

The Rights Practice submission to the Secretary-General on the question of the death penalty pursuant to resolution 42/24 adopted by the Human Rights Council on 27 September 2019.

On the consequences of the lack of transparency in the application and imposition of the death penalty on the enjoyment of human rights.

March 2021

Lack of transparency in the application and imposition of the death penalty in China has an impact on the rights of those facing execution, their families and wider society.

Death penalty statistics are a state secret. This hinders domestic and international understanding, and informed debate. Chinese scholars cannot adequately research the use of the death penalty and policy makers lack information for decision making. The absence of disaggregated data in China makes it impossible to assess how the death penalty impacts vulnerable groups, women, and ethnic minorities.

Domestic Chinese NGOs face restrictions that inhibit their work, their right to information and right to impart information on the death penalty.

Judicial secrecy leaves lawyers unable to access information vital to provide an adequate defence for their client. It is impossible to guarantee a fair trial in China.

Family members of individuals sentenced to death are not provided with information on conditions in detention or execution.

Chinese legal system

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.¹

The CCP oversees the functioning of the institutions of the police, procuratorate and the courts. The police, procuratorate and the courts all operate 'within the system' and share privileged information among themselves. Lawyers are outside this system and are not guaranteed access to all information relevant to death penalty cases.

Death penalty statistics are a state secret

Statistics on death penalty cases are classified in China as a state secret. This includes both the monthly and annual number of death sentences and executions. China has never answered domestic and international calls for disclosure of relevant statistics.²

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>

² United Nations Human Rights Council. "Universal Periodic Review – China. Third Cycle" 6 November, 2018. <https://www.ohchr.org/EN/HRBodies/UPR/Pages/CNindex.aspx>

State secrets laws classify data regarding national-level approval and execution of death sentences as top-secret, the highest possible level of secrecy.³ China is only one of a small number of countries in which the disclosure of statistics about use of the death penalty is also criminalised. A person that discloses such information may themselves be sentenced to death.⁴ This creates a culture of secrecy and fear which inhibits domestic debate and reform.

Lack of disaggregated data in China means that it is impossible to analyse the demographics of individuals sentenced to death. The Chinese government cannot guarantee that the death penalty does not disproportionately impact economically vulnerable, ethnic minorities, or people with psychosocial or intellectual disabilities. Disaggregated data on gender is also not publicised. It is unclear how the death penalty impacts on women, the proportion of women executed for drug crime, or whether cases involve domestic violence.

Chinese legal scholars have called for greater transparency on numbers of death sentences and executions. One Chinese legal scholar, in 2017, called for the number of death sentences and executions to be made public in order to foster public trust in the legal system, reduce wrongful convictions and promote informed debate.⁵ This type of open reflection on and criticism of Chinese legal policy comes, however, with risks.

In recent years, there have been increased restrictions on freedom of expression online and crackdowns on civil society including NGOs and human rights lawyers. Both individuals and organisations calling for increased transparency and reforms of the death penalty process face harassment and the threat of detention.⁶

Lack of domestic and international scrutiny

Without accurate data on the numbers of individuals sentenced to death and executed it is impossible to assess China's claims to have implemented legal reforms and reduced the use of the death penalty. In order to reform the death penalty process, the power to review all death sentences with immediate execution was returned to China's Supreme People's Court (SPC) in 2007. Observers widely see this as a significant factor in reducing the number of executions.⁷ However, as no accurate figures are available this cannot be verified.

Accurate and meaningful comparative research on global trends is not possible. In 2009, international NGO Amnesty International stopped publishing its estimated figures on the application of the death penalty in China. They cited concerns over how China was misrepresenting their estimated figures on the death penalty.⁸ By maintaining secrecy, the Chinese government does not have to face domestic or international scrutiny if death penalty rates change. Were the government to launch another "strike hard" campaign on crime it would not be possible to monitor any increase in the number of executions.⁹

The Chinese government is able to politicise legal proceedings by keeping the real figures a state secret. The government can suggest to a domestic audience that the rates of execution are high, as a perceived form of deterrent and retribution, while simultaneously hinting to an international audience that the rates are falling.¹⁰ For example, every year, Chinese state media reports of death sentences and executions imposed for drug-related offences

³ Human Rights in China (HRIC). "State Secrets: China's Legal Labyrinth" Human Rights in China". 2007. https://www.hrichina.org/sites/default/files/publication_pdfs/hric_statesecrets-report.pdf

⁴ In the 2017 Criminal Law of the People's Republic of China, articles 111 and 113, a person may be sentenced to death if such a disclosure "causes particularly grave harm to the State and the people or if the circumstances are especially serious".

⁵ Duihua. "How Transparency in Death Penalty Cases Can Reduce Wrongful Convictions." 22 August, 2017. <https://www.duihuahrjournal.org/2017/08/how-transparency-in-death-penalty-cases.html>

⁶ Human Rights in China. "Fifth Anniversary of 709 Crackdown: Updated Chart of Persecution of Lawyers and Legal and Rights Advocates." 9 July, 2020. <https://www.hrichina.org/en/fifth-anniversary-709-crackdown-updated-chart-persecution-lawyers-and-legal-and-rights-advocates>

⁷ 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>

⁸ Amnesty International. "Global Report. Death Sentences and Executions. 2019." 21 April, 2020. <https://www.amnesty.org/download/Documents/ACT5018472020ENGLISH.PDF>

⁹ Trevaskes, Susan. *Policing Serious Crime in China: From "Strike Hard" to "Kill Fewer."* 2010. New York: Routledge.

¹⁰ Smith, Tobias. "Body Count Politics: Quantification, Secrecy, and Capital Punishment in China." *Law & Social Inquiry*, Volume 45, Issue 3, August 2020, pp. 706 – 727 DOI: <https://doi.org/10.1017/lsi.2020.10>

significantly increase around the International Day Against Drug Abuse and Illicit Trafficking on 26 June.¹¹ This corresponds with the central government's narrative that drug control is a 'people's war on drugs' which is reflected in heavy sentencing.

Lack of judicial transparency

China's courts cannot guarantee fair trial rights. It is impossible for Chinese courts to be transparent over death penalty cases while also adhering to state secrecy laws.¹² Top-level state secrets provisions have been criticised by both Chinese domestic and international audiences as being too broad and vague.¹³ The policy and regulations guiding courts on what can be made transparent use language that is unclear.¹⁴

According to the 2017 Judges Law, article 7, judges are required to keep 'judicial work secrets' confidential. The 1990 Judicial Work Secrets Regulations prohibits the disclosure of trial secrets.¹⁵ Any violations may be punished by Party discipline, administrative penalties and even criminal prosecution. The definition of judicial work secrets is unclear in Chinese law but includes non-court personnel accessing secondary files without approval of the leadership of a court. Lawyers are not permitted access to this secondary file.¹⁶ This means lawyers are restricted access to information that may be vital to provide adequate defence for their client. Chinese lawyers, legal professionals and judges have previously called to reduce or abolish this secondary file as it contradicts the Supreme People's Court aims of greater judicial transparency.¹⁷

In 2013, the SPC responded to calls for greater judicial transparency by setting up China Judgments Online, an online database of decisions from all levels of Chinese courts.¹⁸ According to SPC Provisions issued in 2016, all criminal case documents should be published on this website.¹⁹ There are however exceptions for cases involving state secrets, minors and "other reasons it is unsuitable to post [a decision] on the internet". According to Chinese legal researchers, cases are uploaded selectively and hundreds of cases are missing²⁰ restricting lawyers and scholars' ability to analyse cases and understand the courts' approach to using capital punishment. Where not all trials are open an incomplete database undermines ICCPR article 14 and the need to make judgements public.

Since September 2020, China Judgements Online has further restricted access, as a phone SIM number is required to register and sign in. This may prevent individuals from seeking to use the database to search for death penalty cases for fear of government monitoring.²¹

¹¹ According to domestic media reports, examined by Chinese researchers, there were between 160 and 200 executions on this day in 2018 and 2019. Private communication shared with The Rights Practice.

¹² Human Rights in China (HRIC). 'State Secrets: China's Legal Labyrinth' Human Rights in China'. 2007. https://www.hrichina.org/sites/default/files/publication_pdfs/hric_statesecrets-report.pdf

¹³ Finder, Susan. "China's Translucent Judicial Transparency". 18 October, 2018. in: Transparency Challenges Facing China (2018), Peking University School of Transnational Law Research Paper, Available at SSRN: <https://ssrn.com/abstract=3344466>. The 2010 State Secrets Law and the 2014 Interim Provisions on Management of State Secrets, and 2014 Interim Provisions on Management of State Secrets Classification are the top-level state secrecy legislation.

¹⁴ 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".

¹⁵ Finder, Susan. "China's Translucent Judicial Transparency". 18 October, 2018. in: Transparency Challenges Facing China (2018), Peking University School of Transnational Law Research Paper, Available at SSRN: <https://ssrn.com/abstract=3344466>. pp. 145

¹⁶ Ibid. pp. 146

¹⁷ Ibid. pp. 147

¹⁸ China Judgments Online. The Supreme People's Court of The People's Republic of China. <http://wenshu.court.gov.cn/>

¹⁹ 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/>

²⁰ Lau, Mimi and Xie, Echo. "How China's supreme court tried to open up the legal 'black box' to let in the light" South China Morning Post. 26 March, 2021. <https://www.scmp.com/news/china/politics/article/3127001/how-chinas-supreme-court-tried-open-legal-black-box-let-light>

²¹ Roth, Kenneth and Wang, Maya. "Data Leviathan: China's Burgeoning Surveillance State". The New York Review of Books. 16 August, 2019. <https://www.nybooks.com/daily/2019/08/16/data-leviathan-chinas-burgeoning-surveillance-state/>

Minimum possible suffering

China is not transparent about the use of torture in criminal cases and cannot guarantee that confessions in death penalty cases are not extorted through torture. The Committee Against Torture, in their concluding observations of the fifth periodic report of China, in 2015, stated that they “remain concerned at the use of State secrecy provisions to avoid the availability of information about torture, criminal justice and related issues”.²² There is no independent monitoring of detention centres and few outsiders have access. There is no official data or information on conditions for detainees or those facing the death penalty. This lack of transparency means that it is impossible to assess whether or not the death penalty is carried out so as to inflict the minimum possible suffering.

Detainees and their family members have the right to prepare for death. In 2012, the UN Special Rapporteur on Torture stated that secret executions may violate this right.²³ In 2019, new SPC Provisions on the death penalty stated that the defence lawyer should be notified by the relevant court of the SPC final verdict within five days after its announcement.²⁴ 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. There is no data to indicate whether these guidelines are being followed. Prior to their release it was common for family members to hear of execution before the lawyer.

Statistics relating to the use of prisoner organs are also a state secret. 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 of individuals sentenced to death.²⁵

²² United Nations Committee Against Torture. “Concluding observations on China’s fifth periodic report”. 9 December, 2015. <https://bit.ly/3wbG7ua>

²³ 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.

²⁴ Supreme People’s Court. “Several Provisions on Protection of Parties’ Lawful Rights and Interests During Death Penalty Review and Enforcement Procedures”. 8 August, 2019. <https://www.chinalawtranslate.com/deathpenaltyreviewprotections/?lang=en>

²⁵ 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, pp. 79. November. 2019, doi:10.1186/s12910-019-0406-6.