of expression and punish rights lawyers, journalists and NGO workers with long prison sentences. This offence is not eligible for the death penalty.

In the Criminal Law (2017), there are currently seven crimes eligible for the death penalty that fall under the category of endangering national security including “treason”, “separatism”, and “providing material to the enemy”. There are a further fourteen crimes that are considered public security offences that are also eligible for the death penalty, including “bombing” and “using other methods to endanger public security”.

Since 2017, in Xinjiang Uyghur Autonomous Region (XUAR), within a broader context of mass arbitrary detention, surveillance and an increase in criminal cases, there are reported cases of Uyghur intellectuals who have been sentenced to two-year suspended death sentences for crimes of “separatism”.¹⁸ For example, Halmurat Ghopar, president of the Inspection and Supervision Department of Xinjiang Food and Drug Administration, missing since 2017, is reported to have been given a two-year suspended death sentence for “exhibiting separatist tendencies” and “acts against the state” although there has been no official information given on the charge.¹⁹

A new Hong Kong National Security Law, promulgated on 30 June 2020, and effective immediately, raises concerns that people in Hong Kong, of any nationality, could be sent for trial in mainland China and subjected to China’s national security laws, including being sentenced to death.

The death penalty was officially abolished in Hong Kong in 1993, but the last execution was in 1966. Hong Kong has a separate legal system from mainland China as part of the One Country, Two Systems principle enshrined, since 1997, in Hong Kong’s Basic Law. The new national security law is worrying for a number of reasons and undermines the policy of One Country, Two Systems. The acts of “separatism”, “subversion”, “terrorism” and “colluding with foreign or overseas powers” are vaguely defined in the new Hong Kong law, opening it up to abuse by judicial authorities. In article 55, the Chinese government now has the power to transfer Hong Kong cases concerning national security offences to mainland China for prosecution and trial under mainland law. There is a lack of clarity and transparency over whether the death penalty could be used. Justice Secretary Teresa Cheng said it was not up to the Hong Kong government whether people sent to the mainland over alleged national security violations could face the death penalty.²⁰

¹⁸ Chinese Human Rights Defenders. ‘Criminal Arrests in Xinjiang Account for 21% of China’s Total in 2017.’ 2018. <https://www.nchrd.org/2018/07/criminal-arrests-in-xinjiang-account-for-21-of-chinas-total-in-2017/>. Accessed 2 Oct. 2020.

¹⁹ Radio Free Asia. ‘Prominent Uyghur Intellectual Given Two-Year Suspended Death Sentence For ‘Separatism.’ 28 September, 2018. <https://www.rfa.org/english/news/uyghur/sentence-09282018145150.html>. Accessed 5 Oct. 2020.

²⁰ Radio Television Hong Kong. ‘Not for us to say who could get death penalty: govt.’ 1 July, 2020. <https://news.rthk.hk/rthk/en/component/k2/1535190-20200701.htm>. Accessed 5 Oct. 2020.

Covid-19 Impact

In February 2020, as the scale and threat of the novel Covid-19 coronavirus emerged, China's National Health Commission, SPC, SPP and MPS, issued a joint statement listing seven different types of offence related to hindering epidemic control. This included refusing to quarantine or accept treatment measures using violence, threats or other methods. It stated that severe cases would be eligible for the death penalty.

Prior to the Covid-19 pandemic, in February 2003, Sudden Acute Respiratory Syndrome (SARS), a coronavirus, was identified in China and spread to a number of other countries. In May 2003, the SPC and SPP jointly issued a judicial interpretation that stated that intentionally spreading sudden contagious disease pathogens that endanger public security or lead to serious injury could also result in severe punishments including the death penalty.

The crimes of "spreading hazardous substances" and "using other methods to endanger public safety" are listed as death penalty eligible in the criminal law.

The restrictions imposed as a result of the Covid-19 pandemic have also disrupted criminal proceedings. China has stated that criminal cases, including death penalty cases, should not be delayed as a result of the pandemic. This raises questions about the speed in which death penalty cases during this time will be reviewed and whether criminal procedure, which is already opaque and lacking in procedural protections against unfair trials, will be adversely affected.

Chapter 2. Vulnerable Defendants

This chapter focuses on Safeguard Three which states that persons below the age of 18 at the time of the crime shall not be sentenced to death, and nor shall pregnant women, new mothers or “persons who have become insane.” This chapter considers how the application of the death penalty in China protects the vulnerable from execution. As is the case in other countries that have not yet abolished the death penalty, one of the difficulties in respecting Safeguard Three is the lack of clear procedures in assessing mental health. Forensic medical assessments are a major source of contestation in criminal procedure. China, also, has no prohibition against the execution of the mentally ill and it would be possible for someone who becomes insane following the commission of the offence to be executed. This chapter concludes with comments on how the use of the death penalty in China discriminates against the poor.

International Law

The rationale for Safeguard Three appears to be that the imposition of the death penalty on the most vulnerable defendants is a disproportionate and cruel punishment. The Special Rapporteur on Torture and other Cruel, Inhuman and Degrading Treatment or Punishment has described “the imposition and enforcement of the death penalty in the case of persons with mental disabilities as particularly cruel, inhuman and degrading”. In the vast majority of countries young offenders are punished with greater leniency than adults in recognition of their relative immaturity and their potential for rehabilitation. Iran is now an outlier in continuing to sentence children to death. The prohibition against executing pregnant women and new mothers acknowledges the effect of the punishment on innocent children. The Additions to the Safeguards, agreed in 1989, call on retentionist countries to establish a maximum age beyond which a person may not be sentenced or executed.

The prohibition against executing persons who have become insane is difficult to implement in practice because of the lack of coherent standards for mental health assessment. There remains a degree of subjectivity in determining whether an individual is “insane”. There is also a wide spectrum of terminology used to discuss insanity and the death penalty reflecting different standards of mental health assessment. The Additions to the Safeguards, 1989, state that the death penalty should be eliminated for persons suffering from “mental retardation” or “extremely limited mental competence, whether at the stage of sentence or execution.”

In the 2010 ECOSOC Report, the Secretary-General emphasized that the “insane” requirement in Safeguard Three is distinct from the doctrine of diminished responsibility, reporting that the Safeguard “is often confused with the related but different questions of responsibility for the crime itself and application of an insanity defence, and of fitness to stand trial, where a person is unable to participate in the trial for mental health reasons.”

The right to an impartial tribunal often implicates issues of equality and non-discrimination. The UN Human Rights Council has expressed concern at the discriminatory application of the death penalty in relation to gender, sexual orientation, race, religion, disability and economic status. The 2018

resolution of the UN General Assembly on the use of the death penalty strengthened calls for protection against the discriminatory application of the death penalty. The Human Rights Council in its recent authoritative interpretation of article 6 of the ICCPR also states that the death penalty must not be imposed in a discriminatory manner “contrary to the requirements of Articles 2(1) and 26 of the Covenant.”

Chinese Law

Age Limits

Under Chinese criminal law persons under the age of 18 or 75 years or over shall have their punishment mitigated. Article 49 (CL.17) confirms that persons under the age of 18 or 75 years or over shall not be given the death penalty.

Pregnant Women and New Mothers

Chinese law is clear that women who are pregnant at the time of the trial cannot be executed (CL.17 Art.49).

There is no legal provision, however, against the execution of new mothers. An appellate judge commenting on informal guidelines for the review of death sentences explained that, mothers with children under 12 years old will often be given a two-year suspended death sentence, even where the offence is seen as very serious.²¹ This seems to be an example of judges adapting the overall policy guidance of ‘balancing severity with leniency’ to guide their approach.

Mental Disabilities

Chinese law does not have an explicit provision to prohibit the execution of persons for reasons of insanity. The criminal law is principally concerned with the question of responsibility although in cases of diminished responsibility, the court may give a more lenient punishment (CL.17 Art.18). Where someone suffers from episodic mental illness, the courts must determine if they were mentally disordered at the time of the offence. There are three key issues in relation to mental illness and the death penalty in China: the focus on criminal responsibility, the understanding of mental illness and the assessment procedures.

Criminal responsibility

The law is primarily concerned with the question of determining criminal responsibility. If a person is found to not have criminal responsibility then they should not be subject to criminal punishments, including the death penalty. Where someone is determined to not have ‘criminal responsibility’ for their actions they should either be released to the care of their family or, where they are deemed to

²¹ Trevaskes, Susan. “From ‘Killing Many’ to ‘Killing Fewer’” in Liang, Bin and Lu, Hong (eds) *The Death Penalty in China: Policy, Practice and Reform*, Columbia University Press, 2016.

be a continued threat to society, placed under compulsory medical treatment. Compulsory medical treatment takes place in closed psychiatric institutions, known as *ankang*, under the jurisdiction of the Ministry of Public Security. There are, however, only about 25 *ankangs* across China, overseen by the Ministry, which can accept mentally ill offenders. The limited capacity of *ankangs* to provide an alternative to executing prisoners, in the case of the most serious offences, appears to be one factor in limiting the court's sentencing options.²²

“when dealing with offenders who might be mentally ill but with low social standing, sentencing or even killing them is convenient”, senior psychiatrist in China²³

Public opinion or opposition from the victim's family can put the police or judicial authorities under pressure to hold the defendant criminally responsible. This may help to explain the authorities' reluctance to agree to mental health assessments. Even where a mental health assessment has identified a mental disorder the court may set the findings against weightier concerns about the nature and seriousness of the offence and the continuing dangerousness of the offender. In cases of diminished responsibility, the courts may consider this a mitigating factor when sentencing (CL.17 Art.18). Low intelligence or learning disabilities are generally understood to result in more lenient sentencing. The option of the two-year suspended death penalty allows courts to legally impose a death penalty while refraining from executing the defendant.

Liu Mo was arrested for the brutal killing of three young children in Xuyi county, Huai'an in Jiangsu province during the mid-autumn festival, 2011. Liu was given a mental health assessment and it was determined that he suffered from schizophrenia. However, because the family were poor he had not sought treatment. A year after the killings he was convicted of murder and sentenced to death. In defending the sentence, the intermediate court explained that the most important factor was the seriousness of the offence and then the continued dangerousness of Liu. The court believed that Liu had limited criminal responsibility. The procuratorate acknowledged the case was a tragedy and described it as a failure to supervise the mentally ill. While this case indicates the intermediate court's reasoning it has not been possible to confirm whether Liu was eventually executed.

Understanding of mental illness

There is no definition of what constitutes mental disorder in Chinese criminal law. It is generally accepted by Chinese practitioners that mental illness refers to psychosis or persons with severe

²² Jiang, Lilou. 'Accessibility of Psychiatric Assessment for Capital Crime Offenders with Mental Illness in China.' *Journal of Law and Criminal Justice*, June 2017. Vol.5, No.1 pp. 1-10. <https://doi.org/10.15640/jlcj.v5n1a1>

²³ Cai, H. Q. 'I Am Not Appealing For Qiu Xinghua Solely.' *Southern Weekly*. 30 November, 2006. Referenced in *ibid*.

intellectual disabilities.²⁴ The stigma associated with mental health disorders in Chinese society helps account for the lack of awareness.

Chinese law does not consider whether mental disabilities may affect a person's fitness for interview and there is no requirement that protective measures are available to ensure that interviews are conducted in an appropriate manner. There are reports that forensic psychiatric services in some provinces have begun to consider assessing fitness for interview. The 2012 revision to the Criminal Procedure Law introduced a provision (Art.34(2)) to designate legal counsel for mentally ill defendants, if they have failed to appoint a defence lawyer. Given some of the difficulties identifying mental disabilities and lack of detail regarding the provision of legal aid, implementation of this provision is understood to be poor, particularly during the important investigation stage. There is a significant risk that suspects with mental disorders will be vulnerable to oppressive and misleading interviewing by the police.

There is a poor understanding of mental illness among police, procuratorate and courts. We have seen many reports of cases where judicial personnel have refused a mental health assessment because the person appears normal. Stereotypes of mental illness often seem to inform decision making. Lawyers, too, have little knowledge of mental illness or how they may identify the need for a mental health assessment. Without more expertise, including in social investigations and interview skills, lawyers will find it difficult to persuade the authorities of the need for an assessment.

Mental health assessments

Only the police, procuratorate and court have the authority to order a mental health assessment. This can be made at any stage of the criminal procedure although research suggests that it is most likely to be ordered by the police at the investigative stage, at least particularly in relation to more minor offences where the police may have an interest in using the diagnosis of mental illness to discontinue the case.

The defence may apply for a supplementary or new mental health assessment if they have concerns with the original assessment. The defence are expected to provide some justification for requesting an additional assessment, but the judicial agencies do not have to approve the defence request. Where a mental health assessment has not been carried out the defence can request this to take place, but, depending on the stage of the criminal proceedings, the decision to proceed lies with the corresponding agency. The victim or victim's family are also entitled to request a new assessment.

There are no specific procedures for mental health assessments in death penalty cases, but internal documents in some provinces indicate that requests for mental health assessments by defence lawyers in capital cases will generally be approved. It is understood that Beijing and Guangdong courts require mental health assessments in all death penalty cases. There is some evidence to suggest that most mental health assessments in death penalty cases take place in the second instance courts or at the SPC review.

²⁴ Jiang, Lilou. 'Accessibility of Psychiatric Assessment for Capital Crime Offenders with Mental Illness in China.' *Journal of Law and Criminal Justice*, June 2017. Vol.5, No.1 pp. 1-10. <https://doi.org/10.15640/jlcj.v5n1a1>

The assessment that a defendant has a mental disability must be authenticated in order for it to qualify as evidence in the trial. The authentication of forensic evidence, including mental health assessments, has become an area of conflict in many trials amid criticism that judges lack expertise and the courage to make an independent judgement when faced with conflicting opinions. Experts will normally only be called to give evidence in court if the expert evidence is contested. Testimony before the court, however, is normally limited to a brief summary of the key points. Defence counsel is not always given permission to cross examine expert witnesses. There are plans for an evidence law which would include a chapter on judicial assessments, including those for mental health.

There is no appeal procedure if the defence request for an authenticated mental health assessment is turned down by the courts. In some cases, the defence will commission an assessment by an independent assessment centre. The defence may be able to use such an assessment to try and persuade the court to reconsider its decision, but the assessment has no formal probative value since it cannot be authenticated.

Akmal Shaikh, a British citizen, was arrested in Urumqi in September 2007 for carrying 4 kilos of heroin. He was convicted and sentenced to immediate execution by Urumqi Intermediate Court in December 2007; his appeal to the Xinjiang Higher Court was turned down in August 2009 and his case was transferred to the Supreme People's Court for review in October 2009. Evidence submitted by British NGO, Reprieve, indicated that Mr Shaikh had a bipolar disorder and Mr Shaikh's lawyer recommended a mental health assessment; no mental health assessment was ordered to be carried out by the Chinese courts. The SPC approved his death sentence and, despite appeals at the highest level by the British government, Mr Shaikh was executed on 29 December 2009.

Poverty and the Death Penalty

Many Chinese criminal defence lawyers are concerned at the disparity in the quality of legal assistance between well-off defendants and the poorest. Where wealthy clients are able to hire a team of lawyers to help at each stage of the case and offer compensation to victims, the poor can only hope that their legal aid lawyer is highly motivated and will be willing to subsidise their time and expenses. Poor persons caught up in the Chinese criminal justice system not only lack the funds to pay for an experienced lawyer, but they also lack the social networks that can help access a lawyer. Low levels of education and literacy leave many of the poor with little understanding of the law itself or how it works in practice.

There is some limited evidence that judges are starting to take the offender's socioeconomic situation into account as they try to reach a sentencing decision. Of the four drug-related crimes which may attract the death penalty, judges and scholars have raised most concerns with sentencing for drug transportation. Although the amount of drug that was being transported has long been seen to be the critical factor in sentencing someone to death penalty with immediate execution, factors, such as low household income and incitement by traffickers, may be considered in discretionary mitigation.

The payment of compensation to the families of victims is a widespread practice by defendants to avoid execution (see Chapter 6). ‘Paying compensation to save one’s life’ has prompted much scholarly and public debate with many legal academics and members of the public, alike, uncomfortable with the inequitable nature of the practice. While compensation arrangements seem to have contributed to a decline in the number of executions, the payments are likely to increase the disproportionate impact of the death penalty on the poorest.

Limited data from China indicate that the poor and poorly educated are over represented among those facing the death penalty. In a limited sample of 281 defendants in death penalty cases, 54% were villagers, 21% were unemployed and 15% were migrant workers. Eighty-eight percent of those executed had a junior middle school or lower level of education. Chinese law has no equality legislation that would allow lawyers to challenge discrimination in the use of the death penalty.

Chapter 3. Evidence

This chapter considers Safeguard Four which states that capital punishment can only be imposed when the guilt of the person is based on “clear and convincing evidence leaving no room for alternative explanation of facts”. We examine the situation in China and the overreliance on confessions in criminal convictions, often obtained through torture or ill treatment. The chapter also looks at the role of lawyers and witnesses, and issues with forensic evidence and examination in death penalty cases. In the final part of the chapter we examine the reluctance of the Supreme People’s Court to reconsider convictions and overturn a death sentence with immediate execution.

International Law

Although there is a lack of guidance in the jurisprudence on what constitutes “clear and convincing evidence” and on the use of expert witnesses under Safeguard Four, international jurisprudence indicates that a heightened burden of proof is required for death penalty cases under this Safeguard. At minimum, the Safeguard has been interpreted to affirm the presumption of innocence as contained in the ICCPR, article 14. Article 14 of the ICCPR also underlines the parties’ right to examine hostile witnesses as a significant element of fair trial, stipulating that “to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him”.

According to the Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions, Safeguard Four demands that, “Defendants must be presumed innocent until their guilt has been proven without leaving any room for reasonable doubt, in application of the highest standards for the gathering and assessment of evidence. All mitigating factors must be taken into account”. The report of the Special Rapporteur goes on to note that these standards must be applied to every case, even when a State’s laws generally comply with international standards for fair trials.

In General Comment No. 36, the Human Rights Committee argues that the execution of a sentenced person whose guilt has not been established beyond reasonable doubt would constitute an arbitrary deprivation of life. States have an obligation to be open to the reconsideration of convictions in the light of new evidence, including new DNA evidence. The Committee also encourages states to consider the implications of studies that suggest the unreliability of eyewitness testimony and the prevalence of false confessions.

Chinese Law

In Chinese law, there is no clear inclusion of the presumption of innocence. Official Chinese publications, however, acknowledge the principle of the presumption of innocence (*e.g.* ‘*New Progress in the Judicial Protection of Human Rights in China*’ 2016). The Criminal Procedure Law also goes some way to include the concept. Article 195 states that “the defendant cannot be found guilty for insufficient evidence”. This, combined with article 12 which states that “no one shall be found

guilty without a legal verdict by the people's court", has been put forward by some scholars as the Chinese concept of presumed innocence.

The right to silence, however, is not guaranteed and suspects are expected to cooperate in the criminal investigation. Article 120 (CPL.18) requires suspects to answer the investigator's questions truthfully, although they also have the right to refuse to answer questions that are irrelevant to the case.

Suspects have the right to defence, but defence rights are circumscribed (see Chapter 5) and there is an onus on the defence to provide evidence that the suspect is "not guilty" (CPL.18 Art.37), despite statements that the burden of proof of guilt in public prosecutions falls on the procuratorate (CPL.18 Art.51). A number of high profile miscarriage of justice cases have spurred efforts to provide some protection for the innocent. The recently revised Organic Law of the People's Courts has a general provision to "ensure the innocent are not prosecuted". Nevertheless, "declared innocent" performance indicators may result in a negative assessment of procurators' work. In Chinese courts the conviction rate remains very high, at around 99%, and obtaining a not-guilty verdict is difficult in judicial practice.

There is still no single, unified evidence law, but there have been calls from Chinese academic circles and moves to draft one. Some criminal legal scholars and experts in China are arguing that the evidence law should reflect Safeguard Four and insist on leaving no room for an alternative explanation of facts. However, serious problems in the collection and examination of evidence as well as the exclusion of illegal evidence remain. There is a lack of specific training and education for police, judges and lawyers on different types of evidence at the university level, with some courses only offering elective rather than mandatory courses. Legal experts cite this as a serious problem in the use of evidence in death penalty trials.

Confessions

In Chinese law, a defendant cannot be convicted and sentenced to criminal punishment based on their confession alone without other evidence. Conviction must be based on "hard and sufficient evidence". However, Chinese legal practice places a strong reliance on a confession for conviction in serious criminal cases, leading to the risk of extortion through torture. In response to high profile miscarriages of justice that came to light in the mid-2000s, there has been some progress in emphasising the importance of evidence other than confessions, and with measures to exclude illegally obtained evidence.

The Criminal Procedure Law, article 50, already prohibited the extortion of confessions (*xingxun bigong*). Enhanced measures on the exclusion of evidence obtained through torture, as well as increased emphasis on other types of evidence, were introduced in 2010. The 'two rules of evidence,' addressed the examination and judgement of evidence in death penalty cases and exclusion of evidence in criminal cases. They were incorporated into the Criminal Procedure Law in 2012. The rules were widely regarded as progress by Chinese legal scholars and academics. They try to set out standards in criminal trials for the examination of evidence and the exclusion of evidence unlawfully obtained through coercion. This was the first time that measures were introduced to exclude such evidence. In a significant step, the new rules required the recording or audiotaping of interviews with

suspects facing the death penalty or a heavy prison sentence. The rules also gave judges the authority to set aside evidence obtained through torture.

Some lawyers observe that physical torture and other forms of physical abuse by the police seem to have abated somewhat in recent years. The 2012 revisions to the Criminal Procedure Law, combined with other rules such as the 2013 “Regulations on Effectively Preventing Miscarriage of Justice” issued by the Central Political and Legal Affairs Commission are said to have improved the situation. These rules require that the interrogation of suspects and defendants take place at an officially designated location and, once the detainee has been transferred to a detention centre, the interrogation should be conducted in the interview room of the detention centre with the whole process audio or video recorded.

This emphasis on audio and video recording has been viewed as a sign of progress in reducing police torture as well as illegally obtained witness testimony. Any confession that has been obtained without audio or video recording is, in Chinese law, considered illegal. In 2017, the SPC announced new regulations on the exclusion of illegal evidence which were also viewed as major progress, although it is yet to be seen how effective they prove in practice. The introduction of *liuzhi*, under the National Security Law and, what appears to be, an increase in the use of RSDL, however, suggest that the investigation authorities are adopting measures to circumvent new restrictions on police conduct in detention centres. *Liuzhi* and RSDL are both forms of incommunicado detention which can be used in ‘the three types of cases’, corruption, terrorism and national security, all crimes which are eligible for the death penalty.

The use of torture and other cruel, inhuman or degrading treatment remains a systemic problem. Despite some improved oversight, investigators are clearly able to ditch restrictions in cases that are politically sensitive at a local or national level, while procurators and judges are still reluctant to overturn evidence provided by the police. The UN Committee on Torture, in their report on China in 2015, stated that torture and ill-treatment were still deeply entrenched in the Chinese criminal justice system and there is an overreliance on confession to bring convictions.

Role of Lawyers

Steps have been taken by China towards introducing a more adversarial style of criminal justice in which greater emphasis is placed on the role of defence in the examination of evidence. (see more on legal assistance in capital cases in Chapter 5). Since the 2012 revisions to the Criminal Procedure Law some progress has also been made in terms of allowing lawyers to meet with their clients.

Lawyers are not allowed to attend police interrogations. They can, however, try to challenge an illegally obtained confession through obtaining signed and fingerprinted meeting transcripts with suspects to fully record the circumstances of evidence collection. Where lawyers are made aware of injuries allegedly obtained as a result of violence by the police they can also request the detention centre or duty procurator take pictures as evidence. However, they continue to face many challenges. It is particularly difficult for lawyers to allege that a confession has been coerced if there are no physical signs of ill treatment. The law in practice does not acknowledge the use of oppressive interviewing or other psychological pressure.

Lawyers have also argued that their role in each of the trial stages is restricted by the lack of disclosure by the procuratorate and the tendency of judges not to accept defence arguments. Although in law, defence lawyers should have access to all the prosecution evidence prior to the trial this does not always happen in practice.

Xu Youchen was executed on 15 November 2018, for killing a police officer while he was being forcibly removed from petitioning the authorities the demolition of his home. He said that he had intended to injure the police officer but did not intend to kill him. His lawyers stated that there was insufficient evidence to determine that he had killed intentionally, and there were a number of problems with the evidence collected. As the authorities had cremated the body of the policeman just four days after he had died there was no way to re-examine the exact time and cause of death. Xu stated, during his appeal trial, that he was tortured by police, during his detention in 2014, into a statement “confessing”. There were inconsistencies in his statement. His lawyer requested to exclude this illegally obtained evidence, but the higher court used his statement as evidence to convict him of intentional killing. Defence counsel had also requested to view a copy of the CCTV footage of the scene of the murder and footage from the interrogations, but these were rejected by the court at first trial and at appeal in the higher court. The images from a bodycam worn by the police were also unavailable to the defence.

Witnesses

Eyewitness accounts are still considered important in capital cases. As is common in civil-law oriented legal systems written witness statements are provided at police stations or to procurators prior to trial. The Criminal Procedure Law states that a witness statement may only be used as the basis for deciding a case once it has been cross-examined in court by both sides and verified.

In the 2012 revision of the Criminal Procedure Law new emphasis was placed on the participation of witnesses. Article 187 sets out the conditions for witnesses appearing at court to testify and article 188 states the rules encouraging witnesses to attend the trial. The new amendments also provide greater protections to witnesses appearing in court as well as financial reimbursement. However, according to some empirical studies there has been no significant increase in expert witnesses attending hearings.²⁵ Identity parades as a method of authenticating eyewitness accounts are also not common in China. Lawyers report that witnesses rarely appear in court and, where they do, judges are often unwilling to cross-examine either witnesses or experts.

Forensic Evidence

The use of forensic evidence in criminal trials in China remains relatively low although there has been a growing awareness of the importance of forensic evidence in the Chinese legal system in recent years.²⁶ In 2005, the NPCSC issued the Decision on Administration of Forensic Identification which

²⁵ Private communication with authors.

²⁶ Qiao, Cong Rui. ‘Emerging Role of Expert Opinions in Chinese Criminal Justice.’ *Forensic Res Criminal Int J.* 2017;4(6):192-193. DOI: 10.15406/frcij.2017.04.00137

attempted to increase the independence of forensic experts, and to restrict the role of forensic assessment agencies affiliated to the police.

The 2010 rule on the examination and judgement of evidence in death penalty cases also emphasised DNA testing, fingerprint analysis, or any other methods of testing biological evidence such as bloodstains, fingerprints or bodily fluids at the scene of the crime. In 2015, the NPCSC revised the “Administration of Forensic Identification and Evaluation” and the Ministry of Justice ordered a revised “General Rules on the Procedures for Forensic Identification and Evaluation” in February 2016, which also placed greater emphasis on the cross-examination of forensic evidence and expert reports in courts.

However, the training of police, judges and lawyers on different types of evidence is reported to be deficient. Some universities only provide this as an elective rather than a mandatory class. There are no nationally applicable standards for validating identification reports and expert opinions.²⁷ Judges must authenticate evidence in court, but either lack the expertise to contest evidence provided by the police or remain unwilling to do so.

In Chinese law, government institutions monopolise the initiation and granting of forensic examinations. The public security bureau, the procuratorate, and the people’s court all have the authority to initiate forensic assessments. The defence cannot initiate forensic evidence assessments; they can only apply for re-assessment or supplementary assessment. The Criminal Procedure Law, article 192, allows all parties to apply to the court to have new witnesses called, new physical evidence submitted or request a new forensic evaluation or crime scene investigation. However, the court is not obliged to grant such a request and there are no remedies such as appeal procedures available to the defence.

The defence can initiate private forensic examinations and submit them as evidence, and judges can consider them as evidence in their sentencing, although this cannot be authenticated. The cost of these examinations is also a significant barrier for the defence and there are cases of families of defendants spending large amounts for private mental health assessments, for example (see Chapter 2). There is also no law that clearly standardises how judges shall review and verify expert conclusions; whether or not an expert opinion is considered depends on the court. Judges remain reluctant to rely on forensic evidence and lawyers say that it is difficult to convince the court to take a forensic identification or expert opinion into consideration.

Experts with experience giving evidence at criminal trials speak of the difficulties, with one Chinese forensic expert calling the system chaotic. There is, however, some limited evidence to suggest that there is an increasing awareness among criminal defence lawyers and forensic experts of the importance of understanding one another’s role to strengthen defence in death penalty cases.

²⁷ Qiao, Cong Rui. ‘Emerging Role of Expert Opinions in Chinese Criminal Justice.’ *Forensic Res Criminal Int J.* 4(6) p.192-193. 2017. DOI: 10.15406/frcij.2017.04.00137

Reconsideration of Convictions

The move away from ‘strike hard’ anti-crime campaigns, the promotion of the suspended death sentence and the involvement of the SPC in reviewing death sentences have had a demonstrable impact on the ability of the Chinese justice system to reconsider convictions and death sentences with immediate execution. The Chinese authorities recognise that miscarriage of justice cases, particularly involving wrongful executions, undermine public confidence in the legitimacy of the death penalty and the criminal justice system more generally. Nevertheless, research shows that there are significant institutional obstacles in the form of bureaucratic and political opposition to the review of verdicts in serious criminal cases. There is a reluctance to overturn prior decisions particularly where there are high levels of public interest in a case. We have observed numerous cases where convictions that appear unsound are ‘resolved’ through lighter sentencing rather than a through reconsideration of the conviction. While persistent lawyers may eventually secure a retrial, preferably under the jurisdiction of another province, many prisoners are likely to remain incarcerated under a suspended sentence of death. Xiong and Miao’s research indicates that it can take ten years or more for determination of a wrongful conviction.²⁸

Zhang Yuhuan was cleared of the murder of two young boys in August 2020 after 27 years in prison. He had been arrested in 1993 in Nanchang, Jiangxi province, and sentenced to the suspended death sentence in the final trial at the higher court in 2001. He had no lawyer representing him at the final trial stage. Jiangxi Higher People’s Court opened the case for review in 2018 and found him not guilty at his appeal in 2020 stating that the evidence had been insufficient to prove his guilt and he had given contradictory confessions. He had claimed that he had been subjected to severe torture, including being attacked by dogs, to force him to confess. Public interest lawyers worked on his appeal. They felt that as he had only been given a suspended sentence, rather than death penalty with immediate execution, for the crime of intentional killing two children, this suggested there had been doubts over his guilt at the time of sentencing. Jiangxi Higher People’s Court gave the overturning of the conviction as an example of Xi Jinping’s work to strengthen the legal system and correct miscarriages of justice.

²⁸ Xiong, Moulin, and Miao, Michelle. ‘Miscarriage of Justice in Capital Cases in China’. *Hastings International & Comparative Law Review*, 273-342. 2018. <https://papers.ssrn.com/abstract=3040537>.

Chapter 4. Fair Trial Rights

This chapter considers Safeguard Five which states that capital punishment may only be carried out by a “competent court” after a legal process which gives all possible safeguards to ensure a fair trial at least equal to article 14 of the ICCPR. We examine the understanding of fair trial rights in China and the right to be tried by an independent and impartial tribunal. Sentencing is considered in Chapter 1 on the most serious crime. The right to defence and effective legal assistance are considered in the following chapter.

International Law

One of the fundamental safeguards for those facing the death penalty is the right to a fair trial. As set out in Safeguard Five, the minimum standards of a fair trial are those of article 14 of the ICCPR. These include the consideration of criminal charges by a public hearing at an independent tribunal, the right to be presumed innocent and access to adequate legal and other services at all stages of the proceedings. A review of international and regional materials with respect to Safeguard Five suggests five key rights: i) the right to a defence, including effective assistance of counsel; ii) the right to be tried by an independent and impartial tribunal; iii) the right to prompt judicial proceedings; iv) the right to consular notification; and v) the right to individualised sentencing.

The right to a fair trial is a human right recognised in the Universal Declaration of Human Rights (UDHR) and has become legally binding on all states as part of customary international law. The independence and impartiality of the court or other tribunal is essential to the conduct of a fair trial. Courts should be “autonomous from other branches of government, be free of influences, threats, or interference of any origin or for any reason” (Inter-American Court of Human Rights). The impartiality requirement applies both to judges and juries.

Failure to ensure a fair trial, in cases involving the death penalty, that is consistent with the guarantees provided for in ICCPR article 14 would result in a sentence that would be considered arbitrary in nature. Under article 6 of the Covenant no one shall be arbitrarily deprived of his life and no state may derogate from article 6 during any time of public emergency (article 4(2)).

Chinese Law

Right to a Fair Trial

Although China has not ratified the ICCPR, the country is a signatory to the convention and legal scholars are familiar with the provisions of article 14. Chinese understanding of law, however, generally favours substantive rather than procedural justice. For the authorities, the priority is to ensure that the outcome of a case satisfies demands for the ‘right result’. Where a case attracts strong public opinion, judicial agencies are expected to balance public concerns with the interests of the Party-state.

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Several prominent Chinese lawyers and legal scholars have tried to draw attention to the importance of procedural justice. In 2003, a number of leading Chinese legal scholars openly criticised the conviction and death penalty for organised crime boss Liu Yong following revelations that he had been tortured. Public opinion, however, was not supportive. With the case of Yang Jia, executed in 2008 for killing six police officers, the public identified with a more sympathetic victim. Although there was no doubt about Yang's guilt there was deep public disquiet that he had been convicted and executed unfairly.²⁹ Yang's case brought to light previous injustices at the hands of the Shanghai police and a public perception that his violence against the police was the result of earlier abuse and frustration. Rather than let justice be seen to be done, the public reacted with anger at the speed with which the authorities convicted and executed Yang.³⁰

The case of villager, Jia Jinglong, who, in 2015, killed the village chief who ordered his home demolished, similarly, attracted considerable public sympathy. Despite widespread criticism, including from legal scholars, lawyers and the media, that the sentence was too harsh, Jia was executed in 2016. Lawyers within the rights-defence (*weiquan*) community have been particularly forthright on the lack of judicial independence and have criticised Chinese Communist Party (CCP) influence on trials. Chinese lawyers have also noted that defendants are given harsher sentences if the case involves the death of a city enforcement official. Jia's execution suggests an unwillingness on the part of the authorities to bow to public pressure. It may not be a coincidence that a crackdown on China's 'rights defence' lawyers was initiated in July 2015, largely silencing more vociferous advocates of procedural justice and the rights of the downtrodden (see Chapter 5 for more detail on the treatment of lawyers).

Although the Criminal Procedure Law makes no explicit reference to a fair trial, the SPC's Implementing Guidelines on the law (2013) do include potential violations of the right to a fair trial as one of the grounds on which the SPC may decide not to approve the death penalty. Nevertheless, lawyers report that they cannot bring up fair trial rights in their written submissions or defence statements. Any appeal to the right to a fair trial must be made with reference to a specific provision in Chinese criminal law.

Successive UN High Commissioners for Human Rights and a wide range of UN independent experts have criticised the lack of transparency surrounding trials and the administration of justice in China as well as the tendency to rely on confessions which may have been coerced.

Courts and the Communist Party

China's constitution states that courts exercise their power of adjudication independently and are not subject to "interference by any administrative organ, public organisation or individual" (Art.131). In Chinese law, it is the court, as a collective institution, that is supposed to be independent and not

²⁹ Lan Rongjie. 'A False Promise of Fair Trials: A Case Study of China's Malleable Criminal Procedure Law.' *Pacific Basin Law Journal* Vol. 27. 2011.

³⁰ *ibid*

individual judges. Nevertheless, successive CCP directives are clear that the Party retains leadership over the legal system. The Party asserts its influence through appointments, Party committees and policy guidance (2019 Party regulations on political-legal work) as well as institutional arrangements, notably judicial adjudication committees. The priority for the Party is ‘stability maintenance’, ensuring not only public order, but also respect for the institutions of the Party-state.

Judicial adjudication committees (*shenpan weiyuanhui*), usually comprising the court president, vice presidents and senior judges, have been a major topic of debate among Chinese legal scholars discussing the idea of a fair trial. The committees, which exist at each of the four levels of the court system to discuss important and difficult cases, exemplify the way Chinese courts decide matters institutionally. They are criticised for their lack of transparency and Party links.

Public Hearings and Transparency

The principle of a public hearing is established in the Chinese Constitution and criminal procedure law. The law also provides for exceptions in cases involving state secrets, juvenile defendants and individual privacy. National security concerns are very broadly conceived and the police have the power to determine whether a case involves state secrets. Information on scheduled court proceedings is supposed to be available to the public, but prospective observers are usually required to register and obtain an observer pass, allowing officials to act as gatekeepers to the courts. Although non-Chinese citizens have the right to attend trials, in practice foreigners rarely gain access, except by special arrangement.

National security concerns are very broadly conceived and the police have the power to determine whether a case involves state secrets.

In 2013, the Supreme People’s Court (SPC) launched its online judgements database (see Additional Resources). This has become a valuable resource for researchers, although many Chinese and overseas legal scholars have criticised the database for its “missing cases”. The 2018 Opinion on Judicial Transparency sets out broad areas where courts should release information, but also provides for situations where the release of information is not permitted or “unsuitable for being made public”. One poorly understood category of secret information is trial work secrets which likely include the discussions of judicial adjudication.

Court Decision-Making

China’s courts are organised hierarchically and geographically, by province, under the Supreme People’s Court. Capital crime cases are not heard at the lowest level of basic people’s courts. Where the procuratorate determines that a case may result in a life sentence or the death penalty, the case will be indicted in the intermediate people’s court. Both the defence and the prosecution may appeal decisions of the first instance court to the higher court, located at the provincial level. The decision of

the second instance court is final. In 2007, the Supreme People's Court resumed its function of approving all death sentences. This is discussed in Chapter 6.

Recent reforms have attempted to make the criminal procedure more trial-focused, nevertheless courts and judges are not central to proceedings. Decisions on the use of bail and pre-trial detention are, for example, outside the purview of the court. As adjudicators, judges reach a judgement in the shadow of prior decisions made by the more politically powerful police and procuratorate. Until the power of the courts is perceived to be greater than other bureaucracies, it is difficult for the judiciary to provide robust scrutiny of the evidence and the respect for due process in a case.

Once a case reaches the procuratorate stage, the victim's family are entitled to appoint their own agent ad litem. The involvement of a lawyer on behalf of the victim goes beyond the inclusion of victim impact statements in many other jurisdictions. The agent ad litem will be able to view case files and submit opinions to the procuratorate and the court.

First instance courts normally have two months to reach a judgement on the prosecution case. This may be extended to three months with the approval of the higher court or longer, if approved by the SPC. Where the court requests further investigations by the procuratorate, the deadline for adjudication will be recalculated.

Death penalty and other serious cases should be considered by a seven-person collegial panel comprising four people's assessors and three judges (People's Assessors Law (PAL) 2018. Art.16). People's Assessors (*renmin peishenyuan*) are citizens appointed to "participate" in trial activities; a phenomenon of many communist countries they are distinct from jurors in common law countries. The 2018 People's Assessor Law revised some of the ways in which assessors are selected from among the general public and the scope of their work. After reviewing the case file and the hearing, people's assessors vote, with judges, on the determination of facts. Although people's assessors are permitted to express their views on the application of the law, they can no longer vote on this question (PAL.18 Art.22). The increased role of the people's assessor system in serious criminal and other public interest cases is a response to the loss of public confidence in the criminal justice system.

"Judges can manipulate the trial procedure to ensure efficiency and convenience and turn the trial into a mere formality."

A pre-trial hearing to consider issues such as evidence or recusal may be held. Applications for the exclusion of illegal evidence should be made at this stage although the effectiveness of the procedure has been called into question by lawyers and many legal scholars (see Chapter 3). Lawyers may also participate in the court investigation and question witnesses. During the trial, defence counsel will be allowed to present arguments, but the opportunity to call witnesses for the defence, and cross examine witnesses for the prosecution, is at the discretion of the court. Trials are generally short and may take no longer than one day. Judges often criticise defence counsel for taking too much time. For

Lan, “judges can manipulate the trial procedure to ensure efficiency and convenience and turn the trial into a mere formality.”³¹

Death penalty cases are also likely to be considered by the court’s adjudication committee. The court president will decide, at the request of the collegial panel, if death penalty cases should be passed to the adjudication committee for discussion and decision. Committees have an odd number of members and their decisions can override those taken by the collegial panel. Recent reforms have established specialist criminal adjudication committees to “discuss and decide major or difficult cases” (Organic Law of the People’s Courts 2018. Art.36). In future, death penalty cases should no longer be heard by judges lacking criminal law experience. Chinese legal scholars speculate that specialist criminal committees may be more cautious in applying the death penalty since research suggests that they are less supportive of the death penalty than their civil law counterparts. However, the new collegial panels with a majority of lay assessors, it was suggested, may be more punitive.

Expedited procedures

Expedited procedures to the trial process were introduced in the 2018 revisions to the Criminal Procedure Law. Expedited procedures may, in principle, be used for capital crimes although the main target is less serious offences. It is too soon to tell what effect these new procedures may have on the number of executions and whether the procuratorate will press for a two-year suspended death sentence or a life sentence as the alternative to immediate execution. The lack of transparency in death sentences will make this very difficult to research.

Many lawyers and scholars worry that the expedited procedures will increase the risk of miscarriages of justice as criminal suspects will be encouraged to confess in the expectation of a speedier resolution of their case and lesser punishment. At the heart of the expedited procedures is the principle of ‘admission of guilt and an acceptance of punishment’ (*renzui renfa*). A key concern is the voluntariness of any admission of guilt and informed consent to the new procedures. The mentally ill, blind, deaf and juveniles are exempted from the procedures, but, given the problems outlined in Chapter 2, there are well-founded concerns that the procuratorate may not make concessions for those not obviously displaying signs of mental illness.

Provisions for expedited procedures require investigators to inform suspects of their procedural rights and the legal consequences of “admitting guilt and accepting punishment” (CPL.18 Art.173). The law requires a suspect who agrees to *renzui renfa* to sign a plea affidavit in the presence of their defence lawyer or a duty lawyer and the procuratorate. There are concerns that suspects will be placed under pressure to sign the plea affidavit and lawyers are worried that they will not be given the opportunity to advise their clients effectively. There is a high risk that the presence of lawyers at the signing of the plea affidavit will be a tick box rather than meaningful procedure. Court proceedings will be limited with no investigation by the court or debate at trial, although the judge must be satisfied that the admission of guilt and acceptance of punishment in the written plea affidavit is lawful. There are real worries that it will be difficult for lawyers or the court to reopen questions of guilt if such an affidavit has been signed following inadequate legal advice or understanding.

³¹ Lan Rongjie. ‘A False Promise of Fair Trials: A Case Study of China’s Malleable Criminal Procedure Law.’ Pacific Basin Law Journal Vol. 27. 2011.

Chapter 5. Adequate Legal Assistance

This chapter follows on from our examination of fair trial rights and also considers Safeguard Five which states that capital punishment may only be carried out after a legal process which guarantees the right to “adequate legal assistance at all stages of proceedings”. We set out the context and the legal framework for the provision of legal representation in death penalty cases in China. Although 2012 revisions to the Criminal Procedure Law expanded the role of lawyers in criminal proceedings, counsel do not enjoy an equality of arms in the preparation of the defence case. Lawyers in China lack access to information, including adequate access to their clients and there remains limited scope to obtain and present potentially mitigating evidence. The difficulties experienced by Chinese lawyers reflect the way in which the state views their role and seeks to limit their independence. The chapter concludes with a discussion of legal aid.

International Law

Effective legal assistance is a critical component of a fair trial. This assistance must be available at every stage of the criminal proceedings and regardless of the ability to pay. There is a growing body of international law and guidance regarding the provision of legal aid in criminal justice systems derived from Articles 10 and 11.1 of the UDHR and article 14 of the ICCPR. Lawyers must also have adequate time to prepare their case, including carrying out their own investigations. Critical to this right to a defence is adequate access to information. As the Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions has stated, “[t]ransparency is among the fundamental due process safeguards that prevent the arbitrary deprivation of life”.

Additions to the Safeguards (1989) build on Safeguard Five by stating that adequate assistance of counsel must go “above and beyond the protection afforded in non-capital cases” at every stage of proceedings. Strengthening of the Safeguards (1996) goes further by encouraging member states where capital punishment has not been abolished to guarantee a fair trial, as contained in article 14 of ICCPR, as well as to bear in mind the Basic Principles on the Role of Lawyers.

The State must “ensure the strict confidentiality of all meetings with [a defendant’s] lawyers” (UN Committee Against Torture). Effective counsel should “develop and present potentially mitigating evidence in a capital case” (Inter-American Commission on Human Rights). The availability and quality of legal assistance in death penalty cases is a recognised problem in all countries that continue to use the death penalty, including the United States. The State is the guarantor of counsel’s competence with the implication that the State must also ensure the availability of adequate funding for legal aid services.

The 2012 United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems (Principles and Guidelines), approved by the UN General Assembly, provide guidance for the delivery of all legal aid, including the principles of fairness, equality before the law and non-discrimination. The right to legal aid is recognised in Principle 1. Legal aid provides a foundation for the enjoyment of other rights.

Chinese law

Situation and Role of Chinese Lawyers in Death Penalty Cases

Few Chinese lawyers choose to specialise in the criminal law. It is seen as a risky and generally poorly rewarded area of practice. Many Chinese lawyers, particularly those working outside the larger cities, are generalists and will represent both civil and criminal cases. A few law firms charge very high fees for complex criminal cases, including the death penalty, largely in corruption or drug crime cases, but most clients are unable to pay for teams of lawyers and experts. Criminal lawyers in China do not normally charge by the hour, but for each stage of the case. Different lawyers and law firms may, also, represent different stages of the case. Access to legal aid is discussed below.

Successive revisions to the Criminal Procedure Law have expanded the role of the defence lawyer allowing them to meet with their client and participate in each of the three main stages of the criminal process: police investigation, procuratorate review and the trial. Lawyers may also play a role during the SPC review of death penalty cases (see Chapter 6). Chinese lawyers, however, face formidable obstacles in providing an effective defence in death penalty cases. Lawyers experience difficulties meeting with their clients and restrictions conducting their own investigations, including calling witnesses for the defence. Lawyers complain about limited disclosure by the prosecution and that judges disregard their submissions. Despite reforms to the procedure law and the requirement that defendants in death penalty cases are represented by counsel, many lawyers complain that they are no more than an “ornament” when a criminal case comes to court.

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There is also criticism of the effectiveness of many criminal defence lawyers. The lack of specialisation is a key factor as is the general absence of performance standards. Experienced lawyers brought in to assist at the SPC review complain that lawyers in earlier stages have failed to keep comprehensive case files and key information is missing. Many lawyers do not seem to take responsibility for the whole of the case, instead viewing their role limited to a particular stage in the case. While low levels of remuneration in legal aid cases may account for some poor lawyering others have argued that lawyers with paying clients are usually adequately remunerated for their time.

Regulating Lawyers

Chinese lawyers are obliged to be members of the local branch of the All China Lawyers’ Association, an organisation answerable to the Ministry of Justice and with the power, each year, to renew lawyers’ licenses and register law firms. In cases that may be politically sensitive government approved lawyers

are imposed. In the Yang Jia case, the court appointed lawyer was a long-term contracted lawyer with the local government for which the victims worked.³²

Article 306 of the criminal code on the falsification of evidence and encouraging someone to commit perjury is directed at defence lawyers. Lawyer Li Zhuang was sentenced to 18 months in prison after his client claimed that Li had induced him to allege that his confession had been obtained through torture. Although there have been few convictions under article 306, lawyers worry that if they investigate allegations of torture their client may, with police pressure, subsequently allege incitement.

In recent years the authorities have sought greater control over lawyers with a succession of codes of conduct and regulations that seek to restrict lawyers' use of the Internet and social media to discuss cases, sign public letters and petitions, or offer "imprudent" judicial commentary. A controversial 2015 amendment to the Criminal Law introduced "insulting, defaming or threatening judicial personnel or litigation participants" as conduct which could constitute contempt of court. Lawyers are concerned that the provision may be used arbitrarily when lawyers challenge the prosecutor or the judge in court. The Ministry of Justice has also introduced regulations to strengthen the role of the Communist Party of China over law firms. This is likely to further limit the independence of lawyers and restrict their ability to carry out their duties, particularly in more politically sensitive cases.

In July 2015, the authorities initiated a wide-scale crackdown on Chinese lawyers, including the incommunicado detention, torture and conviction of several high profile human rights lawyers who had been practising a more activist approach to lawyering.

In July 2015, the authorities initiated a wide-scale crackdown on Chinese lawyers, including the incommunicado detention, torture and conviction of several high profile human rights lawyers who had been practising a more activist approach to lawyering.³³ A number of the lawyers caught up in the so-called '709' cases, called after the date on which the crackdown was launched, had campaigned and represented cases of alleged miscarriages of justice, including involving the death penalty.

Legal Assistance

Lawyers may meet with their clients in the detention centre (*kanshousuo*) following the first police interrogation. Lawyers are normally appointed by the family of the detainee except, as discussed below, where the case may be supported by legal aid. Detention centres are usually open during office hours from Monday to Friday, although in some cities there is now weekend opening. In less developed regions or in politically sensitive cases, families may try to appoint lawyers from outside

³² Lan Rongjie. 'A False Promise of Fair Trials: A Case Study of China's Malleable Criminal Procedure Law.' Pacific Basin Law Journal Vol. 27. 2011.

³³ For more information, see: 'Fifth Anniversary of 709 Crackdown: Updated Chart of Persecution of Lawyers and Legal and Rights Advocates.' Human Rights in China. HRIC. 9 July, 2020. <https://www.hrichina.org/en/fifth-anniversary-709-crackdown-updated-chart-persecution-lawyers-and-legal-and-rights-advocates>

the city or province since they are less likely to experience pressure from the local authorities, including the local lawyers' association. In such cases a half hour meeting with their client may require two days' travel.

The investigation phase of the case is the responsibility of the case investigation department of the local bureau of public security. Many lawyers recognise the importance of being able to participate in this initial stage although their role is quite limited. Lawyers cannot be present during the police interrogations, but they can provide their client with information about the law, including provisions against self-incrimination. Lawyers have the right at this stage to be informed of the alleged offence and to submit their opinions. They can also advise their clients, if appropriate, to file a complaint against ill treatment or other unlawful behaviour. Many lawyers suggest that their early involvement in a case is a deterrent against coerced confessions.

The police have up to 30 days to decide whether to recommend the formal arrest of a suspect. Although intended to be an upper limit, reports indicate that the police make routine use of all time available. After one month, the procuratorate have a further seven days to approve the decision to arrest. In the Concluding Observations, following their review of China, the UN Committee Against Torture was very critical of this extended pre-charge detention. The Committee recommended reducing the maximum period of police custody and bringing detained persons before a judge within 48 hours.

The more people have approved decisions in a case the harder it is to challenge the decisions, and, by inference, the people who made them.

The investigation phase of the case can offer lawyers the best prospects to influence the outcome for their client. If lawyers can convince the police and the procuratorate that the case is weak there is a chance for it to be dismissed before proceeding too far along in the system. The more people have approved decisions in a case the harder it is to challenge the decisions, and, by inference, the people who made them.

Once the procuratorate have approved the decision to arrest, defence counsel may review the case files and conduct their own investigations. Regulations, first introduced in 2010, now require the recording of all police interviews where the suspect faces a prison sentence of ten years or more. Lawyers report that they are generally able to view the video recordings, although in legal aid cases time spent will not be remunerated. Chapter 3 provides further details of the kinds of evidence that can be considered and the role of the lawyer.

Although recent reforms have aimed to make the criminal procedure more trial-centred, many lawyers observe that the investigation and procuratorate stages also provide opportunities to influence decision-making and to protect their client from ill treatment. New expedited procedures (see Chapter 4) reinforce the importance of prompt access to legal advice.

Foreign nationals facing the death penalty in China and who are not Chinese speakers are likely to experience particular difficulties accessing effective legal assistance given the fact that most criminal defence lawyers are not English speakers. In her 2019 report, the Special Rapporteur on Extrajudicial,

Summary or Arbitrary Executions has identified a number of consular responsibilities including the need for consular services to maintain contact with and monitor the detainee's legal representation. She also recommends funding resource counsel to support any State-appointed or pro bono lawyer and funding a lawyer where no such assistance is available. There is a lack of information on the situation of foreign nationals facing the death penalty in China. A number of reported cases raise concerns about politicised sentencing (see Chapter 1).

Legal aid in death penalty cases

The Criminal Procedure Law (Art.34) states that the police, procuratorate and courts shall notify the legal aid agency to provide a lawyer in cases where a criminal suspect or defendant faces the possibility of life imprisonment or the death penalty and they have not appointed anyone to defend them. Legal aid centres, under the local administrative level of the Ministry of Justice, are responsible for the provision of legal aid, either directly through lawyers working for the centre or, more commonly, through law firms contracted by the legal aid centres.

Chinese lawyers and legal scholars report three sets of problems with the current provision of legal aid in death penalty cases: poor quality representation; the appointment of lawyers; and inadequate levels of funding. These problems are interrelated.

Poor quality representation

In the majority of law firms, particularly those located outside the main cities, lawyers are general practitioners. Since the subsidy provided in legal aid cases is very low, many law firms give such cases to young and inexperienced lawyers. In submissions to The Rights Practice, lawyers report cases where the defending lawyer had no prior experience with a death penalty case and no expertise in taking serious criminal cases. One young lawyer wanted the procuratorate to remove all the photographs of the dead body from the case file to avoid viewing distressing images.

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Lawyers and the families of some defendants have also described their experience of legal aid lawyers who show little interest or motivation in the case. Poor families describe resorting to borrowing money from relatives in order to pay for the services of a lawyer rather than rely on legal aid. Appalled that the legal aid lawyer appointed to defend her husband had met him just once for 20 minutes, Xu's wife sold their old home to pay privately for a lawyer.³⁴

Where a case involves political interests, such as the killing of a police officer or other state agent, the defendant's family will worry that a government appointed legal aid lawyer will be under pressure

³⁴ Private communication with authors.

from the local judicial authorities. In some cases, rights-defence lawyers have been able to offer free help in more complex and politically sensitive cases, but recent regulations and repression of the human rights lawyers' community has made this more difficult.

Appointment of legal aid lawyers

Under the legal aid system for death penalty cases, the authorities at each stage of the criminal process are expected to notify the legal aid centre if a suspect or defendant has not appointed a lawyer. Historically, in many death penalty cases a legal aid lawyer was not appointed until the trial stage although it is difficult to know how often this situation still occurs. Legal scholars admit that the law is unclear about how and when it should be determined that a case may result in the death penalty and that a defence lawyer should be appointed.

Published guidelines in 2017 for the new duty lawyers' scheme do not include any specific provisions for ensuring early representation in death penalty cases. Duty lawyers are expected to provide detainees with help in making legal aid applications. They are also expected to play a role in the new expedited criminal procedures and in applications for the exclusion of illegally obtained evidence. In some provinces the legal aid centres contract with a single law firm to handle legal aid cases. Observers worry that a monopoly in the provision of legal aid will not help drive up standards.

Where local authorities do provide legal aid in all three stages this often results in three different sets of lawyers representing the case. In a review of several cases, a senior lawyer reported that lawyers did not communicate with each other and information obtained from one stage was not available to lawyers at a later stage. One lawyer described how video evidence, indicating the possible use of torture, and reviewed by a lawyer during the procuratorate stage, was not shared with the defence lawyer for the trial stage. In another case, the lawyer at the procuratorate stage only reviewed a tiny proportion of the case files since, he argued, this was the only section relevant to his role at this stage. The appointment of different legal aid lawyers prevents lawyers from treating the procedure in its entirety and has led to evidence in support of the defendant being overlooked.

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Inadequate levels of funding

All lawyers who take criminal legal aid cases complain about the low level of remuneration. Lawyers report that the subsidy they receive for legal aid cases does not cover the costs of frequent meetings to interview their clients and witnesses. In one example, a lawyer reported being paid a subsidy of 650 RMB (approx. £65) for an appeal. The legal aid official suggested this was just a matter of submitting a document. The lawyer described how he and a colleague had made three trips to collect evidence and had held several meetings with the judge handling the case. The subsidy did not even cover the travel costs.

Lawyers also report that legal aid payments do not cover the basic cost of conducting independent investigations or consultations with experts. Many lawyers describe having to subsidise the cost of cases from their own resources.

Although lawyers report that the subsidy for representing a death penalty case in the first instance trial has increased, remuneration for subsequent stages – appeal, second instance trial, Supreme People’s Court review - was wholly inadequate. Private efforts to raise funds to support complex legal cases from within the increasingly affluent Chinese legal community were abandoned following the introduction of the Charity Law and restrictions on online fundraising by unregistered groups.

Chapter 6. Pardons, Appeals, Commutations

This chapter considers Safeguards Six, Seven and Eight. These Safeguards focus on the right to appeal to a court of higher jurisdiction, the right to seek pardon, or commutation of sentence, and that capital punishment shall not be carried out pending any of these procedures. We examine the extent to which the right to appeal a death sentence is minimally respected in China. This includes the low rate of overturning a death sentence at the Supreme People's Court review stage, the impact of seeking compensation and forgiveness from the victim's family and trial supervision procedures.

International Law

Regional and international materials on Safeguards Six, Seven and Eight reveal four practices characteristic of an effective appeals process: (1) substantive review of all matters of law and fact; (2) right to counsel during review; (3) right to appeal for amnesty, pardon, or commutation; and (4) stay of execution during review.

The UN Human Rights Committee (UNHRC) has stated that there is "a duty to review substantively, both on the basis of sufficiency of the evidence and of the law, the conviction and the sentence, such that the procedure allows for due consideration of the nature of the case." In its General Comment on article 6 the Committee has stated that States must "take all feasible measures in order to avoid wrongful convictions in death penalty cases." The UNHRC has also stated that free legal assistance must be provided for appeals and constitutional challenges. The Working Group on the Death Penalty at the African Commission on Human and People's Rights has expressed concerns about executions pending review by a regional human rights body.

Chinese Law

The right to appeal against a death sentence in China is minimally respected through both the defendant's right to appeal and the automatic review that takes place by both the higher court and SPC. The procedure for these reviews is set out below. Although it is generally agreed that the SPC review has contributed to a drop in the number of executions, it is not clear how far the appeals procedures in China really allow a case to be properly reconsidered. While higher level courts can consider both the facts in a case and the application of the law, the political and bureaucratic factors discussed in Chapter 4 suggest that it is very difficult for the courts to overturn decisions taken by lower courts and, particularly, by the police and procuratorate.

Lawyers' participation in the appeals procedures remains limited and poor defendants are discriminated against by the lack of comprehensive quality legal aid. Although deadlines in hearing an appeal against the death penalty can be extended with approval from the SPC, the defence does not have a right to request a delay in order to have adequate time to prepare the defence. The trial supervision procedure does not provide an adequate mechanism for considering death penalty cases where there may be serious grounds for concern that violations of the right to a fair trial have taken place (see section on Trial Supervision Procedures later in this chapter).

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Second Instance Court

Defendants have ten days following the judgement to appeal the decision to the higher court (CPL.18 Art.230). The appeal may also be made by defence counsel or close relatives, with the consent of the defendant. The second instance court should review both the law and the facts of the case irrespective of the scope of the appeal. In death penalty cases the court will form a collegial panel and hold a court session (CPL.18 Art.234). The higher court normally has two months to reach a decision following appeal, although in death penalty cases this can be extended by a further two months. In special circumstances and with the approval of the SPC, the deadline can be further extended (CPL.18 Art.243).

The second instance court may uphold the decision of the lower court or amend the judgement where the law was applied incorrectly. Where there are doubts about the facts of the case or the evidence is seen as insufficient, the court may either amend the judgement or revoke the earlier finding and remand the case to the original court for a new trial (CPL.18 Art.236). 2012 amendments to the Criminal Procedure Law limit the higher court to a single remand to the original court for a new trial. Prior to this revision a number of death penalty cases were repeatedly remanded for a retrial to the original court. If the decision is again appealed following a retrial, the higher court is now encouraged to reach a judgement.

Article 42 of the SPC interpretation on the application of the PRC Criminal Procedure Law, 2013, specifies that the court should notify the legal aid centre to provide legal aid in those cases where the defendant has not appointed a lawyer when the SPC performs the final review of a death penalty case.

All death sentences are reviewed by the higher court whether or not the defendant has appealed the decision of the first instance intermediate court. Death sentences with a two-year suspension are reviewed and approved (*hezhun*) by the higher court (CPL.18 Art.248). The review and approval procedures are similar to the SPC review with no requirement for a hearing, although the court is required to interrogate the defendant in cases of the death sentence and two-year suspended sentence (SPC interpretation on the application of the PRC Criminal Procedure Law, 2013. Articles 344 & 345).

Supreme People's Court Review

Where the higher court upholds the death penalty with immediate execution, the case will be transferred to the Supreme People's Court for review and approval. A death penalty with a two-year suspension is not referred to the SPC for review. Chapter IV of the 2018 Criminal Procedure Law describes the death penalty review procedures. A case should be reviewed by a collegial panel of three adjudicators (*shenpanyuan*) who may decide to either authorise or not the death penalty. Where the

court does not authorise the death penalty, the SPC has the power to remand the case for retrial or modify the judgement (CPL.18 Art.250). The SPC Interpretation of the CPL, 2013, however, indicates that the most likely outcome of an SPC decision to not approve the death penalty is for the case to be remanded to the higher court or intermediate court for a retrial. The SPC Interpretation outlines the decision making criteria for the death penalty review. Where the facts in the original judgement are “unclear”, the evidence is deemed “insufficient” or new evidence has come to light, the decision should be revoked and the case remanded for retrial. This is also the case where there are found to be failures in the application of the law or a violation of litigation procedures might have influenced a fair trial (*gongzheng shenpan*) (SPC.I13. Art.350(6)). In 2016, the SPC issued a brief judicial interpretation limiting the number of remands to retrial to first instance courts. This may expedite the final decision in death penalty cases although it also limits the potential for political interference in cases at the local level.³⁵

Under 2015 Supreme People’s Court regulations on legal representation in death penalty cases, *Measures for Considering the Views of Defence Lawyers in Death Penalty Review Cases*, defence lawyers are permitted to review the defendant’s file, provide additional evidence and have a hearing with the judges handling the case, although this is not a formal court hearing. Lawyers may contact the judge handling the case and the SPC office. They can consult the case files in the SPC office and they may interview the defendant at the detention centre. Based on their review of the case files and any interview with the defendant, lawyers may submit a written opinion to the SPC judge. Lawyers at the SPC stage need persistence and contacts to help set up interviews with the case-handling judge.

The 2019 SPC Provisions on Safeguarding the Lawful Rights and Interests of the Parties in the Procedures of Death Sentence Review and Execution, effective from 1 September 2019, confirm that the defendant has the right to defence during the SPC review of a death penalty case. These guidelines also state that the lawyer must submit all relevant documents regarding their appointment to the SPC within ten days of accepting the case. They must submit the defence opinions within one and a half months from the date of accepting the appointment.

Lawyers from outside Beijing are less well placed to be effective at the SPC review stage. While some will seek the help of Beijing-based colleagues, data suggests that in the majority of SPC reviews of death penalty cases there is no defence representation despite the regulations. In a survey of 255 death penalty review cases, between 2014 and 2016, only 9% of the cases had defence lawyers. The chance of the SPC review procedure overturning the death penalty is low. In the same sample, death sentences with immediate execution were approved in 250 of the 255 cases.³⁶

There are no time limits for the SPC to complete their review. A review of cases suggests reviews may take from one month to two years. High profile cases that attract public attention are likely to take longer. While some legal scholars suggest that SPC judges are looking for ways to refuse approval of the death penalty with immediate execution, others have commented on the perfunctory nature of the review. Many of the judges in the SPC lack trial experience and have few skills to assess the

³⁵ Finder, Susan. ‘Supreme People’s Court tweaks capital punishment review procedure.’ Supreme People’s Court Monitor. 27 June, 2016. <https://supremepeoplescourtmonitor.com/2016/06/27/supreme-peoples-court-tweaks-capital-punishment-review-procedure/>

³⁶ Private communication with authors.

evidence presented in the case file. Some Chinese commentators note that it is “not in the interest” of SPC judges to challenge a decision that has already been made by the police and procuratorate, as well as the intermediate and higher court. SPC judges will be reluctant to damage colleagues’ performance assessment. SPC decisions to approve the death sentence generally lack detailed reasoning.

Compensation and forgiveness

Research reveals that a key contributory factor to helping judges decide against imposing a death sentence with immediate execution is agreement between the defendant and the victim’s family to pay compensation. The payment of compensation helps to address worries about the loss of future earnings and other financial burdens that may arise from the death of a family member. Meeting these concerns can defuse the anger of family members and their vociferous demands for a ‘life for a life’. Victims’ families can be effective in mobilising popular opinion, particularly at the local level, in support of their claims. For judges, the payment of compensation is a tangible demonstration of remorse which can help to mitigate the likely social harm and the malicious intent of the offence.

The payment of compensation will also help to secure the forgiveness of the victim’s close family. Where there is no such forgiveness this will be considered an aggravating factor as the judge weighs up relevant considerations in differentiating between a death sentence with immediate execution and a suspended death sentence. SPC Guiding Case No. 4, issued on December 20, 2011, suggests the proper handling of a death penalty case in such a situation. Wang Zhicai was originally sentenced to immediate execution by Weifang City Intermediate Court for the murder of his girlfriend. Following appeal, the Shandong Higher Court rejected his appeal and upheld the original verdict. The SPC did not approve the death sentence with immediate execution and sent the case back to the Shandong Higher Court for retrial. In the retrial, the Shandong Higher Court reasoned that although this was a case of intentional homicide there were a number of mitigating circumstances including the fact this was a case triggered by relationship disputes and that Wang had confessed and paid compensation to the victim’s family. However, against this was the view that the method of killing was cruel (multiple stabbings) and the victim’s family did not forgive him and were demanding harsher punishment. To balance these considerations, the Shandong Higher Court sentenced Wang to a suspended death sentence with restricted commutations.³⁷

SPC authorisation

In practice, where the SPC authorises the death penalty with immediate execution the decision is final. The President of the SPC signs and issues the order to carry out the execution (CPL.18 Art.261). In some cases, the court president delays signing the order to carry out the execution. In the controversial case of the death penalty for Jia Jinglong, there was a delay of several weeks before the order was signed.³⁸ Prior to the 2019 Provisions on Safeguarding the Lawful Rights and Interests of the

³⁷ Chen, Xingliang. “Guiding Cases for China’s Death Penalty” in Liang, Bin and Lu, Hong (eds) *The Death Penalty in China: Policy, Practice and Reform*, Columbia University Press, 2016.

³⁸ Phillips, Tom. ‘Outcry as China executes symbol of injustice Jia Jinglong.’ *The Guardian*. 15 November, 2016 <https://www.theguardian.com/world/2016/nov/15/outcry-as-china-executes-symbol-of-injustice-jia-jinglong>. Accessed 5 October, 2020.

Parties in the Procedures of Death Sentence Review and Execution there was no legal requirement for the lawyer to be informed of the decision or the order to carry out the death penalty. However, these provisions state that the court entrusted to pronounce the judgment should inform legal counsel within five days of the decision (see Chapter 7 for a discussion of the circumstances in which the death sentence is carried out).

Pardon and Commutation

The Chinese Constitution confers power on the President to order special pardons (Art.80). Although, in theory, this provides the possibility of an amnesty for prisoners facing the death penalty, in practice the measure has not been used for such cases. For the first time in 40 years, President Xi Jinping used this power, in 2015, to grant a special pardon to over 30,000 people, 95% of whom were under 18 years at the time of the offence and either sentenced to fewer than three years in prison or had not been convicted of a serious crime and had less than one year left of their sentence. Other beneficiaries were veterans and elderly prisoners with disabilities.³⁹ There is no right to seek a pardon as called for in Safeguard Seven.

Chinese law provides for the court to commute a two-year suspended death sentence to life imprisonment or a fixed term sentence after two years. There is no similar right for a prisoner facing immediate execution to apply for the sentence to be commuted.

Trial Supervision Procedures

In principle, China's trial supervision procedures provide for an additional appeals procedure. The relevant legislation is found in Chapter V of the 2018 Criminal Procedure Law. The law allows for parties or their lawyers to appeal against a court judgement on grounds of either new evidence or problems with application of the law. The appeal is considered by the adjudication committee which may order a new trial. Enforcement of the original judgement is not automatically suspended during consideration of the appeal or the retrial.

The trial supervision procedures make no reference to death penalty cases. With executions supposed to take place within seven days of the SPC authorisation, the initiation of trial supervision procedures is unlikely. Chinese observers note that trial supervision procedures are very rarely invoked and are difficult for the SPC to enforce. The case of Nie Shubin, executed in 1995 for rape and murder, had been submitted to Hebei Higher Court to review after another man had confessed to the murder some 10 years later. For the next nine years Hebei Higher Court, which had originally approved the death sentence, made little progress despite petitioning by Nie's family. Eventually, the SPC felt compelled to instruct Shandong Higher Court to review the case. The Shandong Higher Court did not find sufficient evidence to support the conviction of Nie and recommended the SPC review the case. The

³⁹ Duihua. 'China: Juveniles Biggest Winners in 2015 Special Pardon. 29 January, 2016.
<https://www.duihuahrjournal.org/2016/01/china-juveniles-biggest-winners-in-2015.html>

SPC circuit court in Liaoning finally ruled that the original conviction had been made based on unclear facts and they found Nie not guilty.

Legal scholars have been advocating for greater use of the trial supervision procedures by the SPC in cases of alleged miscarriages of justice. To make the trial supervision procedure relevant in death penalty cases, China would need to introduce the procedure prior to the formal SPC approval and provide lawyers with a mechanism to request the SPC to initiate the procedures. Such a reform in the current situation is unlikely unless a new high profile miscarriage of justice case comes to light and the SPC review process itself becomes more meaningful.

Chapter 7. Minimum Possible Suffering

This chapter considers Safeguard Nine, which states that capital punishment, where it occurs, shall be carried out so as to “inflict the minimum possible suffering”. We focus on the conditions in detention for those facing the death penalty in China. This includes the lack of a specific ‘death row,’ the extensive use of shackles, meeting with family, access to a lawyer, time until execution, the method of execution as well as the practice of procuring organs from executed prisoners.

International Law

The 2015 United Nations Economic and Social Council Report highlights five main ways in which Safeguard Nine may be violated: (1) death row conditions; (2) the death row phenomenon; (3) treatment of family members of persons sentenced to death; (4) method of execution; and (5) public execution.

The Inter-American Commission on Human Rights argues that physical deprivation, including insufficient food, water, and sanitation, as well as prolonged solitary confinement without opportunities to leave their cell for exercise all violate the rights of death row prisoners. The IACHR also emphasised the need for education, especially training on violence prevention and control.

The death row phenomenon is the notion that prolonged incarceration on death row constitutes cruel, inhuman, or degrading punishment. The UN Human Rights Committee has attempted to specify the precise length of detention period before the death row phenomenon becomes cruel, inhuman and degrading. Detention on death row for 13 years not only caused “psychological distress” but was also a consequence of negligent management of the prisoner’s case file. The UNHRC has also explained that detention of more than eight years, pending determination of an appeal, affected the physical and mental health of the applicant.

The Human Rights Council, in a resolution adopted on 21 March 2013, called upon States to give due consideration to the best interests of the child in death penalty cases. Children should have access to any parent facing execution and to all relevant information about the situation.

Most international and regional human rights bodies have generally avoided determining whether specific methods of execution violate Safeguard Nine, in part because mental and physical suffering are an unavoidable consequence of the death penalty, regardless of the method. Given the inevitable pain of any method of execution, some international and regional commentators have, however, questioned whether capital punishment itself should be considered cruel and inhumane.

The Special Rapporteur on Torture has highlighted the right of detainees and family members to prepare for death and that secret executions may violate this right.⁴⁰ In January 2013, three UN Special Rapporteurs stated that executions in public add to the cruel, inhuman and degrading treatment.

⁴⁰ Méndez, Juan E. ‘Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment’. 9, August, 2012. A/67/279.

Chinese Law

“Death Row” Conditions

Individuals sentenced to death in China are not detained separately from others on a specific “death row.” Prisoners continue to be held in detention centres (*kanshousuo*) between sentencing and execution. They will share a large cell with inmates in pre-trial detention and those given short-term prison sentences. There are no official data or information on conditions for detainees or those, specifically, facing the death penalty. Reports from former detainees, convicted of lesser crimes, and lawyers reveal conditions that do not meet international standards.

Detention Centres

In mid-June 2017 the Ministry of Public Security issued its draft Detention Centre Law for public consultation, however no further progress has been made to bring legislation to the NPC. Despite calls over the years for detention centres (*kanshousuo*) to be transferred to the authority of the Ministry of Justice, they remain under police jurisdiction. The Detention Centre Law will update the 1990 Detention Centre Regulations. In recent years, Chinese legal academics and officials have engaged with international experts on best practice and international law. However, the draft available for public consultation offers no significant improvements on current regulations. The Ministry of Public Security retains its control of pre-trial detention (article 6) and detention centres will continue to cater to the same three categories of prisoners: pre-trial, short term sentences and the death penalty.

The notorious “hide and seek” case in 2009, in which a young man in Yunnan allegedly died from playing hide and seek with cell mates, highlighted security concerns and the potential for abuse and official cover-ups. This and other cases which attracted public ire led to calls for stronger monitoring of detention facilities by the procuratorate.

There is no independent monitoring of detention centres and few outsiders have access. In recent years, former detainees, including several foreign nationals, have released accounts of their incarceration. Reports from former detainees describe a daily regime of petty humiliation including the withholding of toilet paper and eating utensils. Detainees are disciplined through the imposition of long periods of silence and immobility.

The diet in detention centres is of low nutritional value, particularly in poorer provinces. Detainees are allowed to purchase better food as well as daily necessities with funds deposited by friends or relatives. However, costs are well above the market rate and the right to deposit funds has been denied in politically sensitive cases.

Detention centres have made little effort to accommodate the specific needs of their diverse and vulnerable populations from physical, learning and mental disabilities to healthcare and religious observance.

Use of Shackles

Detainees sentenced to death are normally shackled. The extensive use of handcuffs and shackles on prisoners sentenced to death appears to be in violation of international standards. The use of such restraints was criticised by the Special Rapporteur on Torture following his November 2005 visit to China. He recommended the practice be abolished.

In 2015, the UN Committee Against Torture, after its review of China, stated that it “regrets the lack of information with regard to the regulation and due process rights concerning the use of restraints”. The Committee recommended that China “should avoid the use of restraints as much as possible or apply them, only if strictly regulated, as a measure of last resort, when less intrusive alternatives for control have failed and for the shortest possible time”.

The rationale for the use of physical restraints seems to be that prisoners facing execution are deemed at risk of self-harm or suicide. The 1991 Notice on Instruments of Restraint in the Criminal Detention Centre states that the Ministry of Public Security shall define common standards for the use of instruments of restraint. In particular, handcuffs cannot exceed 0.5 kilos in weight and shackles cannot exceed 5 kilos. These instruments can be used only to stop or deter criminals from committing acts of violence, trying to escape, committing suicide or disrupting the supervisory and control system. For example, they can be used when the police are supervising detainees sentenced to death at the first instance, or whose capital punishment has been confirmed after review on appeal as well as other cases not specified.

The 1990 Detention Centre Regulations do not provide the necessary guarantees for the protection of detainees when adopting measures of restraint. There are no specific provisions requiring detainees to be visited by a doctor prior to the adoption of measures of restraint. Persons sentenced to death are often held in cells with remand prisoners who can be expected to help them with eating and other functions. Family members of prisoners sentenced to death have also raised concerns about the overuse of shackles, questioned whether prisoners need their hands and feet cuffed at all times and how much pain and suffering is caused. In one case, the mother of a man sentenced to death said that when she met her son his feet were shackled so tightly that he had to wrap something around them to enable him to walk. She thought it was inhumane to constantly keep prisoners in shackles and that they should be allowed at least a certain degree of movement.

Nian Bin, who was sentenced to death and held in detention for eight years before being exonerated, described being held in handcuffs at all times, with his hands attached to his feet by a chain. He said that in order to eat he would lower his face to a bowl like a dog and other inmates, who were not shackled, would brush his teeth, help him to dress and help him go to the toilet. He said that the pain he felt from being constantly shackled kept him awake at night.

Meeting with Family

In the current 1990 Detention Centre Regulations there is no reference to the particular needs of those facing execution to be in regular contact with lawyers and family members. Prisoners facing execution are seen as dangerous. The 2019 SPC Provisions, effective from 1 September 2019, require the courts

of first instance, after receiving the final judgment from the SPC, to inform the prisoner as well as their close relatives of the imminent execution and allow them to meet. The court may also allow the person facing execution to meet their extended family and friends for the last time but this is only if there is a “valid reason” for such a meeting. The guidelines state that the prisoner has the right to record any last words, including through video and audio recording.

Prior to these new guidelines being issued, the sister of one man sentenced to death said that normally the family are only allowed to meet with the inmate once before execution and she did not feel that this was enough, and in some circumstances families may not meet at all. She also felt that the scope should be extended to include other family members and friends, not necessarily only immediate family. The Criminal Procedure Law, article 252 states that “after the death penalty has been carried out, the enforcing court shall notify the criminal's family” but there have been cases of family members only finding out through public reports rather than directly through the courts. It remains to be seen whether or not these new provisions have made a difference in practice.

Given the rights of the detainee and family members to prepare for death, in the case of foreign detainees there is a special obligation on consular officials to, with the consent of the detainee, inform the families of the date of execution. Consular officials should also ensure that the body can be repatriated or, where not possible, ensure the body is buried according to the religion or beliefs of the deceased.⁴¹

Access to a Lawyer

For further details on legal assistance and the death penalty see Chapter 5.

Under the new 2019 SPC Provisions on the death penalty the defence lawyer should be notified by the relevant court of the SPC final verdict within five days after its announcement. Prior to these guidelines, after the SPC Review stage the lawyer of the defendant was not directly informed of the verdict and whether or not the death sentence had been approved. It is not known the extent to which courts are following these guidelines in practice. Prior to their release it was common for family members to hear of the execution before the lawyer. This raises the issue of when the defendant is informed about the result and how much time is given for them to meet with their lawyer and family before the execution takes place. In one of the cases we have seen, the sister of a person sentenced to death believed that it was immoral to give the lawyer notice so late and it also negatively affected the person sentenced to death as well as their family members.

Time until Execution

According to research, the average time spent between SPC approval and execution is two months.⁴² However, this is difficult to determine due to the lack of official data. For certain cases such as drug-related offenses the death sentence may be approved, but the date for execution could be delayed.

⁴¹ Callamard, Agnes. Report of the Special Rapporteur of the Human Rights Council on extrajudicial, summary or arbitrary executions. A/74/318. 20 August, 2019. <https://undocs.org/A/74/318>

⁴² Duihua. ‘China’s Average “Death Row” Prisoner Waits 2 Months for Execution.’ 27 April, 2016. <https://www.duihuaresearch.org/2016/04/chinas-average-death-row-prisoner-waits.html>

Some of those sentenced for drug crimes may have to wait weeks or even months so that their execution coincides with the “International Day against Drug Abuse and Illicit Trafficking” commemorated on June 26. Unlike most death sentences which are not reported in the media, the timing of drug crime-related executions is often governed by political concerns rather than the court’s timetable (see Chapter 1 on Most Serious Crimes for more detail on drug crimes). Chinese lawyers have stated that due to the, relatively, short time between SPC approval and execution, the problem of the death row phenomenon does not exist in China. However, the two-year suspended sentence is considered a death sentence and the threat of execution remains. Individuals sentenced to the two-year suspended death penalty, and those imprisoned for long periods pending appeal, may also suffer psychological distress that resembles the death row phenomenon criticised in other jurisdictions.

The Method of Execution

In China, lethal injection is considered to be more humane and scientific, compared to shooting, as a method of execution. It is also more expensive. Lethal injection was introduced as an alternative method of execution to shooting in the 1997 amendment of the Criminal Procedure Law, article 252, as a result of both domestic and international concern over the use of firing squad as inhumane and cruel. The CPL, article 252, states that death sentences are carried out by methods such as shooting or lethal injection and may be carried out on execution grounds or inside a designated detention area.

Although statistics about the use of lethal injection, and the types of drugs and dosages, remain a state secret, it is believed that its use has expanded across China since the mid-2000s; application, however, is likely to be uneven.⁴³ Chinese legal debates in the mid-2000s emphasised the need for lethal injection as a more humane method over shooting. The use of mobile vans to execute people was also introduced and were argued to be a cost effective method in which to carry out the lethal injection. However, concerns have been raised over the vans as a means by which to make organ harvesting easier.⁴⁴

Other areas of concern include the determination of death which does not conform to medical science or international standards of medical ethics. Although there is little published about the lethal injection in China, it is known that death is induced pharmacologically by using anaesthetics and lethal drugs, and it is thus considered reasonable that the combination of drugs used for lethal injection is the same as those used in the U.S. (sodium thiopental, pancuronium bromide, and potassium chloride). This combination of drugs as the lethal injection has been criticised in the United States, and internationally, over concerns that it could inflict serious pain once administered.

Procurators and judges must witness the executions and eyewitnesses say that they have been distressed by what they have seen in the use of the lethal injection, including the belief that the person was not dead at the time it was declared. Evidence shows that in China the practice of declaring death by lethal injection within “tens of seconds” is not sufficient time. Moreover, executions are not always carried out by a trained medical doctor or with the appropriate expertise. There have been reports of

⁴³ Trevaskes, Susan. “From ‘Killing Many’ to ‘Killing Fewer’” in Liang, Bin and Lu, Hong (eds) *The Death Penalty in China: Policy, Practice and Reform*, Columbia University Press, 2016.

⁴⁴ Trevaskes, Susan. *The Death Penalty in Contemporary China*. Palgrave Macmillan, 2012.

organs being removed before the prisoner would be considered medically dead by international standards.⁴⁵

Procuring Organs from Executed Prisoners

China has stated that it would end the sourcing of organs from prisoners, but there are no laws or regulations in place banning its practice and Chinese law allows for Chinese prisoners to “consent” to donating organs. However, consent by prisoners and those sentenced to death, as well as their families, is not free from coercion or always fully informed. The World Medical Association states that “in jurisdictions where the death penalty is practised, executed prisoners must not be considered as organ and/or tissue donors”.

In 2006, Chinese officials admitted that organs were widely sourced from executed prisoners and in 2007 claimed it would reduce this number. In 2014, Huang Jiefu, China’s most senior official responsible for organ transplantation, stated that China would end the procurement of organs from prisoners by 1 January 2015, but in 2017 Chinese officials stated that it was still not possible to guarantee that the use of organs from prisoners had ceased and it is believed that the practice is widespread.⁴⁶

Statistical analysis of official Chinese datasets for deceased organ donation from 2010 to 2018 revealed that, surprisingly, the number of voluntary donations conforms almost exactly to a simple mathematical formula. The researchers, publishing their findings in *BMC Medical Ethics*, concluded that having examined a variety of evidence the official organ datasets can “only be explained by systemic falsification and manipulation”.⁴⁷ Without transparent and accurate data on organ donations it is impossible to guarantee that organs are not being procured from prisoners sentenced to death.

The practice of involuntary organ procurement raises concerns for families. In one case, the mother of a man executed in 2008, expressed suspicions that her son’s organs had been used without her knowledge, and asked questions about whether her child had consented to his organs being transplanted. The court had refused to allow her husband to see her son’s body, and so they were very worried that their son’s organs had been removed for transplant purposes.

Public Executions

Under Chinese law executions cannot be carried out in public. The Criminal Procedure Law, article 252 stipulates that executions shall be publicly announced, but not publicly displayed. Previously there were cases of people being executed publicly. We know of no recent reports, although public sentencing does still take place.

⁴⁵ Paul, Norbert, Caplan, Arthur, Shapiro, Michael, Els, Charls, Allison, Kirk, Li, Huige. (2018) ‘Determination of Death in Execution by Lethal Injection in China.’ *Cambridge Quarterly of Healthcare Ethics*, 27, 459-466. 2018.

⁴⁶ Amnesty International. ‘Death sentences and Executions 2017.’ 2017.

<https://www.amnesty.org/en/latest/news/2018/04/death-penalty-sentences-and-executions-2017/>

⁴⁷ Robertson, Matthew P., et al. ‘Analysis of Official Deceased Organ Donation Data Casts Doubt on the Credibility of China’s Organ Transplant Reform.’ *BMC Medical Ethics*, vol. 20, no. 1, p. 79. November. 2019, doi:10.1186/s12910-019-0406-6.

Conclusion

The UN Safeguards for persons facing the death penalty set out minimum standards that must be respected by any country that has not yet abolished the use of the death penalty. Our review of the extent to which China complies with these basic international standards reveals that the country falls woefully short.

Overall, we believe that there is a high risk of arbitrary execution in China because the right to a fair trial is not protected. There is no right to an independent and impartial tribunal. The authority of the Chinese Communist Party over the legal system ensures that courts, at all levels, are required to consider the interests of the Party in their decision making.

Recent years have seen greater emphasis placed on the collection and examination of evidence. Obtaining a confession to convict, however, continues to take priority in the investigation and trial stages leaving suspects open to the risk of torture and other forms of ill treatment. This risk is increased for suspects accused of one of the three types of offences (terrorism, national security and corruption) where incommunicado detention, RSDL or *liuzhi*, may be authorised.

The right to appeal in death penalty cases is seriously compromised by the reluctance of Chinese appeal courts to undertake a substantive review of law and fact and by restrictions on the right to counsel. While some rights are protected on paper, the implementation of these rights is undermined by political considerations.

China cannot guarantee the provision of effective legal assistance in death penalty cases. The role of lawyers is restricted and they are not given sufficient opportunity to present evidence in mitigation. The lack of adequate funding for legal aid in death penalty cases discriminates against defendants on the grounds of economic status.

The death penalty is given extensively for a range of drug-related offences. These do not meet the threshold for “most serious crimes”. There are still 46 capital crimes in Chinese criminal law of which just one is solely for intentional killing. There is limited recourse to individualised sentencing by the Chinese courts.

Publicity given to death sentences for drug crime is often used for political propaganda purposes. We are also concerned by what appears to be an increase in the politicised sentencing of foreigners as a result of diplomatic disputes. There is a potential for the death penalty to be applied where cases, under Hong Kong’s National Security Law, are prosecuted in China.

The suffering of prisoners sentenced to death is not minimised. The use of shackles on such prisoners appears to be the norm. The two-year suspended death sentence imposes additional trauma through the threat of execution. Research also indicates that prisoners facing execution are pressured to give consent to providing their organs for transplant purposes.

Future Prospects

Recent years have seen little progress towards further restrictions on the use of the death penalty in China. The erosion of freedom of expression and the right to receive information, after a period of some relaxation of controls, are hindering evidence and human rights-based discussions of criminal law. The introduction of the Overseas NGO Management Law, 2017, is indicative of increased official aversion to international engagement. The earlier rhetoric of step by step progress towards a rule of law in China rings hollow these days.

The Chinese government promotes a narrative of overwhelming support among the public for retaining the death penalty. However, there are no known surveys conducted by the government of public opinion on the use of capital punishment in China. Empirical studies that have been carried out do indicate general public and government support for the retention of the death penalty.⁴⁸ Analysis of online discussions by Chinese netizens, in a research report commissioned by The Rights Practice, reveal a more nuanced picture. Criticism of the “barbarism” of high profile executions suggests that it is misleading for the government to state overwhelming support for retention. Although discussions generally favour retention of the death penalty, there are those who publicly support abolition, especially in the long term.

High profile miscarriages of justice and wrongful executions have led to public concern over the application of the death penalty. These cases have also encouraged online discussions about the unfairness of the death penalty for poor and vulnerable defendants. A 2017 study of students’ views on the death penalty, at a mainland university, revealed that concern about wrongful executions was the main reason given by those supporting abolition, this was followed by the lack of deterrent effect and the global trend towards abolition.⁴⁹

One recent small-scale study with Chinese law students supports experience elsewhere that, when provided with information about alternatives and the risks inherent in judicial proceedings, support for retention of the death penalty declines.⁵⁰ Anecdotal evidence also suggests that criminal defence lawyers with experience representing those facing the death penalty in China are more likely to support abolition than lawyers with less direct experience.

While many Chinese legal scholars believe that the long-term trend is towards abolition of the death penalty in China, it is difficult to see what factors are likely to drive abolition in the current political environment. Perhaps the best we can hope for in the years ahead are further restrictions on the use of the death penalty through tighter guidelines. Despite the constraints facing civil society and public debate in China, there remain grounds for optimism that when lawyers, students, legal scholars and the general public have a chance to learn and reflect critically on the use of the death penalty support for its use ebbs away.

⁴⁸ See, for example: Oberwittler, Dietrich and Qi, Shenghui. ‘Public Opinion on the Death Penalty in China. Results from a General Population Survey Conducted in Three Provinces in 2007/08.’ Max Planck Institute for Foreign and International Criminal Law. 2008.

⁴⁹ Liang, Bin, Liu Jianhong, Lu, Hong. ‘Variability of death penalty attitude in China: an empirical test of the Marshall hypotheses’. *Crime, Law, and Social Change*. pp 276, 293. 28 January, 2019.

⁵⁰ Private communication with authors.

Recommendations

The use of the death penalty in China has an impact well beyond its borders. Its use undermines the dignity of everyone caught up in a process that undermines the right to life. There is a special obligation on countries that have abolished the death penalty and ratified the Second Optional Protocol to the ICCPR to challenge China's use of the death penalty.

Public information

China cannot claim overwhelming support for the death penalty unless it provides everyone with the right to information on how the death penalty is used and the alternatives. The international community should support activities in China, and among Chinese, that raise awareness of capital punishment and challenge its use.

Drug crime

The argument that drug crime does not fall into the category of "most serious crime" and should, therefore, not attract the death penalty, falls on deaf ears in China and many other retentionist countries in Asia. There is an urgent need to shift the perception of drug crime as a national security issue towards the right to health. This should be addressed on an Asia-wide basis and with the support of civil society. At the same time, China should introduce tighter sentencing guidelines for the use of the death penalty in drug crime cases. The disproportionate impact of drug crime and the death penalty on women and the poorest should be acknowledged by the Supreme People's Court and lower courts encouraged to consider a broad range of mitigating circumstances in sentencing.

Unfair Trials

Unfair trials in China are a matter of growing concern to the international community. This is an issue that goes well beyond the use of the death penalty. As some countries issue travel advisories about the risk of arbitrary detention in China, there is a need to broaden participation in this debate to include the business community and a wider civil society. The introduction of the Hong Kong National Security Law has highlighted the need for openness and accountability in the Chinese criminal process. International stakeholders should use every opportunity to press for greater transparency and accountability in every aspect of judicial proceedings in China.

Role of Lawyers

Defence lawyers offer those facing the death penalty some protection from unfair trials. The international legal community should be more forthright in calling on China to allow the development of an effective and independent legal profession. Better resourced and higher quality legal aid would help to mitigate some of the unfairness in the use of the death penalty.

Transparency

The international community must continue to challenge China's secrecy over the use of the death penalty. There is a particular need for transparency with respect to the two-year suspended death sentence. Information on how many of these cases result in execution, and for what reason, is essential. While greater use of this alternative to immediate execution is welcome, the sentence is still a death penalty and places, probably, hundreds of prisoners and their families, each year, under the

threat of execution. In many ways this resembles the death row phenomenon criticised in other jurisdictions.

Consular Assistance

We support the call, from the Special Rapporteur on Arbitrary Executions, for all countries to improve the quality of consular assistance in death penalty cases. All countries face the risk that their citizens in China may be executed. Embassies should ensure that consular staff are properly informed about the criminal procedure and the necessity of ensuring prompt and effective assistance. Countries with sufficient resources should guarantee the provision of an adequate defence.

Procurement of Organs for Transplant Operations

There are too many unanswered questions about organ transplantation in China leading to serious concerns that death penalty cases might be expedited to meet the demand for organs. Governments should press China to end the use of prisoners' organs, urge China to provide full information on transplant operations and ban travel to China for transplant operations.

Treatment on Death Row

The routine use of shackles for prisoners facing execution amounts to cruel, inhuman and degrading treatment and should be abolished. The time between SPC approval and execution is too short to allow for any meaningful reconsideration of the verdict. There is also a need to ensure better communication with the family and lawyers of prisoners facing execution in order to allow them to prepare for death. China should introduce clemency proceedings for all prisoners sentenced to death.

Annex I. Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty

Approved by Economic and Social Council resolution 1984/50 of 25 May 1984

1. In countries which have not abolished the death penalty, capital punishment may be imposed only for the most serious crimes, it being understood that their scope should not go beyond intentional crimes with lethal or other extremely grave consequences.
2. Capital punishment may be imposed only for a crime for which the death penalty is prescribed by law at the time of its commission, it being understood that if, subsequent to the commission of the crime, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.
3. Persons below 18 years of age at the time of the commission of the crime shall not be sentenced to death, nor shall the death sentence be carried out on pregnant women, or on new mothers, or on persons who have become insane.
4. 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.
5. Capital punishment may only be carried out pursuant to a final judgement 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 International 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.
6. Anyone sentenced to death shall have the right to appeal to a court of higher jurisdiction, and steps should be taken to ensure that such appeals shall become mandatory.
7. 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.
8. Capital punishment shall not be carried out pending any appeal or other recourse procedure or other proceeding relating to pardon or commutation of the sentence.
9. Where capital punishment occurs, it shall be carried out so as to inflict the minimum possible suffering.

Additions to Safeguards as Agreed by the Economic and Social Council Resolution 1989/64

1. Affording special protection to persons facing charges for which the death penalty is provided by allowing time and facilities for the preparation of their defence, including the adequate assistance of counsel at every stage of the proceedings, above and beyond the protection afforded in non-capital cases.
2. Providing for mandatory appeals or review with provisions for clemency or pardon in all cases of capital offence.
3. Establishing a maximum age beyond which a person may not be sentenced to death or executed.
4. Eliminating the death penalty for persons suffering from mental retardation or extremely limited mental competence, whether at the stage of sentence or execution.

Strengthening of the Safeguards as Agreed by the Economic and Social Council Resolution 1996/15

The Council:

1. Encouraged Member States in which the death penalty had not been abolished to ensure each defendant facing a possible death sentence was given all guarantees to ensure a fair trial, as contained in article 14 of the International Covenant on Civil and Political Rights, and bearing in mind the Basic Principles on the Independence of the Judiciary, the Basic Principles on the Role of Lawyers, the Guidelines on the Role of Prosecutors, the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, and the Standard Minimum Rules for Treatment of Prisoners.
2. Also encouraged Member States in which the death penalty had not been abolished to ensure that defendants who did not sufficiently understand the language used in court were fully informed, by way of interpretation or translation, of all charges against them and the content of the relevant evidence deliberated in court.
3. Called upon Member States in which the death penalty might be carried out to allow adequate time for the preparation of appeals to a court of higher jurisdiction and for the completion of appeal proceedings, as well as petitions for clemency, in order to effectively apply rules 5 and 8 of the safeguards guaranteeing protection of the rights of those facing the death penalty.
4. Also called upon Member States in which the death penalty might be carried out to ensure that officials involved in decisions to carry out an execution were fully informed of the status of appeals and petitions for clemency of the prisoner in question.
5. Urged Member States in which the death penalty might be carried out to effectively apply the Standard Minimum Rules for the Treatment of Prisoners, in order to keep a minimum the suffering of prisoners under sentence of death 'and to avoid any exacerbation of such suffering.

Annex II. Listing of Crimes Eligible for the Death Penalty

No.	Chinese Crime Name	English Translation	Chinese Law
Crimes of Endangering National Security			
1	背叛国家罪	Treason	CL2017. Article 102 and 113
2	分裂国家罪	Separatism	CL2017. Article 103 (i) and 113
3	武装叛乱、暴乱罪	Armed rebellion, rioting	CL2017. Article 104 and 113
4	投敌叛变罪	Defecting to the enemy or turning traitor	CL2017. Article 108 and 113
5	间谍罪	Espionage	CL2017. Article 110 and 113
6	为境外窃取、刺探、收买、非法提供国家秘密、情报罪	Stealing, spying into, purchasing, or illegally providing State Secrets or Intelligence to a foreign body	CL2017. Article 111 and 113
7	资敌罪	Providing material support to the enemy	CL2017. Article 112 and 113
Crimes Endangering Public Security			
8	放火罪	Arson	CL2017. Article 115 (i)
9	决水罪	Flooding	CL2017. Article 115 (ii)
10	爆炸罪	Bombing	CL2017. Article 115 (iii)
11	投放危险物质罪	Spreading hazardous substances	CL2017. Article 115 (iv)
12	以危险方法危害公共安全罪	Using other methods to endanger public safety	CL2017. Article 115 (v)
13	破坏交通工具罪	Sabotaging communications	CL2017. Article 119 (i)
14	破坏交通设施罪	Sabotaging transportation facilities	CL2017. Article 119 (ii)
15	破坏电力设备罪	Sabotaging electricity	CL2017. Article 119 (iii)
16	破坏易燃易爆设备罪	Sabotaging gas, fuel or other explosive materials	CL2017. Article 119 (iv)
17	劫持航空器罪	Hijacking aircraft	CL2017. Article 121

18	非法制造、买卖、运输、 邮寄、储存枪支、弹药、 爆炸物罪	Illegally manufacturing, selling, transporting, posting or storing of explosives or firearms	CL2017. Article 125 (i)
19	非法制造、买卖、运输、 储存危险物质罪	Illegally manufacturing, selling, transporting or storing hazardous materials	CL2017. Article 125 (ii)
20	盗窃、抢夺枪支、弹药、 爆炸物、危险物质罪	Theft or forcibly seize firearms, ammunition or explosives	CL2017. Article 127 (i)
21	抢劫枪支、弹药、爆炸 物、危险物质罪	Theft or forcibly seize firearms, ammunition or explosive materials from State organs, members of the armed forces, the police or the people's militia	CL2017. Article 127 (ii)
Economic crimes			
22	生产、销售假药罪	Producing or selling counterfeit medicine	CL2017. Article 141 (i)
23	生产、销售有毒、有害食 品罪	Producing or selling toxic or harmful food or non-food raw materials	CL2017. Article 144 and 141 (i)
Crimes against personal and democratic rights			
24	故意杀人罪	Intentional killing	CL2017. Article 232
25	故意伤害罪	Intentional injury	CL2017. Article 234
26	强奸罪	Rape	CL2017. Article 236
27	绑架罪	Kidnapping	CL2017. Article 239
28	拐卖妇女儿童罪	Trafficking of women and children	CL2017. Article 240
Crimes against property			
29	抢劫罪	Robbery	CL2017. Article 263
Crimes against public order			
30	暴动越狱罪	Violent prison escape	CL2017. Article 317 (i)
31	聚众持械劫狱罪	Organising a prison escape with weapons	CL2017. Article 317 (ii)

32	走私、贩卖、运输、制造毒品罪	Smuggling, selling, transporting and manufacturing of drugs	CL2017. Article 347
Crimes against national defence			
33	破坏武器装备、军事设施、军事通信罪	Sabotaging military weapons or equipment, military installations or military communications	CL2017. Article 369
34	故意提供不合格的武器装备、军事设施罪	Providing substandard weapons, military equipment or military installations	CL2017. Article 370
Corruption and bribery			
35	贪污罪	Corruption	CL2017. Article 383
Breach of duty by military person			
36	战时违抗命令罪	Insubordination	CL2017. Article 421
37	隐瞒、谎报军情罪	Concealment or false reporting of military intelligence	CL2017. Article 422(i)
38	拒传、假传军令罪	Refusing to pass or falsely passing military orders	CL2017. Article 422(ii)
39	投降罪	Surrender	CL2017. Article 423
40	战时临阵脱逃罪	Fleeing during battle	CL2017. Article 424
41	军人叛逃罪	Defection as a military person	CL2017. Article 430
42	为境外窃取、刺探、收买、非法提供军事秘密罪	Stealing, spying into, buying military secrets or illegally offering secrets to foreign agencies, organisations or individuals	CL2017. Article 431(ii)
43	盗窃、抢夺武器装备、军用物资罪	Theft of military weaponry or supplies	CL2017. Article 438(i)
44	盗窃、抢夺枪支、弹药、爆炸物罪	Theft of guns, ammunition or explosives	CL2017. Article 438(ii)
45	非法出卖、转让武器装备罪	Illegally selling or transferring military weaponry or supplies	CL2017. Article 439
46	战时残害居民、掠夺居民财物罪	Cruelly injuring innocent residents of war zones or plundering their property	CL2017. Article 446

Annex III. Additional Resources

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