



The Rights Practice submits this response to the UN Secretary-General's report on the question of the death penalty, to be presented at the fifty-first session of the Human Rights Council in September 2022.

This submission focuses on China, and developments since 1 July 2020 regarding the question of the death penalty and the implementation of the safeguards guaranteeing the protection of the rights of those facing the death penalty, in particular persons under 18 years of age at the time of the offence, pregnant women and persons with mental or intellectual disabilities, and the human rights of children of parents sentenced to the death penalty or executed.

The Rights Practice works to promote human rights (as set out in the Universal Declaration of Human Rights and subsequent UN conventions and declarations). Our mission is to build the capacity of those working for human rights. We have built a programme of work that addresses three strategic themes within China: access to justice, human rights and criminal justice, and public participation. For many years we have engaged with Chinese lawyers, legal scholars and NGO workers to help prevent the use of torture, reduce the application of the death penalty and support civil society. This submission is informed by stakeholder consultations and review of Chinese law and recent cases.

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Introduction

Since 1 July 2020, judicial transparency in China has further declined hindering both domestic and international understanding of the application of the death penalty in China. Death penalty statistics remain a state secret.¹ Without accurate, and disaggregated, data on the numbers of individuals sentenced to death, and executed, it is impossible for the Chinese government to guarantee the protection of the rights of those facing the death penalty.

Lack of disaggregated data means that it is impossible to analyse the demographics of individuals sentenced to death in China. The Chinese government cannot guarantee that persons under the age of 18, pregnant women or individuals with mental or intellectual disabilities are not impacted.

From the information that is available— Chinese legal provisions, the experience of Chinese lawyers, and case reports—it is clear that China falls far short of minimum international standards in implementation of the safeguards.²

There is some evidence to suggest that women with young children are often given a two-year suspended death sentence, which is subject to lower review standards.

Persons with mental or intellectual disabilities in China are not adequately protected by Chinese law. A lack of clear procedures in assessing mental health, criminal responsibility and problems with forensic mental health assessments in criminal cases mean that persons with mental or intellectual disabilities can be executed.

Lack of judicial transparency

Since at least June 2021, China's Supreme People's Court (SPC) has removed thousands of cases, including all SPC review decisions of death penalty cases, from China Judgements Online, an online database of decisions from all levels of Chinese courts.³ China Judgements Online⁴ was established by the SPC in 2013, as a response to calls for greater judicial transparency. According to SPC Provisions issued in 2016, all criminal case documents should be published on this website.⁵ There are, however, exceptions for cases involving state secrets, and cases have always been uploaded selectively.

¹ The Rights Practice. "Lack of Transparency on the Death Penalty Impacts Human Rights". March 2021.

<https://www.rights-practice.org/news/lack-of-transparency-on-the-death-penalty-in-china-impacts-human-rights>

² 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>

³ Luo Jian; Kellogg, Thomas. "Verdicts from China's Courts Used to Be Accessible Online. Now They're Disappearing." ChinaFile. 1 February 2022. <https://www.chinafile.com/reporting-opinion/viewpoint/verdicts-chinas-courts-used-be-accessible-online-now-theyre-disappearing>

⁴ China Judgments Online. The Supreme People's Court of The People's Republic of China. <http://wenshu.court.gov.cn>

⁵ Supreme People's Court. "Provisions on People's Court Release of Judgements on the Internet" 29 August, 2016. <https://www.chinalawtranslate.com/en/the-supreme-peoples-court-provisions-on-peoples-courts-release-of-judgments-on-the-internet/>

The SPC has not publicly stated why thousands more cases have been removed, except in a notice on the database website that said it was a “migration” process which would be complete within days.⁶ This is a blow to judicial transparency in China and further restricts understanding of how legal procedures impact the rights of those facing the death penalty. It restricts lawyers and scholars’ ability to hold the government to account and advocate for legal reform.

Persons under the age of 18 years

In the Chinese Criminal Law (2021), Article 49, persons under the age of 18 years, at the time of the offence, cannot be sentenced to death. The Rights Practice is not aware of any cases of children under the age of 18 being given the death penalty. However, due to the opacity of the Chinese judicial system and lack of publicly available disaggregated data this cannot be guaranteed.

Pregnant women and new mothers

The Chinese Criminal Law (2021), Article 49, also clearly states that the death penalty cannot be given to women who are pregnant at the time of trial. There is no legal provision against the execution of new mothers. Courts do not explicitly consider having children or other dependants a mitigating factor at sentencing. Judges have, however, stated 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.⁷

In a small study of 300 Chinese cases involving “drug offences, death sentences and women”, the overwhelming majority of women in the sample were also sentenced to a suspended death sentence. Women sentenced to death for drug crimes were more likely to be the primary caregivers of young children.⁸ The use of suspended death sentences has reduced the number of executions in China, but there are concerns associated with higher risks of miscarriages of justice.⁹

Under the criminal law, the suspended death sentence will normally be commuted to either life, or a fixed term imprisonment of 25 years, provided that the prisoner has not committed any intentional crimes in the two-year period. Suspended death sentences are not subject to the Supreme People’s Court review procedures, unlike death sentences with immediate execution. This means they are subject to lower standards of review and this brings higher risks of

⁶ Xie, Echo. “Millions of court rulings removed from official Chinese database.” South China Morning Post. 26 June 2021. <https://www.scmp.com/news/china/politics/article/3138830/millions-court-rulings-removed-official-chinese-database>

⁷ 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, 201

⁸ 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>

⁹ The Rights Practice. “Use of Death Penalty in China: Sentencing”. October 2021. <https://www.rights-practice.org/death-sentences-in-china>

wrongful convictions. Individuals sentenced to a two-year suspended death sentence may also still suffer psychological distress that resembles death row phenomenon.¹⁰

Persons with mental or intellectual disabilities

Since 1 July 2020, there have been cases of persons with a history of mental illness, or without clearly having had a mental health assessment, executed in China.

For example, in October 2021, Wu Chi-man, a Hong Kong man with a history of mental illness was executed in China for drug trafficking.¹¹ Wu had been diagnosed with polysubstance abuse, hallucinations and adjustment disorder in Hong Kong. His psychiatric history was not considered at the trial stage of his case, or during his appeal which upheld the death sentence with immediate execution.

There are many issues in Chinese law surrounding criminal responsibility, the understanding of mental illness and assessment procedures, in death penalty cases. The Chinese Criminal Law, Article 18, states that a mentally ill person should not bear criminal responsibility if they were unable to understand or control their conduct at the time of the offence, if confirmed by a mental health evaluation. They should not be subject to criminal punishments, including the death penalty. However, there is no clear definition of what constitutes a mentally ill person, and no definition in Chinese law of mental disorder. There is also no explicit legal provision that prohibits the execution of persons for reasons of insanity.

The police, procuratorate, and courts can order a mental health assessment of a criminal suspect at any stage of the case. However, there is a lack of knowledge and understanding of mental illness among them, as well as lawyers, which means that vulnerable persons are not adequately protected. Defence lawyers may apply for a supplementary, or new, mental health assessment if they have concerns about the original assessment. This new assessment must then be authenticated in order to be used as evidence, but many judges also lack the expertise, or courage, to make an independent judgment about such authentication. The defence cannot appeal if their request for authentication of a mental health assessment is turned down.

Since 1 July 2020, there have been some steps made by the Chinese government to improve legal protections for vulnerable groups including persons with mental illness. In January 2022, a new Legal Aid Law came into effect.¹² Under this new law, a suspect in a criminal case who does not have a defender is automatically entitled to a legal aid lawyer if the accused lacks mental capacity, and if they might be sentenced to death. Legal aid lawyers can also be appointed during the SPC Review Stage of a death penalty case. Simultaneously, the SPC and

¹⁰ Human Rights Commission. "Extrajudicial, Summary or Arbitrary Executions. Report of the Special Rapporteur, Philip Alston: Transparency and the Imposition of the Death Penalty," March 24, 2006, UN Doc. E/CN.4/2006/53/Add.3. Para. 42-51

¹¹ Ho, Kelly. "China executes Hongkonger with history of mental illness over drug trafficking". Hong Kong Free Press. 29 October 2021. <https://hongkongfp.com/2021/10/29/china-executes-hongkonger-with-history-of-mental-illness-over-drug-trafficking/>

¹² Legal Aid Law of the People's Republic of China. 8 August 2021. Unofficial English translation by China Law Translate: <https://www.chinalawtranslate.com/en/legal-aid-law/>

the Ministry of Justice published “Provisions on Providing Defendants with Legal Aid in Review of Death Penalty Cases” which states that lawyers must have at least three years’ experience to take a death penalty case.¹³

However, it is unclear how these new legal provisions will be implemented in practice. Government-appointed legal aid lawyers work ‘within the system’ and in line with Chinese Communist Party priorities, rather than the defendant. Legal aid is poorly funded and there is a lack of training for lawyers on mental illness. There has been some growing awareness of the importance of forensic evidence and mental health assessments in recent years, and some lawyers have been making efforts to work more closely with mental health experts.¹⁴ But lawyers continue to face many obstacles defending their clients sentenced to death, such as lack of access to case files, restrictions on client meetings and harassment and punishment by the authorities if they are deemed too politically sensitive. For example, on 26 November 2021, lawyer Liang Xiaojun (梁小军), a prominent lawyer with twenty years’ experience taking human rights, and death penalty cases, had his lawyer’s license revoked. Beijing Judicial Department stated that this was a punishment due to Liang’s comments on domestic and foreign social media and for publicly supporting Falungong practitioners.¹⁵

¹³ Supreme People’s Court and Ministry of Justice of the People’s Republic of China. “Provisions on Providing Defendants with Legal Aid During Review of Death Penalty Cases (Provisional)”. 31 December 2021. Unofficial English translation by China Law Translate: <https://www.chinalawtranslate.com/en/dp-review-representation/>

¹⁴ 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.2017.04.0013

¹⁵ The Rights Practice. “Submission to the report on the protection of lawyers”. December 2021. <https://www.rights-practice.org/news/submission-to-the-report-on-the-protection-of-lawyers>