



Use of Death Penalty in China: Sentencing

October 2021

This briefing paper sets out the law and approach to sentencing for death penalty eligible crimes in the People's Republic of China. This note is for general information purposes only and nothing contained in the note is intended to provide legal or other professional advice. Our report, "Respect for Minimum Standards?"¹ described the application of the death penalty in China and concluded that there is a high risk of arbitrary execution from the failure to comply with international standards.

Key Points:

- A death sentence in China will either be pronounced with immediate execution or with a two-year suspension. A suspended death sentence is generally commuted to a fixed term after two years, but some restrictions on commutation have recently been introduced.
- Available evidence indicates that a significant majority of the executions carried out by China are for murder and drug crime.
- 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. Some publicly announced death sentences appear politically motivated.
- The number of death sentences and executions each year in China is not known; secrecy limits fair trial rights, research and public understanding of the death penalty.

Immediate execution and suspended death sentences

The death sentence in China may be given with notice of immediate execution or suspended for two years. There are now three types of suspended death sentences: a suspended death sentence; suspended death sentence with restricted possibility for parole or commutation; and a suspended death sentence with no possibility for commutation. This briefing note sets out the differences in these death sentences and the range of factors that may be considered at sentencing.

Increased use of the suspended death sentence has reduced the number of executions in China. The Rights Practice, however, has concerns that the two-year suspended death sentence is associated with a higher risk of miscarriages of justice. Death sentences with immediate execution are reviewed by the Supreme People's Court whereas suspended death sentences are appealed and reviewed by the Higher People's Court at the provincial level. News that several leading Uyghur intellectuals and officials in the Xinjiang Uyghur Autonomous Region have been given death sentences with two-year suspension for the offence of separatism suggests that the use of the suspended death sentence can

¹ The Rights Practice, "Respect for Minimum Standards? Report on the Death Penalty in China" October 2020. <https://www.rights-practice.org/Handlers/Download.ashx?IDMF=2a885eaf-8f27-4180-9cd0-20344ad47f50>

also be politically motivated.² Researchers suggest that approximately 5% of suspended death sentences are not commuted.³

Death penalty eligible crimes

There are currently 46 death eligible crimes in China.⁴ These include both violent and non-violent offences. Article 48 of the 2017 Criminal Law states that the death penalty can only be applied in the cases of the most serious crimes (极其严重的犯罪). ‘Most serious crime’ is not defined in Chinese law. It is not consistent with international law which restricts the death penalty to intentional crimes with “lethal or other extremely grave consequences.” In China, most serious crime is generally understood to refer to the most serious examples of capital crimes rather than the idea of the ‘worst of the worst’.

Sentencing policy

Overall, Chinese sentencing is harsh. In recent years the judicial authorities have tried to increase consistency in all sentencing with an “Opinion on Several issues Regarding the Standardisation of Sentencing Procedures” (2020) and “Guiding Opinions on Sentencing in Common Crimes” (2021). Neither document, which largely deal with procedural issues, directly addresses death sentences. The 2021-2025 Human Rights Action Plan calls for “more rigorous procedures” for reviewing capital sentences. It is not clear whether new legislation is envisaged. The previous Action Plan called for strengthening ‘checking and verification’ of death sentences and regularisation of the oversight procedure. The evaluation of the 2016-2020 programme highlights the 2019 *Several Provisions on Safeguarding the Lawful Rights and Interests of Parties in the Procedures of Death Sentence Review and Execution*⁵ as an achievement of the plan.

Official **Lai Xiaomin**, was executed in January 2021 for receipt of bribes. The former chairman of China Huarong Asset Management Co. was convicted of accepting or soliciting money and assets worth nearly 1.79 billion yuan. The judge at his first instance trial justified the sentence explaining that Lai had not only received the highest ever amount in bribes, but was also guilty of corruption and bigamy.

Court hearings on sentencing hear the views of the prosecution, victims or their representatives, the defendant and defence counsel. The scope for sentence mitigation is, however, limited by law and Chinese courts do not assess individual characteristics in sentencing. In murder cases, the most significant factor in influencing sentencing is whether or not compensation has been agreed with the victim’s family.

Immediate execution

Chinese law is 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 Supreme People’s Court issues a range of guidance to lower courts from exemplary cases to “guiding cases” which can be cited in a court judgement. ‘Judicial adjudication committees’, normally comprising the court president, vice presidents and senior judges,

² The Rights Practice Working Paper, “Criminal Law and Deprivation of Liberty: Xinjiang Uyghur Autonomous Region”, 31 August 2021. <https://www.rights-practice.org/Handlers/Download.ashx?IDMF=2cc37e4d-31f6-4870-b7fa-3607fa63d102>

³ Miao, Michelle “Two years between life and death: A critical analysis of the suspended death penalty in China.” 2016. *International Journal of Law, Crime and Justice* 45 (2016) 26-43.

⁴ A full list of death eligible crimes in China can be found in Annex II of The Rights Practice report at footnote 1 above.

⁵ See p.47 of The Rights Practice report, Respect for Minimum Standards?

discuss important and difficult cases, including all death sentences. The committees are a channel for Communist Party influence.

A death sentence with immediate execution must be reviewed and approved by the Supreme People's Court. This procedure includes a review of the case files, an interview with the defendant and, more recently, listening to the views of the defence counsel. The new Legal Aid Law, which comes into effect on January 1, 2022, expands access to legal aid to include death penalty review cases. Lawyers must have three or more years' experience.

The SPC began to publish court judgements online, including some death penalty cases, in 2013. Since June 2021, millions of judgements have been removed from the database including SPC review decisions of death penalty cases. This move away from earlier promises of greater judicial transparency has made it more difficult for lawyers and the wider public to understand court decision making.

International standards

Article 3 of the Universal Declaration of Human Rights states that everyone has the right to life, liberty and security of person. Since this landmark document the international community, through the United Nations, has sought to successively restrict the use of the death penalty. In 1971, in its first resolution on capital punishment the General Assembly concluded that it was 'desirable' for states to abolish the death penalty. Today, there is a widespread presumption against the use of the death penalty. Growing understanding of the impact of the death penalty and the risks associated with it have contributed to the evolution of increasingly stringent international safeguards regarding its use.

Paragraph 1 of Article 6 of the International Covenant on Civil and Political Rights (ICCPR), adopted in 1966, states that, "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life." Although Article 6 exempts the death penalty, paragraphs 2, 4 and 5, seek to restrict its use, including to the "most serious crimes". The Second Optional Protocol to the ICCPR, aiming at the abolition of the death penalty was adopted by the UN General Assembly in December 1989; 88 countries have ratified this treaty. In 2018, the Human Rights Committee issued a new interpretation of Article 6. General Comment 36 sets out detailed arguments for the narrowest possible use of the death penalty.

China has no individual executive clemency procedure. Chinese courts, however, support defendants reaching a victim reconciliation agreement (VRA) in murder cases.⁶ This entails the defendant or their family paying compensation to the victim's family and, usually also issuing an apology. A VRA should help to mitigate the sentence from immediate execution to a suspended death penalty. In the absence of a criminal compensation scheme in China a VRA also provides the victim's family with some financial recompense for their loss. Although the courts are involved in negotiations between the defendant's representatives and the victim's family there is no legal requirement for the judge to agree a stay of execution where a VRA is agreed.

⁶ Pascoe, Daniel and Miao, Michelle. "Victim-Perpetrator Reconciliation Agreements in Murder Cases: What Can Muslim-Majority Jurisdictions and the PRC Learn from Each Other?" October 6, 2017. *International & Comparative Law Quarterly*. Cambridge University Press.

The SPC does not publish complete data on the number of cases it reviews or the number of executions it approves making it impossible to gain a proper understanding of the outcomes of the review process. It has been suggested that the SPC has overturned less than 10% of the higher court decisions on immediate execution with some suggesting the rate is as low as 3%.⁷

Research by Dui Hua looked at the length of time between trials, SPC review and execution and found it varied case by case. The shortest observed was 37 days from first instance trial to SPC review with the median being 370 days.⁸ Earlier research by Dui Hua showed that the average prisoner waits two months for execution following SPC approval⁹ despite the Criminal Procedure Law (2018 Art. 262) stating that executions should be carried out by the lower court within seven days of receiving the order to execute from the SPC.

Suspended Death Sentence

In a capital case, if the immediate execution of the defendant “is not necessary” the court may impose a suspended death sentence (死缓). 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). The Ninth Amendment to the Criminal Law (2015) specified that prisoners with suspended death sentences would only be subject to executions if they committed an intentional crime in “heinous” circumstances. The 2018 revision to the CPL (Art. 261) similarly states that a suspended death sentence will be commuted when no intentional crime has been committed in the two-year period.

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 sentence may be used for those convicted of violent crimes as well as some recidivists (CL 2011 Art.50).¹⁰ 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.¹¹ Miao notes 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.¹²

The Ninth Amendment to the Criminal Law (2015) 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)

⁷ Miao, Michelle. “Defining Death-eligible Murder in China” 2019. *American Journal of Comparative Law*

⁸ Dui Hua “Observations in Death Penalty Cases in China” May 6, 2020.

<https://www.duihuajournal.org/2020/05/observations-in-death-penalty-cases-in.html>

⁹ Dui Hua. “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>

¹⁰ China Law Translate. China Criminal Law 2011 <https://www.chinalawtranslate.com/en/criminal-law-of-the-prc-2011-including-8th-amendment/>

¹¹ Guiding Case No. 4: Wang Zhicai, An Intentional Homicide Case. Available in English from Stanford Law School China Guiding Cases Project. <https://cgc.law.stanford.edu/guiding-cases/guiding-case-4/>

¹² Miao 2016 footnote 18. See footnote 3 above.

since the prisoner spends the first two years under the threat of execution. This sentence is currently restricted to corruption cases.

A suspended death sentence is subject to lower standards of review than a death sentence with immediate execution. Suspended death sentences are reviewed and approved by the Higher People's Court, located at the provincial level. Although the appeal and review will likely involve different court personnel the two procedures take place at the same court administrative level and may be subject to the same local political pressures. The Rights Practice has seen cases which have been sent back for retrial on more than one occasion due to concerns with the adequacy of the evidence needed to convict. In some cases, rather than reach a not guilty verdict the sentence was reduced from immediate execution to suspended death sentence. In a 2016 Judicial Interpretation to Henan Higher People's Court the SPC explained that the retrial of a death penalty case, where the SPC had not approved the death penalty, should not be sent back to the original first instance court. It is possible that this measure is intended to enable the case to be reheard away from local public pressure although there may also be concerns to improve efficiency.¹³

Many observers see the suspended death sentence as a unique and positive sentencing option in serious cases. It appears to satisfy advocates of the death penalty while also reducing the numbers of persons executed. Although the absence of official data makes it impossible to provide accurate figures researchers estimate that 95% of suspended death sentences are commuted after two years. This leaves 5% of an unknown number executed; perhaps several hundred. The 2018 CPL (Art. 261) states that where the death sentence should be enforced, following a suspended death sentence, the higher court must report the case to the SPC for final review.

Politically motivated sentencing and executions

A number of executions for drug crime are reported prominently by state media around International Day against Drug Abuse and Illicit Trafficking on June 26. Prisoners may have waited weeks or months for their execution to be used for anti-drug propaganda. In a disturbing and unusual development, Canadian citizen Robert Schellenberg was sentenced to death following his appeal against a 15-year sentence for drug smuggling. His case has been seen as retaliation for the arrest, in Canada, of Chinese Huawei senior executive Meng Wanzhou. Schellenberg's appeal against the death sentence was rejected by a court in Shenyang and his case will now be reviewed by the SPC. This process is likely to take a long time; Chinese officials have linked this case to Meng's extradition case.¹⁴

The two-year suspended death sentence has been used against prominent Uyghurs in what appear to be politically motivated prosecutions and harsh sentencing for alleged separatism. Chinese television reported in 2021 that Sattar Sawut, former Deputy Secretary of the Education and Work Committee in XUAR and Shirzat Bawudun, former head of the department of justice in the region were both given two-year suspended death sentences for separatism. These followed reports that Tashpolat Teyip, President of Xinjiang University had been given a similar sentence, since denied by the Chinese authorities.

¹³ Supreme People's Court Monitor. "Supreme People's Court Tweaks Capital Punishment Review Procedure" June 27, 2016. <https://supremepeoplescourtmonitor.com/2016/06/27/supreme-peoples-court-tweaks-capital-punishment-review-procedure/>

¹⁴ Davidson, Helen. "China court upholds death sentence against Canadian Robert Schellenberg" August 10, 2021. *The Guardian*. <https://www.theguardian.com/world/2021/aug/10/china-death-sentence-canadian-robert-schellenberg-michael-spavor>

Women and death sentences

China does not publish disaggregated data on gender and the use of the death penalty. It is unclear how the death penalty impacts on women, the proportion of women executed for drug crimes, or whether the cases involve domestic violence. However, in a study carried out by Cornell Center on the Death Penalty Worldwide and China University of Political Science and Law, of 300 cases involving “drug offences, death sentences and women”, the overwhelming majority of women in the sample were sentenced to a suspended death sentence. Women sentenced to death for drug crimes were also predominantly poor, uneducated and from rural backgrounds. They were also more likely to be the primary caregivers of young children.¹⁵ Chinese law is clear that women who are pregnant at trial cannot be executed but there is no legal provision against execution of new mothers. Courts do not explicitly consider having children or other dependants a mitigating factor at sentencing. However, an appellate judge commenting on informal guidelines for the review of death sentences explained that, mothers with children under 12 years will often be given a two-year suspended death sentence, even where the offence is very serious.¹⁶

According to Chinese legal scholars, in cases of domestic violence in which the victim has murdered the perpetrator, there has been a move away from giving death sentences with immediate execution and more recognition of mitigating factors in recent years. In 2015, the judicial authorities issued the “Opinions on Handling Domestic Violence Criminal Cases in accordance with the Law”. This is China’s first criminal justice guidance document focused on punishing and preventing domestic violence crimes. It clarifies a series of issues in the application of the criminal law including considerations for sentencing, such as the fault of the victim. Although domestic violence cases are predominantly still considered intentional killing, sentencing now ranges from fixed-term imprisonment to a two-year suspended death sentence.

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.

State secrets

State secrecy on the numbers of persons facing the death penalty and executed each year in China has an impact on the entire use of capital punishment. The lack of transparency makes it impossible to monitor how the death penalty is being used and the fairness of criminal proceedings. Without data on the numbers executed, their alleged offences and socioeconomic background, people in China cannot participate in an informed debate on the nation’s use of the death penalty. The desire to

¹⁵ Cornell Center on the Death Penalty Worldwide. “No One Believed Me”: A Global Overview of Women Facing the Death Penalty for Drug Offenses”. October 5, 2021. <https://deathpenaltyworldwide.org/publication/no-one-believed-me-a-global-overview-of-women-facing-the-death-penalty-for-drug-offenses/>

¹⁶ 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.

maintain secrecy over the use of the death penalty restricts the use of legal aid and lawyers' access to relevant information. China's lack of transparency on the death penalty goes against its obligations under international law.

The UN Human Rights Council adopted a new draft resolution on the death penalty at the 48th session on 5th October 2021, by a vote of 29 states in favour.¹⁷ China was one of 12 member states that voted against.¹⁸ A further 24 states, not members of the Human Rights Council, signed in support of the resolution. The resolution takes note of the latest report of the Secretary-General which focussed on the consequences of lack of transparency in the application and imposition of the death penalty. The UN Secretary-General's report emphasises that the United Nations system has over many years underlined the importance of the public availability of information on the death penalty. At a minimum, this includes the number of persons sentenced to death and the number of executions actually carried out. The Special Rapporteur on extrajudicial, summary and arbitrary executions also stated that under international human rights law, even during a state of emergency, derogation from transparency rights is never permitted in death penalty cases. During the last Universal Periodic Review (UPR) in 2018, dozens of states raised the issue of the death penalty with China. A number of these states, including Australia, Italy and France, specifically recommended China publish death sentence and execution data and increase transparency.¹⁹

Concluding thoughts

Despite reductions in executions in recent years, Chinese sentencing remains harsh. Chinese law remains ambiguous about when an immediate execution should be sentenced. Death sentences are regularly imposed for offences that do not meet the threshold of "most serious crimes" under international law, such as drug crimes. Defendants are not guaranteed a fair trial as outlined in the ICCPR, Article 14.

Suspended death sentences, unique to China, are viewed by some observers as a positive sentencing option which have helped to reduce executions, such as in domestic violence cases. However, suspended death sentences are not subject to the same level of review and approval as immediate execution. There is thus higher risk of miscarriages of justice. Lack of transparency over not only death penalty statistics but also criminal procedure means that it is impossible for China to guarantee that the death penalty is not being applied arbitrarily.

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¹⁷<https://undocs.org/a/hrc/48/l.17/rev.1>

¹⁸ Global Times. "China objects UNHRC draft resolution on death penalty" October 11, 2021.
<https://www.globaltimes.cn/page/202110/1235956.shtml>

¹⁹ <https://lib.ohchr.org>